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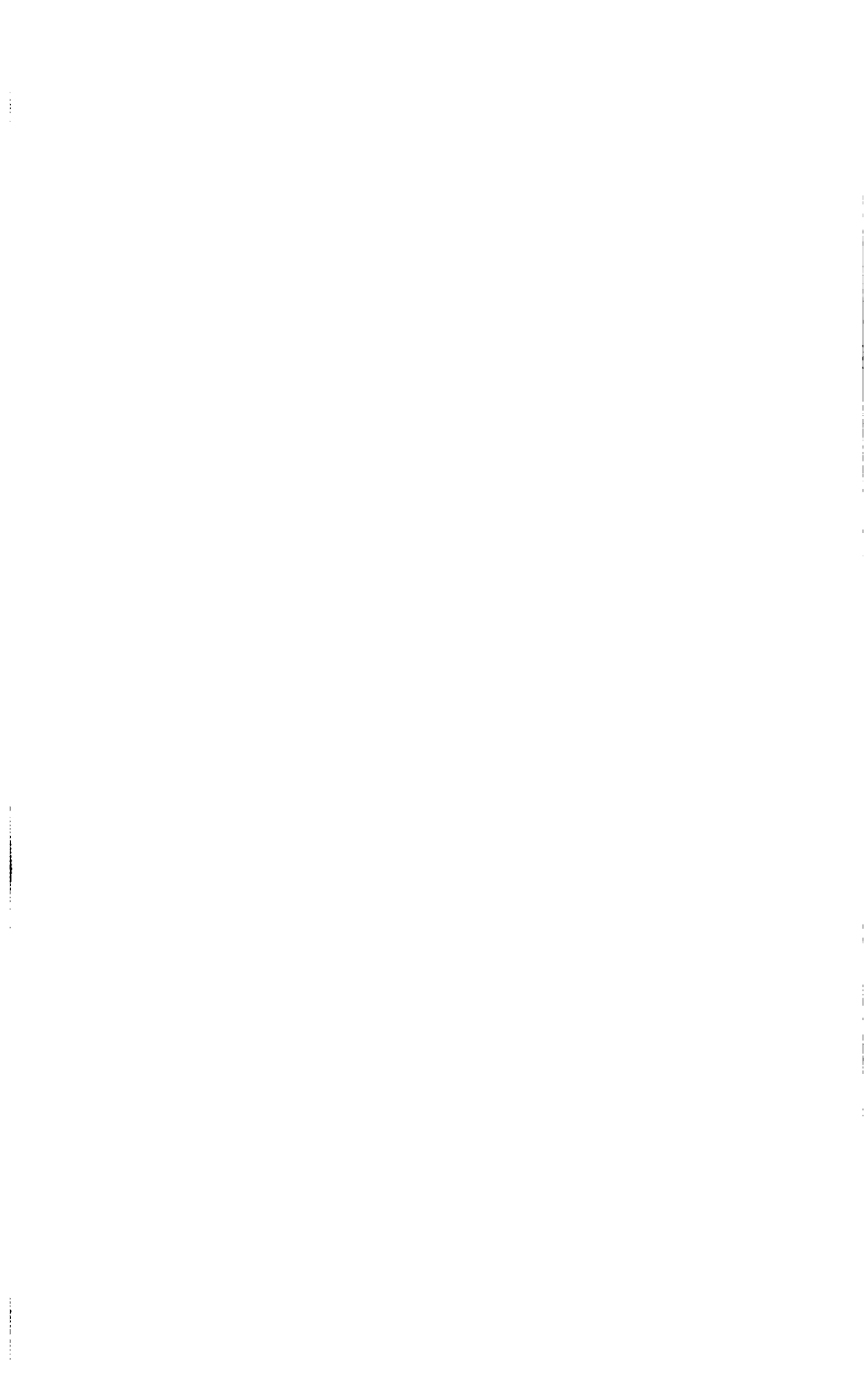
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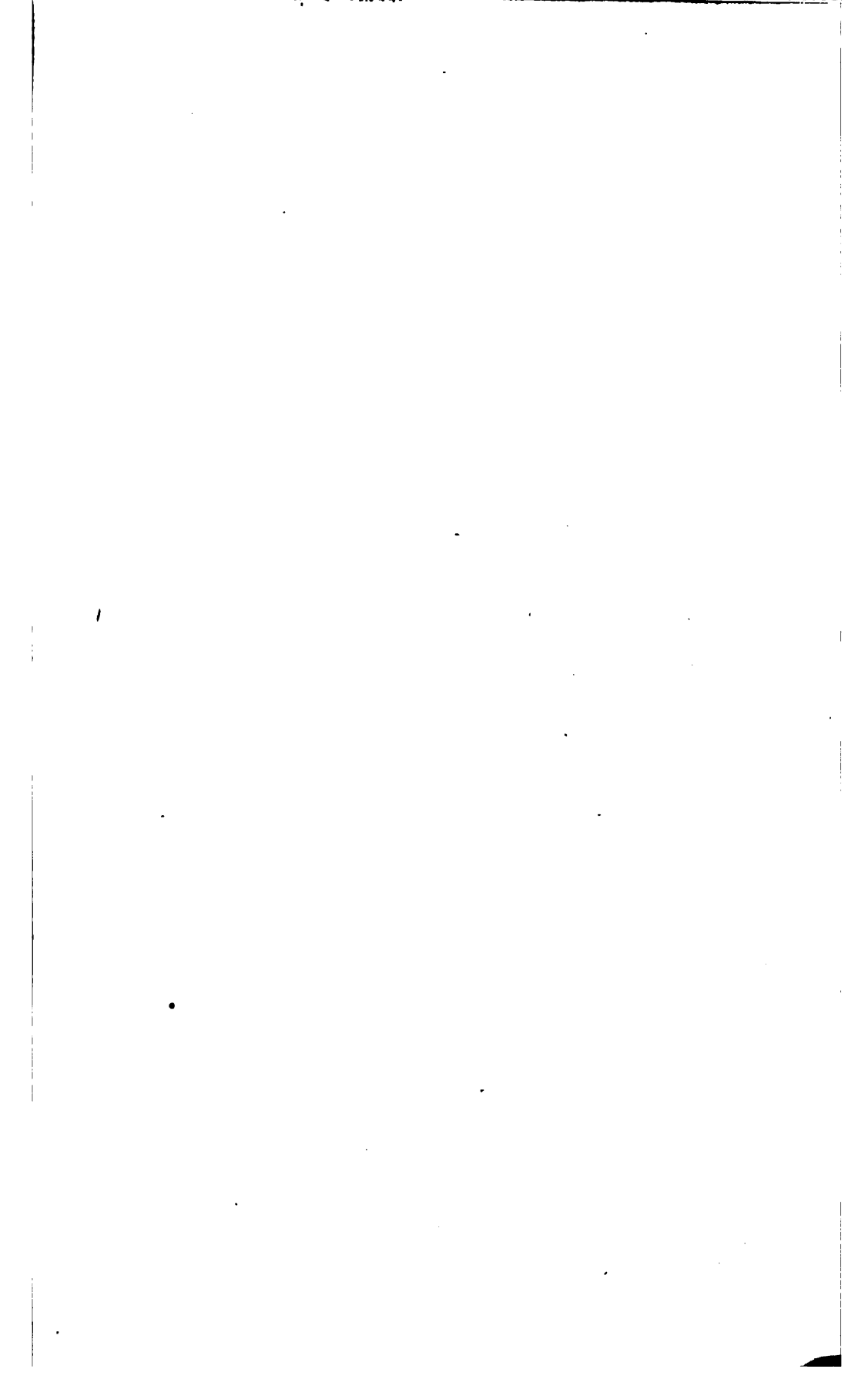
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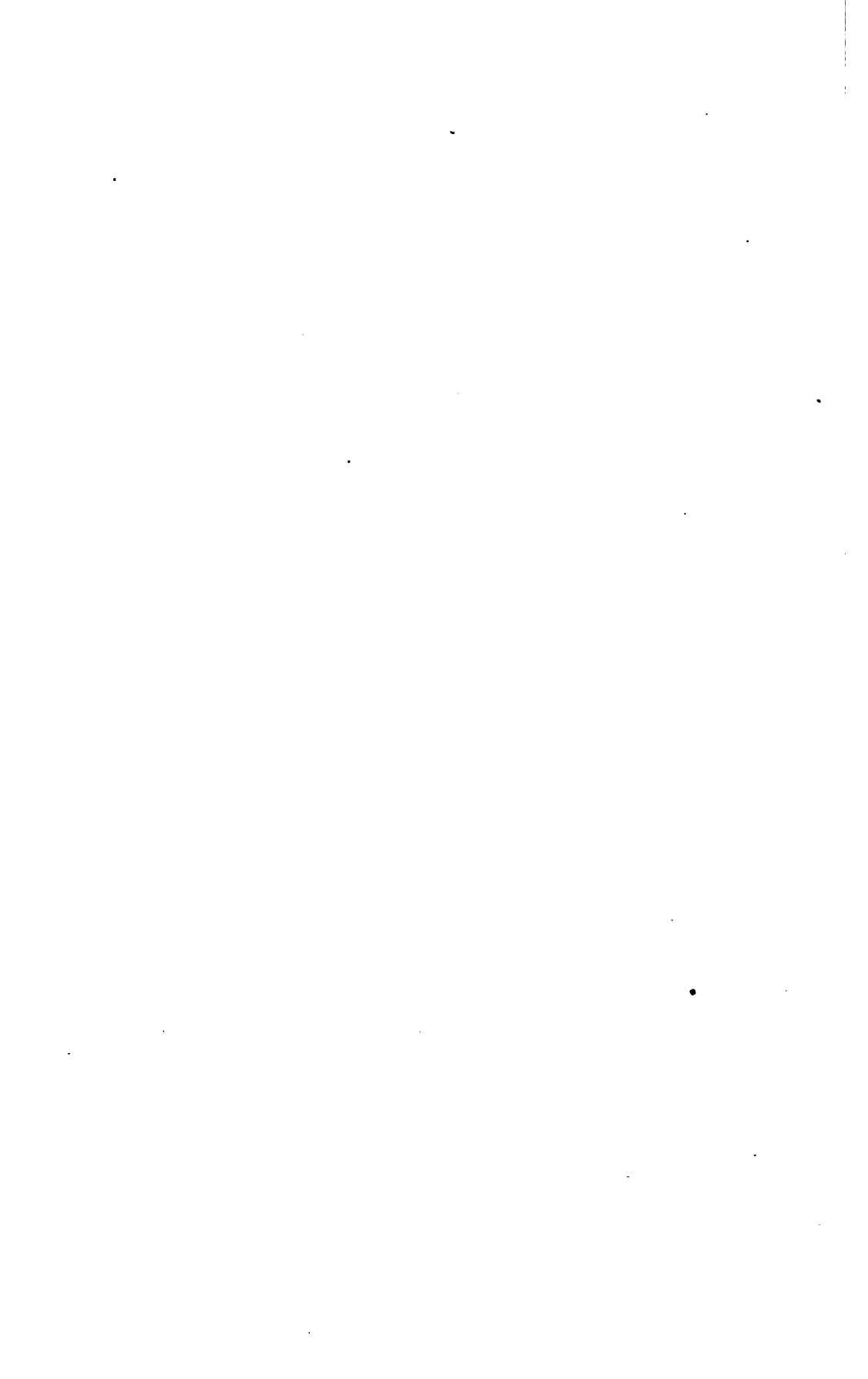
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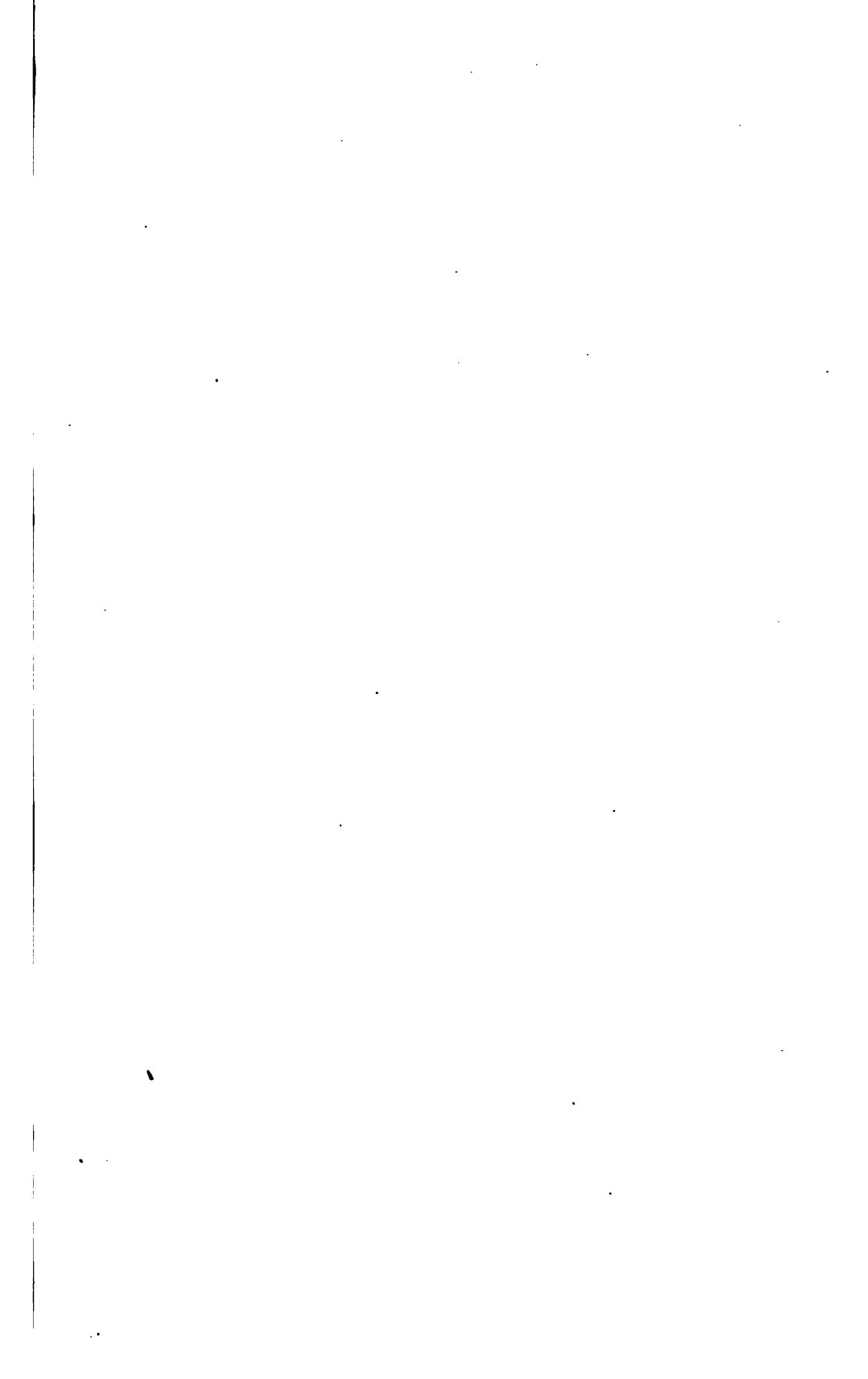
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THE
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ANNOTATED

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BURDETT A. RICH, EDITOR, HENRY
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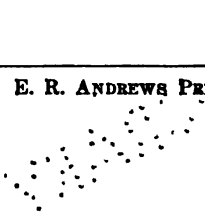
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LAWYERS' REPORTS

ANNOTATED.

LOUISIANA SUPREME COURT.

Joseph D. JAMES, for Use of Paul Anthony
Calvit JAMES,
v.
RAPIDES LUMBER COMPANY, Limited,
Appt.

(50 La. Ann. 717.)

*1. It is the negligence of the foreman of a steam saw mill to call on one of its employees, suddenly and on the spur of the moment, to take a position in the mill that is dangerous, without giving him any in-

structions or explanation whatever of the movements of the machinery, or the risk and hazard of the employment, with which the employee had neither a previous knowledge nor acquaintance. For such knowledge the proprietor is responsible to the servant.

2. It is the duty of the master to give warning of danger to an inexperienced employee, not informed of the danger, who is placed in charge of dangerous machinery.

3. The facts found by the verdict are sustained by a presumption of correctness, until error is shown.

(March 7, 1898.)

*Headnotes by WATKINS, J.

NOTE.—The duty of a master to instruct and warn his servants as to the perils of the employment.

I. Introductory.

II. Actual knowledge of servant, existence of duty to instruct negatived by.

III. Constructive knowledge of servant as bearing upon the duty of the master to instruct him.

a. Generally.

b. Ordinary perils of an employment, no duty to instruct as to.

c. Extraordinary risks of employment, master prima facie bound to instruct servant with regard to.

1. Risks arising from a changed condition of the instrumentalities or place of work.

2. Risks arising from the introduction of new or abnormally dangerous appliances.

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d. Fact that danger was or was not discoverable by the exercise of ordinary care, duty of instruction discussed with reference to.

1. No duty to instruct where knowledge imputed to the servant.

2. Cases illustrating this general rule.

3. Master bound to instruct, where no knowledge of the danger can be imputed to the servant.

IV. Experience of servant as a special factor bearing upon the master's duty of instruction.

a. Generally.

b. Circumstances under which no instruction is necessary.

c. Circumstances under which instruction is necessary.

V. Minority of servant as a special factor bearing upon the master's duty of instruction.

V.—(continued.)

a. General principles stated.

1. Introductory.

2. Rationale of rule requiring the master to instruct a minor servant.

3. Special principles applicable in action by the father of an injured minor.

b. Minor employees usually on the same footing as adults, after proper instruction has been given.

c. Constructive knowledge of dangers, when a bar to an action by minor servants.

d. Circumstances to be considered in determining whether knowledge of a danger is to be imputed to a minor.

e. Illustrative cases in regard to the constructive knowledge of minor servants.

VI. What knowledge of scientific facts is imputed to servants (adults and minors).

a. In the case of adults.

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VII. Duty to warn servant against transitory and sporadic dangers.

a. Introductory.

b. Cases involving customary methods of doing business and departures from such methods.

c. Perils due to transitory changes in the condition of the place of work.

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VIII. What instruction and warning will be sufficient.

a. In the case of adults.

b. In the case of infants.

c. As to sporadic and transitory dangers.

IX. No recovery by servant unless failure to instruct was efficient cause of injury.

X. Duty of instruction considered with reference to the doctrine of common employment.

APPEAL by defendant from a judgment of the Judicial District Court for Rapides Parish in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. Howe, Spencer, & Cooke and Robert P. Hunter for appellant.

Mr. Horace H. White, for appellee:

In construing insurance contracts in which there is some ambiguity, courts should be guided by the rule that where two interpretations equally fair may be given, that which gives the greater indemnity shall prevail.

Meyer v. Queen Ins. Co. 41 La. Ann. 1000.

Since it is the duty of the master to use due diligence to see that the servant is not exposed to unnecessary risks in the course

of his employment, he is bound, before an employee is put in charge of dangerous machinery with which he is not acquainted, to instruct and qualify him for his duty.

Buswell, Personal Injuries, § 202.

A master who carries on an extraordinarily dangerous undertaking, such as the generation and distribution of electricity, is bound to know the character and extent of the danger, and to notify the same to the servant specially and unequivocally, so as clearly to be understood by him.

Myhan v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L. R. A. 172.

When the master has created the danger, he is bound to guard against it, and if he himself does not know or believe that the danger exists, he cannot require superior knowledge and judgment from the servant.

Faren v. Sellers, 39 La. Ann. 1011.

I. Introductory.

The omission of a master to instruct a servant as to the danger of his work cannot become the basis of a legal liability unless the evidence establishes three facts:

First, it is manifest that the general principle developed in a note recently published in this series (*Walkowski v. Penokee & G. Consol. Mines (Mich.)* 41 L. R. A. 83), will preclude recovery in the absence of proof that the master was himself aware, actually or constructively, of the existence of the perils with respect to which it is alleged to have been his duty to enlighten the servant.

Secondly, the same result must follow, as a necessary result of the application of the same principle, where the defendant did not know, actually or constructively, that the plaintiff was excusably ignorant of the danger to which his injury was due, and, by reason of such ignorance, was exposed to an abnormal risk over and above those which he was presumed to contemplate as incidents of the employment.

Thirdly, since it is self-evident that an obligation to impart information cannot exist in regard to any person who already possesses that information, or would be in possession of it if he had made a proper use of the means of knowledge within his reach, a master cannot be made juridically responsible for his omission to warn a servant as to perils of which the latter actually knew or would have known if he had been ordinarily careful in taking notice of his surroundings.

The first of these prerequisites to the maintenance of the action is an element common to all actions of which the gist is the negligence of the master in the furnishing or maintenance of safe conditions for the servants' work, and, as it has been fully discussed in the note referred to, we need not here examine it at length.

It will be convenient, however, to notice in this connection that the absence of any obligation to instruct may sometimes be predicated from the fact that, taking into consideration the nature of the particular work assigned to the servant, the employer was not bound to anticipate the contingency of the servant's placing himself in such a position as to incur the danger in regard to which there is alleged to be such an obligation. (See subd. V. of the above note, as to the master's imputed knowledge or ignorance of future events.)

In *Neff v. Broom* (1883) 70 Ga. 256, an omission to instruct was held not to be culpable where the defendants had employed women to work at one end of a room, 72 feet in length, to wrap soap in papers which were brought to

them, and one of the women, returning out of working hours, had gone to the back part of the room to get some paper, and there fell into a reservoir of lye. The court expressed its agreement with the position of defendants' counsel that negligence could not be predicated of the mere omission to inclose the reservoir, but said that this contention did not exactly meet the complaint, which charged that defendants were negligent in keeping the reservoir in a part of the room too dark for the plaintiff to discover it herself, and in failing to notify her of its existence. The liability of the defendants from this standpoint was then discussed as follows: "We recognize their obligation to provide her with a perfectly safe place for the performance of the duties in which she was engaged; and if, for any proper purpose, she was expected or required to expose herself to the danger of falling into their reservoir, it was their duty to have notified her of its existence that she might have guarded against it. It is shown by the proof, beyond question, as it looks to us, that there was neither necessity for, nor expectation of, her going near the danger: that the accident occurred out of the accustomed hours for work; that those whose duty it was to furnish her with the paper, of which she was in search, were away, and their absence known to her; that she chose to wait upon herself rather than be delayed; that she voluntarily went into this unlighted part of the room, and, by her own negligence, occasioned her injuries; that she was paid by the quantity of work she did, and being unwilling to await the return of her coemployees, sought to perform, not only her own, but their duties."

The second results from a particular application of the principle which makes knowledge an essential element of negligence to a case in which the special question to be resolved is whether, in view of the material conditions which produced the injury, and the personal characteristics of a certain servant, the master should have seen that such servant was probably incapable of understanding the perils of the situation. The inquiry under this head, it will be noticed, ranges over much the same area of facts as that which is explored in ascertaining whether the third prerequisite to the maintenance of the action exists. The only difference is that the problem for the solution of which the data are used is propounded in another form decided by the theory on which the complaint is framed, and that the testimony which, in one case, is directed to the establishment of a breach of a positive duty, is directed in the other case to the support of a plea which is virtually one of confession and avoidance.

The risk assumed by the servant is the ordinary hazard incident to the employment, and this is synonymous with unavoidable accident.

Wood, Mast. & S. p. 738.

It is not contributory negligence *per se* to engage in a dangerous occupation.

Beach, Contrib. Neg. 370; Wood, Mast. & S. p. 763.

The master is liable for negligence where either the master, or vice principal, personally interferes, and either does, or commands the doing of, the act which caused the injury.

2 Thomp. Neg. p. 969; Beach, Contrib. Neg. 311-350; Wood, Mast. & S. pp. 676, 699, 837, 843; Wharton, Neg. 205.

It is the duty of the master to provide suitable places, appliances, and agents.

Buswell, Personal Injuries, §§ 192-197;

The statement of the third prerequisite to the maintenance of the servants' action at once suggests what is, for practical purposes, the most important point to be remembered in connection with these actions, *viz.*, that any case which is submitted on the theory of a breach of the duty to instruct must involve an examination into the legal effect of evidence which is equally competent upon the question whether the servant shall, as a result of his knowing the conditions under which he is working, be charged with the legal consequences of an assumption of the risks or of contributory negligence. The closeness of the connection between these defenses and the duty to instruct the servant is indicated by the fact that the courts, in affirming or denying the existence of the duty, often express their conclusions by declaring that the servant's acceptance of the responsibility or his want of care had or had not been established by the testimony. So intimate, indeed, is the correlation between the duty and the defenses that, in many cases in the books, it seems to have been a mere matter of accident that they were tried on the theory of a breach of the duty, rather than on the theory that the defenses were available. It is worth noting, however, that a servant who seeks to recover damages upon a complaint of which the essence is a breach of the duty to communicate certain facts will often place himself in a less advantageous position than if he had relied generally upon the existence of the conditions indicated by these facts as charging the master with a want of care in the furnishing or maintenance of the instrumentalities. Manifestly the breach of a duty to instruct is at once negatived by proof of the servant's knowledge, actual or constructive, whereas such knowledge is not in any jurisdiction regarded as being in all cases conclusive proof of contributory negligence, and by many courts of the very highest authority (see *Smith v. Baker* [1891] A. C. 320; *Mahoney v. Dore* [1892] 155 Mass. 513), is considered not to be conclusive proof, even of an assumption of the risk.

In *Perry v. Marsh* (1854) 25 Ala. 659, the action was on the case for a fraudulent misrepresentation as to a material fact, the allegation being that the employer knew of the dangerous condition of the building in which the work was to be done, and failed to disclose that fact to the employee. The concealment of the danger being the gist of the action, it is evident that this case, although it arrives at a conclusion similar to that which would have been reached if the ordinary duty of the master to provide a safe place of work had been relied

Helm v. O'Rourke, 46 La. Ann. 178; *Towns v. Vicksburg, S. & P. R. Co.* 37 La. Ann. 630; *Clairain v. Western U. Tele. Co.* 40 La. Ann. 182; 14 Am. & Eng. Enc. Law, pp. 889-900.

Watkins, J., delivered the opinion of the court:

This action was instituted by the plaintiff for \$4,000 damages for the use of his minor son, Paul Anthony Calvit James, against the defendant company, for the injuries he suffered for the deprivation and loss of his left hand, which was cut off at the wrist by a diminutivesaw in its mill, through the fault and negligence of the company, its officers and employees. The defendant answered at length and in detail, and also filed a plea of no cause of action, which was considered with the merits. The cause was tried by a jury, who found a verdict for the plain-

on, belongs to a rather different category from those reviewed in the present note.

That this conception of deceit quite naturally suggests itself in such cases is evident from such a passage as the following:

"If a master employs a servant to do work for him, not knowing of any special or latent danger in the work, the servant takes the consequence of any danger there may be in it. The master does not mislead the servant, but only avails himself of his voluntary service. On the other hand, if the master knows of danger which the servant does not, it is clearly the duty of the master to communicate his knowledge of the danger to the servant." *Griffiths v. London & St. K. Docks Co.* (1884) L. R. 12 Q. B. Div. 493.

The use of the word "trap" in regard to certain latent dangers indicates another connecting link between the principle of the Alabama case above cited, and those under discussion. See, for example, *Plank v. New York C. & H. R. R. Co.* (1875) 60 N. Y. 607.

It will be noticed, also, that the cases cited *infra*, in III. c. 1 and 2, might readily be referred to the principle that the circumstances are such as to induce a false sense of security in the servant, if the implied obligations arising from the contract of service were not available as a ground of decision.

We are now in a position to review and test the correctness of the various forms of statement which the courts have employed in enunciating the rule which expresses the character and extent of the master's duty to instruct a servant.

In the first place, as showing the necessity for proof of the master's knowledge of the danger, whether existent or expected to arise in the future, we may cite *Melchert v. Smith Brewing Co.* (1891) 140 Pa. 448. There the plaintiff's proposition was that the danger of explosion was an actual, latent danger, which was known to the defendant, or ought to have been known, and therefore it was the duty of the defendant to warn the plaintiff of this latent danger, and for not doing this the defendant was negligent. The court said: "It will be seen at once, from the above review of the testimony, that the plaintiff entirely failed to show any knowledge by the defendant of this alleged danger, since the fact of the explosions was not communicated by either of the witnesses who say they had knowledge, and all the other testimony proves there was no such danger, because there never were such explosions. The learned court below could not possibly commit that question to the jury upon such a state of testimony."

tiff in the sum of \$3,750; and, after an unsuccessful effort to obtain a new trial, the defendant prayed for and obtained this appeal.

The plaintiff's demand is for \$3,000 general damages and for \$1,000 insurance. He represents that on the 17th of September, 1897, his minor son was working in the employment of the defendant company as watchman and lumber grader, and that while so employed he was ordered to go to work at one of their machines, known as an "edger," and that upon going to work at the edger, and upon taking hold of the first piece of lumber from it, his left hand was cut off at the wrist by the edger. He shows that his son was a minor, that the edger is an exceedingly dangerous machine, and that it was situated in an exceedingly dangerous position; that its appliances were

not properly protected, so as to prevent the happening of accidents, and that, consequently, only skilled and well-trained workmen should be employed to work there; that at the time his son was assigned to duty at the edger, the defendant well knew that he was a minor, that he was not a skilled workman, that he knew nothing about working at the edger, and that he had been theretofore employed at work which was not dangerous; that, notwithstanding all that, the defendant's foreman called upon him suddenly, upon the spur of the moment, at a time when the mill was in full operation, to assume that position of danger; and that his son, being called upon to make a sudden and unexpected election whether he would undertake the employment, or by declining it run the risk of a discharge, chose the former, not having

Similarly, a minor who has been fully instructed as to such dangers of his work as are reasonably to be anticipated, cannot recover for an injury arising from an unexpected cause, not indicating negligence on the master's part. *Ash v. Verlienden Bros.* (1893) 154 Pa. 247.

Nor can any actionable breach of duty be predicated of the master's omission to warn a servant not to work at a place in a ditch where the sides are not shored up if there is no reason to anticipate that they will fall in. *Burns v. Petchal* (1894) 75 Hun, 437.

Dangers which "the employer" himself cannot be deemed to have foreseen" are also excepted from those in regard to which a duty of instruction can be predicated, in *Wagner v. H. W. Jayne Chemical Co.* (1892) 147 Pa. 475.

In the second place, we find numerous recognitions of the principle that, before the master can be held liable on the ground of a breach of the duty to instruct, he must be shown to have had knowledge, actual or constructive, of the servant's ignorance and inability to appreciate the danger alleged to exist.

The rule which requires an employer to warn a servant of danger is applicable only where there is a danger which is known or ought to be known to the employer, and which the employee, owing to youth or inexperience, does not know and cannot reasonably be expected to discover by the exercise of ordinary care. *Rooney v. Sewall & D. Cordage Co.* (1894) 181 Mass. 153.

Where the work of a servant exposes him to danger of which he is ignorant, and which, from youth or inexperience, he is manifestly incapable of comprehending without assistance, it is the duty of his master, if he knows or ought to know of it, to give him such warning and instruction as are necessary for his safety. *Cirlack v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733.

Where an employer knows the danger to which his servant will be exposed in the performance of any labor to which he assigns him, and does not give him sufficient and reasonable notice thereof, its dangers not being obvious, and the servant, without negligence on his own part, through inexperience, or through reliance on the directions given, fails to perceive or understand the risk, and is injured, the employer is responsible. The dangers of a particular position or mode of doing work are often apparent to a person of capacity or knowledge of the subject, while others, from youth, inexperience, or want of capacity, may fail to appreciate them; and a servant, even with his own consent, is not to be exposed to such dangers, unless with instructions and cautions sufficient to enable him to comprehend them, and to do his 44 L. R. A.

work safely with proper care on his own part. *Leary v. Boston & A. R. Co.* (1885) 139 Mass. 580, 52 Am. Rep. 733.

The duty of an employer to give instructions to one about to work on dangerous machinery exists only when there are dangers in the employment of which he has or ought to have knowledge, and which he has reason to believe his employee does not know, and will not discover in time to protect himself from injury. *Stuart v. West End Street R. Co.* (1895) 163 Mass. 391.

To show negligence in the defendants, it must appear that the danger was such that the plaintiff would not be presumed to know it, and that the defendants did not give him information of it. If he knew and appreciated the danger, he cannot recover. *Pratt v. Prouty* (1891) 153 Mass. 333.

An employer is under no obligation to warn an employee of dangers which are obvious, nor to instruct him in matters which he may fairly be supposed thoroughly to understand. *Cirlack v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733.

It is a fact, if proved, tending to show gross negligence in a railway company, to employ any inexperienced person, knowing such person to be ignorant of the business for which he is employed, in any hazardous and dangerous business, unless said company makes known and explains fully the hazard and danger connected with such business, and instructs such person how to avoid the danger. *St. Louis & S. E. R. Co. v. Vallirius* (1877) 56 Ind. 511.

The rule that the employee impliedly assumes the risks of the service, and of such dangers as are obvious and open to ordinary observation, does not embrace such risks as the employer knows, or which, by the exercise of reasonable care, he might have known, beforehand, that the employee, by reason of his immaturity and inexperience, is ignorant of, or such as the employer knows the employee, without experience, cannot appreciate or avoid without instruction or warning. *Louisville, N. A. & C. R. Co. v. Frawley* (1886) 110 Ind. 18.

The duty of the master to instruct and warn the servant only arises as to dangers which the master knows or has reason to believe the servant is ignorant of. *Yeager v. Burlington, C. R. & N. R. Co.* (1894) 93 Iowa, 1.

When an employer engages one to perform a dangerous service which requires caution and the exercise of peculiar skill, knowing that he is without experience, and ignorant of its dangers, it is the duty of the employer to give the employee suitable instructions and warnings as to the dangers he is likely to meet in the perform-

been warned by the foreman of the defendant, or any officer of the company, of the danger there was in working at the edger, nor given any instructions as to the character of the work he was expected to perform or of the means of guarding against accident. He shows that, when he was employed by the defendant, the amount of 75 cents per month was exacted from his son by the company, and deducted from his wages, as premium on accident insurance, the policy representing which the company had obtained from the Union Casualty & Surety Company of St. Louis, Missouri. He shows that no policy was issued to him, and that none was applied for in his name, but that same was applied for by, and was issued in favor of and made payable to, the defendant company: that notwithstanding the aforesaid monthly exactions of insurance premiums

from his son as an employee, the conditions of the insurance were never explained to him; that since the accident he has made demand of the defendant first, and afterwards of the insurance company, for a statement of the insurance, but was refused information by both of them,—the latter only admitting that it carried an accident policy indemnifying the defendant company against loss or damage they might sustain or had to pay their employees. It is on this score that the plaintiff claims \$1,000, and it was at this demand that the defendant's plea of no cause of action was leveled.

In this court the plaintiff and appellee filed an answer to the appeal, and requested an amendment of the judgment, so as to award him \$1,000 insurance money against the defendant. This demand, as we understand it, is that his son is entitled to the sum of \$1,-

ance of the services he is engaged in and is required by the employer to perform. *Reynolds v. Boston & M. R. Co.* (1891) 64 Vt. 66.

Employers "are bound to see that their employees have reasonable notice of any hidden danger known to the employer, but of which the employee might be ignorant without blame, and of which, at the time he is hired, he may reasonably be supposed to be in fact ignorant." *Dowling v. Allen* (1878) 6 Mo. App. 195.

Unless the defendant knew or ought to have known of some occasion for information or instruction on this point, its neglect to impart any could not be regarded as the proximate cause of any injury that ensued to the plaintiff for want of such information or instruction. The mere fact that he was injured because he was inexperienced and ignorant of the danger and hazard would not suffice to charge the defendant. *Klochinski v. Shores Lumber Co.* (1896) 93 Wis. 417 (holding that a special verdict was defective because there was no finding of the employer's knowledge of the need of instruction).

The servant is not entitled to rely on the want of proper instruction, "unless . . . the defendant was not justified in believing that he had done his duty by him. If he did all that most other men, under like circumstances, would have done, that is enough." *Foster v. Pusey* (1888) 8 Houst. (Del.) 168 (charge to jury). To the same effect, see *Crowley v. Pacific Mills* (1889) 148 Mass. 228; *Mannion v. Hagan* (1896) 9 App. Div. 98; *Arizona Lumber & T. Co. v. Mooney* (Ariz. 1893) 83 Pac. 590; *Missouri P. R. Co. v. King* (1893) 2 Tex. Civ. App. 122; *Missouri P. R. Co. v. Sasse* (1893, Tex. Civ. App.) 22 S. W. 187; *Fort Smith Oil Co. v. Slover* (1893) 58 Ark. 168; *Rilliston v. Mather* (1891) 44 Fed. Rep. 743.

In *Ingerman v. Moore* (1891) 90 Cal. 410, a case where the plaintiff was caught upon a set-screw in a revolving shaft, it was remarked that, in passing upon the question of defendant's alleged negligence, it was necessary for the jury to determine: (1) Was plaintiff in fact inexperienced in the work in which he was engaged? and, if so (2) were defendants informed of this fact? (3) If defendants were so informed, did they neglect to give him notice of the location of the set screw, and to instruct him in the manner of running the machine, so as to guard him against the injury which he received?

With these statements may be classed those in which the duty to instruct the servant is predicated in regard to latent or hidden dangers, or, what is the same thing, dangers which are not obvious to a person of ordinary intelligence in the exercise of ordinary care, the employer

being presumably chargeable with knowledge that the servant cannot be expected to ascertain the existence of dangers answering that description. (For the cases illustrating the converse of this proposition that there is no duty to instruct as to patent dangers, see III. d. *infra*.)

An employee engaging in work "new to him should be instructed in it, and if he is not acquainted with the latent dangers incident to it they should be explained to him, that he may, so far as is consistent with a proper performance of it, avoid them; and in such case he is not presumed to know whether his employer has furnished appliances which are reasonably safe and in ordinary use, and he is not chargeable with an assumption of the risks involved in the failure to provide them." *Bannon v. Lutz* (1893) 158 Pa. 168.

The rule that the master is not required to inform his servant of dangers pertaining to his duties "is true as to dangers which are obvious, and which the servant would necessarily see."

It is also true of the ordinary dangers pertaining to a particular service, and which all persons who engage in it are presumed to know. But the statement is far from being universally true. The true rule on this subject is well stated in *Wharton on Negligence*, § 206. It is there said, that a "servant generally assumes only those risks of which he has expressed or implied notice. Some risks are so obvious that notice of them will be presumed. Where there are special risks in an employment, of which the employee is not, from the nature of the employment, cognizant, or which are not patent in the work, it is the duty of the employer to notify him of such risks, and on failure of such notice, if he is hurt by exposure to such risks, he is entitled to recover from the employer." *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100.

The servant does not assume latent dangers known to the master that are actually unknown to him, and which one of his capacity and experience would not have known by the use of ordinary care. It is the duty of the master to notify the servant of such dangers. *Bohn Mfg. Co. v. Erickson* (1893) 12 U. S. App. 260, 55 Fed. Rep. 943, 5 C. C. A. 341.

A master is bound to notify his servant of risks which the latter has no reason to believe from the nature of his employment he will have to encounter, and which arise from hidden causes or such as would reasonably escape his observation, if the master knows, or by the exercise of necessary care ought to know, of them. *Wood v. Helges* (1896) 83 Md. 257.

One who contracts to perform labor for an-

000 of the insurance money which is ultimately recoverable from the accident insurance company on the policies of insurance which were issued payable to the defendant company, because he had paid the premiums which bought the insurance. Or, in other words, the insurance premiums having been exacted from its employee, and used to keep in force a policy guaranteeing the defendant against loss or damage it may have to pay said employee on account of an accident, the amount of said insurance, when realized by the defendant from the insurance company, should be paid over to his son in diminution of the full amount of the damages due him. That is to say, the insurance policies should inure to the benefit of an employee who has kept up the premiums which give life to the policy.

other takes upon himself such risks only as are necessarily and usually incident to the employment. If the employer has knowledge that the particular employment is, from extraneous causes, hazardous or dangerous to a degree beyond what it fairly imports or is understood by the employee to be, he is bound to inform [him] the employee of the fact. *Baxter v. Roberts* (1872) 44 Cal. 187, 13 Am. Rep. 160.

A superior is bound to know whatever may endanger the person or life of an employee in the discharge of the duties of his employment, and is bound specially to warn him of the nature of the danger, unless said employee well knew of the existence of the hazard or risk, and willingly exposed himself to it. *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 188.

The master may not wilfully expose his servant to danger of loss or injury in the course of his employment, the risk of which is known to him, but notice of which is wrongfully withheld. *Guirney v. St. Paul, M. & M. R. Co.* (1890) 43 Minn. 496.

Where an employee is young and inexperienced, or the risk is a latent or unusual one, and for either reason there is more than ordinary danger of getting hurt, the employee should be specially warned. *Northern P. R. Co. v. Blake* (1894) 27 U. S. App. 190, 63 Fed. Rep. 45, 11 C. C. A. 93.

It is presumed that the master or foreman placed in charge of and conducting a manufacturing business knows and is familiar with the dangers, latent and patent, ordinarily accompanying that business, and if there are latent risks that a servant is, from ignorance or inexperience, not capable of understanding and appreciating, or which he would not be likely to know, the master should inform him of such dangers. *Smith v. Peninsular Car Works* (1886) 60 Mich. 501.

It is culpable negligence in the master to fail to notify the servant of risks which are not patent, and of which he is not cognizant from the nature of his employment. *Consolidated Coal Co. v. Wombacher* (1890) 134 Ill. 57.

It is a master's duty to notify his servant of any hidden defect in the place where the latter is expected to work which increases the ordinary risks of his employment, and to advise him of any latent danger which may attend the doing of any work which the servant is called upon to perform, provided the defect or the danger in question is known to the master and is unknown to the servant. *Gowen v. Bush* (1896) 40 U. S. App. 349, 76 Fed. Rep. 349, 22 C. C. A. 196. (Doctrine said to be "elementary.")

The master is under the duty "of exercising care in furnishing and maintaining machinery

The defendant, for answer, pleads a general denial, and then admits that plaintiff's son was injured in the hand by its mill, but avers "that if, in any event, respondent was liable for damages, which is expressly denied. . . . then respondent avers that the damages claimed . . . are out of all proportion to the injury done," etc. It denies any knowledge of the minority of the plaintiff's son, and affirms that from his size and appearance it was believed that he was a grown man, several years past majority. It avers that he came to the mill several months prior to the accident, sought employment, and was employed in several capacities, especially as night watchman, and had received his wages in his own name, without disclosing his minority; that, after having been employed as a night

and appliances that are reasonably safe, or of giving notice to the employee of defects that are not obvious, or of which the latter has no knowledge." *George H. Hammond & Co. v. Schweitzer* (1887) 112 Ind. 246.

If the danger is apparent, and is as well known to the employee as to the employer, the former takes the risk of it; but if the employer knew, or by the exercise of ordinary care might have known, that the employment was hazardous to a degree beyond that which it fairly imports, he was bound to inform the latter of such fact or put him in possession of such information. *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 14 Fed. Rep. 566.

Whether a master is negligent in failing to notify a servant of a danger depends upon whether the peril involved was patent or latent—"such as could be seen and known by ordinary care and prudence. . . . or such as was obscured and could not be seen or appreciated." *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 11 L. R. A. 619.

In all cases the master is bound to disclose to the servant latent defects and dangers of which he has knowledge or of which he ought to have knowledge by the exercise of reasonable attention, care, and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care. This is particularly so when the master employs, for a hazardous and dangerous work, a child, young person, or other person without experience, and of immature judgment. In such a case the master is bound to point out the dangers of which he has, or ought to have, knowledge, and give to the employee such instructions as will enable him to avoid injury by the exercise of reasonable care, unless both the danger and the means of avoiding it are apparent, and within the comprehension of the servant. A neglect of such duties may, in a proper case, the servant being without contributory negligence, render the master liable, regardless of the fact that he may have exercised reasonable care in making and keeping the premises, machinery, and appliances in a safe condition. *Pittsburgh, C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 165. See also, for similar statements, *Western U. Tele. Co. v. McMullen* (1895) 58 N. J. L. 155, 32 L. R. A. 351; *Hightower v. Bamberg Cotton Mills* (1896) 48 S. C. 190; *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141; *Williams v. Walton & W. Co.* (1892) 9 Houst. (Del.) 322; *Turner v. Goldsboro Lumber Co.* (1896) 119 N. C. 387; *McDade v. Washington & G. R. Co.* (1886) 5 Mackey, 144; *Bromley v. Smith, B. & R. Mach. Co.* (1882) 12 Mo. App. 594.

watchman for several months, the plaintiff's son sought work at the mill, "expressing to the defendant's foreman and superintendent his capacity to fill, and his desire to fill, any place to which he might be assigned," etc., and that at his request "he was put to work in the mill at day work, and had worked in the mill for several days in different capacities, in plain view of the machine and saw, where he was finally hurt in his hand; that on the morning of the accident [the plaintiff's son] was by the foreman of the mill hands requested to fill the place of one of the men who was sick and absent, and whose duty and work were to take plank which had been sawed and planed off a table and platform, to lay them on a machine about 8 or 10 feet away from the saws, [which were] so placed [as] to cut off square

both ends of the plank, and which machine was operated by steam power and worked rollers and dogs, so that, after the plank was laid on the rollers, it was not necessary for a workman to follow the planks, or to remove from his safe and remote position with reference to the saws." It avers "that the machine was first-class of its kind, and in perfect working order, and that it was so placed, and all of its appliances were so arranged, as to furnish the best possible protection to the men engaged in operating it; that it required no particular skill or knowledge to safely and properly perform the labor required of the workman at the machine; that any man who could lift, with other men at the other end, one or several planks, and lay them on the rollers, could perform the work required of the plaintiff's son; . . .

Similarly, we find that the master's knowledge of the servant's ignorance of the danger is an implied element in statements which predicate the duty to instruct from circumstances increasing the risks of the employment beyond its ordinary hazards. Of the existence of this extraordinary peril the servant is presumably not aware, and the master must, of course, take notice of this fact.

If by reason of the omission to supply the usual and ordinary means to prevent accident, the hazard to its servants was increased, and the changes in appliances was not known to the servants, or so open and visible that they, by the exercise of ordinary care, would see and know of it, the legal duty rested upon the master to notify them of the increased danger to which they were thereby exposed. *Pullman Palace Car Co. v. Laack* (1892) 143 Ill. 242. 18 L. R. A. 215, where the employer was held liable for his failure to supply a stopcock to prevent the outflow of oil from a tank, where the pipe which conveyed it had been broken.

If the master knew, or under the circumstances ought to have known, that a machine in use was out of repair and dangerous, it was his duty to see that it was put in proper repair, or to warn those using it of the danger, if they were ignorant of it. *Rice v. King Philip Mills* (1887) 144 Mass. 229, 59 Am. Rep. 80. For another example of the form of statement, see *Strahlendorf v. Rosenthal* (1872) 30 Wis. 874. Illustrative cases as to the duty to give instructions with regard to extraordinary risks will be found cited in III. c. *infra*.

The essential feature of the legal situation supposed in the above cases to exist is, as will be noticed, that the master is regarded as a person who, being in possession of information which he understands to be necessary for the safe performance of the work which he orders to be done, fails to impart that information to a servant whom he knows to be without it. (See the form of statement used in *Connor v. Saunders* (1894) 9 Tex. Civ. App. 56.)

Since the obligation of the master is to place the servant on the same footing as himself in respect to knowledge of the dangers of the work, it follows that the duty of instruction arises when the master possesses what the courts term "superior means" of knowledge. *Louisville & N. R. Co. v. Shivel* (1892) 13 Ky. L. Rep. 902.

It is error to leave it to the jury to say whether a master should have warned his servants how to handle heavy locomotive wheels without danger, where no evidence has been offered tending to show that any such method was either known to him, or generally known 44 L. R. A.

and practised by other employers. *Richmond Locomotive Works v. Ford* (1897) 94 Va. 627.

Other statements of the circumstances under which a master is held liable, on the ground of a failure to instruct, do not take account of the necessary element of his knowledge of the need of instruction, and to this extent are imperfect as formal enunciations of the rule. But the omission is evidently merely accidental, and cannot be construed as indicating any real antagonism between the courts in regard to a principle so elementary. Of such statements the following may serve as illustrations:

If the master knows of danger which the servant does not, it is clearly the duty of the master to communicate his knowledge of the danger to the servant. *Griffiths v. London & St. K. Docks Co.* (1884) L. R. 12 Q. B. Div. 495.

If persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. *Mather v. Rillston* (1895) 156 U. S. 391, 89 L. ed. 464.

A workman must know the dangers of his employment by actual experience in the employment, or by the instructions of his employer, before he can be held to have assumed them. *Rummel v. Dilworth* (1890) 131 Pa. 509.

A master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of such facts. *McGowan v. La Plata Min. & Smelting Co.* (1882) 9 Fed. Rep. 861.

A master who withholds from his servant such information as is necessary to enable him to provide for his own safety does so at his own peril. *George H. Hammond Co. v. Johnson* (1893) 38 Neb. 244.

"If a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet, if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity may fail to appreciate the danger. It is a breach of duty on the part of the master to expose the servant of such character, even with his consent, to such dangers, unless he first gives him such instructions or caution as will enable him to apprehend them, and do his work safely, with proper care on his part." *Hughes v. Chicago, M. & St. P. R. Co.* (1891) 79 Wis. 264. Other such defective state-

that, instead of maintaining the position he was told to take, at a perfectly safe distance from the saw, which was intended to cut off the ends of the planks, at the end of which he was put at work, as soon as he had put the plank on the rollers, he immediately began to follow them up the incline, and in the direction of the saw; that the other workmen warned him by calling to him in a loud voice, but he continued to follow the planks until they had reached the saw, which was in plain view of him; and that he reached his hand forward until it touched the saw, and was injured by it." Under the foregoing statement of facts, the answer charges the plaintiff's son with contributory negligence which exonerates the company from liability for damages; and its averment is that he voluntarily and knowingly as-

sumed all of the risks which were incident to his employment, and for that additional reason there can be no recovery.

In the answer there is no mention made of the plaintiff's demand for the payment of insurance money; consequently, it must rest on the general issue. From the evidence it appears that young James was assigned to work at the trimmer, which is a small circular saw, situated near the edger, a much larger machine. From the parol evidence, as well as the photographs which were taken of the *locus in quo* while the machinery was in operation, it appears that there is visible to the eye not more than one fourth of the saw, which is apparently of but a few inches in diameter. As stating defendant's view very succinctly, we make the following quotation from counsel's brief, viz.: "That

ments occur in *Roth v. Northern P. Lumbering Co.* (1889) 18 Or. 205; *Missouri P. R. Co. v. Callbreath* (1886) 66 Tex. 526; *Monnion v. Hagan* (1896) 9 App. Div. 98; *Galveston, H. & S. A. R. Co. v. Garrett* (1889) 73 Tex. 262.

It has been held not to be the duty of the master to instruct a servant respecting the rules, regulations, and usages by which the service is governed, unless he is asked for such information, or unless he knew the servant to be inexperienced. *Missouri P. R. Co. v. Watts* (1885) 63 Tex. 549. In the same case in (1885) 64 Tex. 568, however, an instruction was approved which made the master liable if he knew that the servant was inexperienced and uninformed as to the rules—a very different proposition. The servant's duty to seek for information is denied.

In some cases in which we find statements similarly imperfect it will be found that the correct principle was actually relied upon, since the fact that the servant needed instruction was alleged and testified to in the course of the action. See, for example, *Wolski v. Knapp-Stout & Co.* (1895) 90 Wis. 178; *Ogley v. Miles* (1893) 139 N. Y. 458; *American S. B. Co. v. Foust* (1895) 12 Ind. App. 421; *Verdell v. Gray's Harbor Commercial Co.* (1897) 115 Cal. 517.

In the opinion in *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614, we find another of these defective statements, but by the charge of the trial judge the master's knowledge of the servant's inexperience has been made a prerequisite of recovery. In *Mather v. Rillston* (1895) 156 U. S. 391, 39 L. ed. 464, the ignorance of the plaintiff was established, but nothing is said as to the employer's knowledge of his ignorance. The implication apparently is that the danger that dynamite may explode from the jarring of machinery or from the overheating of a room is one which the employer is bound to know not to be within the comprehension of a man hired merely to run machinery, unless he has been specially instructed. See *V. infra*, as to the servant's presumptive knowledge of scientific facts.

The fact that a servant upon entering the employment received from the master a specific promise that instructions would be given is of course sufficient to negative the inference of an assumption of the risk. *McCormick Harvesting Mach. Co. v. Burandt* (1891) 136 Ill. 170.

As one of the purposes of rules promulgated by a master is to warn the servant that it is dangerous to do certain acts in a certain manner, or that his fellow employee will, at fixed or indefinite times, do certain acts which will imperil his safety if he does not keep a vigilant 44 L. R. A.

lookout, it is evident that there is a very intimate relation between the duty to instruct and the duty to make rules. (This duty is discussed in a note published in 43 L. R. A. 305). Both duties in fact are merely special forms of the more comprehensive obligation of a master to see that a servant may be secured from all unnecessary perils, whether these perils spring from causes under the control of the master himself, of the servant to be protected, or of his coservants. As might be expected, therefore, we sometimes find the duty of the master, as regards the plaintiff himself, stated in the alternative to be that of instructing the particular servant, or of promulgating some general rule. *Latorre v. Central Stamping Co.* (1896) 9 App. Div. 145. Compare also the cases cited in VII. *infra*, with regard to the duty to warn as to sporadic perils.

The decisions illustrating the general principles set forth above will now be collected under headings suggested by the terms in which the nature and extent of the master's obligations have been stated by the court.

II. Actual knowledge of servant, existence of duty to instruct negatived by.

It is "not the duty of the master to admonish his servant to be careful, when the servant well knows his danger and the importance of using care to avoid it. It is the duty of the servant to exercise care proportionate to the danger of his situation as he understands it, and if he fails to do so the fault is his and not his master's." *Clrback v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733. To the same effect, see *Goodnow v. Walpole Emery Mills* (1888) 146 Mass. 261; *Perry v. Old Colony R. Co.* (1895) 164 Mass. 296; *Hathaway v. Illinois C. R. Co.* (1894) 92 Iowa, 837; *Junior v. Missouri Electric Light & P. Co.* (1895) 127 Mo. 79; *Yeager v. Burlington, C. R. & N. R. Co.* (1894) 93 Iowa, 1.

This principle has been also stated thus: "Even if a master is negligent in not giving his servant instructions and cautions as to the dangers of his employment, yet if the servant receives the same information and cautions from other sources, whether from other persons or from his own observation, and is nevertheless thereafter injured, the negligence of the master is not the proximate cause of the injury. *Truntle v. North Star Woolen Mill Co.* (1894) 57 Minn. 52.

But this is manifestly an illogical way of putting the matter. No question of causation is involved. The conception underlying the rule is merely that this duty, being essentially a duty of supplying the servant with one particular

on the day of the accident the plaintiff's son was requested to take the place at the trimmer of the regular workman, who was sick and temporarily absent; that the duties required of him were to take the planks, after they had been sawed, from a table or platform, and lay them on the apron of the trimmer, several feet from the saws, and were taken thence to the saws by machinery for the purpose of having their ends squared; so that it was not necessary for the workman to follow up the planks, or to move from his safe position, remote from the saws," etc. And he further places the defendant's charge of contributory fault on the part of young James on the ground stated in its answer,—“that it charges specially that he did not leave his position and follow up the timber until it and his hand reached

the saw, and this carelessness caused the accident,” etc.

Before analyzing the evidence, or stating our conclusions thereon, we may just as well disembarass the case of young James' minority, as he testifies as a witness that he was 19 years of age at the time of his engagement in the defendant's service, and there is no evidence tending to show that the defendant was aware of his minority. And it is shown that the young man was very well grown for his years, and justified the assumption of his being a major, resulting from the fact, which was pointed out by the witnesses, that he had made his contract with the company, and collected and received for his monthly wages.

Counsel for the defendant claim that after young James had served the defendant for

means of securing his safety, cannot be predicated of a case where the servant already possesses such means.

Failure of an employer to warn an employee who has been about twenty days in the service of the danger of stepping upon a grating beneath which there is machinery will not render him liable for an injury to the employee caused by stumbling and falling upon the grating, where the employee knew that the openings were large enough to let his foot through, and that there was machinery beneath the grating, although he did not know how far beneath. Here the servant already possesses all the information he could have obtained by instructions, as the master could only have told him that it was dangerous to step on the grating. *Cmielewski v. Mollenhauer Sugar Ref. Co.* (1896) 11 App. Div. 111.

So, also, railroad companies do not owe any duty to trainmen to place signals at snow banks along their tracks, or to give them notice by whistle or bell of the approach of their train to such banks. They assume the risks arising from the existence of such banks just as they assume the risk of the existence of permanent structures which they know to be near the track. *Brown v. Chicago, R. I. & P. R. Co.* (1886) 69 Iowa, 161.

The disability of the servant to recover on the ground of his previous acquaintance with the conditions is altogether independent of the source from which he has derived his information. *Downey v. Sawyer* (1892) 157 Mass. 418. Citing *Pratt v. Prouty* (1891) 153 Mass. 333; *De Souza v. Stafford Mills* (1892) 155 Mass. 476; *s. p. Emma Cotton Seed Oil Co. v. Hale* (1892) 56 Ark. 232.

Where a father hires out his son for the purpose of piling lumber, with which business the son is somewhat familiar, having assisted his father frequently in such work, the employer may assume that the father has given his son all instructions necessary to enable him to do the work in safety to himself, and is under no obligations to warn him of danger, where no danger is apparent, and the work is not extraordinary, hazardous, and dangerous. *East & West R. Co. v. Sims* (1888) 80 Ga. 807.

A servant cannot recover if he has been sufficiently notified and cautioned by a co-servant. *Alabama C. Coal & C. Co. v. Pitts* (1892-93) 98 Ala. 285.

A charge like the following is therefore correct: “If the plaintiff [servant] had such instruction, caution, information, or knowledge as would enable him, with a reasonable exercise of care on his part, to do his work with safety to himself, the defendant was not liable, and that 44 L. R. A.

it made no difference whether he derived it [such knowledge] from the defendant's officers, from a second hand in another part of the room, from a stranger, or from his own perceptions and intelligence.” *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396 (a case of a minor servant).

So, also, a servant cannot hold his master liable for failing to instruct him as to the danger of moving heavy locomotive wheels by hand, where, before his own injury was received, he had seen an accident in which one of the workmen had very narrowly escaped injury while a wheel was being moved in this manner, and his own testimony is to the effect that his fellow servants had told him that this method of doing the work was dangerous, and that this was also his own opinion. *Richmond Locomotive Works v. Ford* (1897) 94 Va. 627.

On the other hand, the plaintiff is not entitled to a charge that “the duty of cautioning a boy of the plaintiff's age [fourteen years], and giving him full notice of the risks attending the work, is a responsibility from which the company cannot free itself by delegating it to a foreman or to a second hand.” Such an instruction would create the erroneous impression that, even if the plaintiff had full instructions, it would have been of no avail, if they proceeded from the defendant's foreman or second hand. The master cannot escape the responsibility, if there be one upon him, of notifying the servant of the risks of the work by merely delegating it to one of the servants, but if the duty thus delegated was performed, the servant had all the notice requisite for his safety. *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396.

In *Tagg v. McGeorge* (1893) 155 Pa. 368, plaintiff requested the court to charge that, if the jury found the boy to be young and inexperienced, it was the duty of defendants to explain to him the danger. The answer was: “I affirm that point, . . . also, with the qualification, perhaps, that, if he had that experience from any other source, then it would not be necessary.” In the general charge the court explicitly instructed the jury that, if the boy had knowledge of the dangerous character of the machine by information from others or by experience, he could not recover. Held, that the use of the word “perhaps” was not, under the circumstances, sufficient ground for reversing the judgment in favor of the plaintiff.

A verdict is rightly directed for the defendant in an action in which the servant seeks to recover on the ground that he, being immature and inexperienced, was sent by his master into danger the full extent of which he did not comprehend, where it appears from his own testi-

several months in the capacity of night watchman, and afterwards of lumber grader, he was assigned to duty in trucking lumber as it came from the trimmer, and "in doing this work he was about ten steps from the trimmer saw which afterwards hurt him, . . . and, consequently, had the opportunity to observe the machinery, and know the danger of the situation." They take the further position that young James subsequently worked at the "live rollers," an automatic contrivance to carry boards away after they have been trimmed, and that while thus engaged he was only about five steps from the trimming saw by means of which he lost his hand, and that in this way he had become familiar with the position and movement of the saw, and knew of the danger of the employment to which he was thereafter assigned. With these state-

ments kept in view, we will make some extracts from the evidence, and apply same thereto.

Young James testifies, in speaking of the incidents which occurred just previous to the accident, that he went to the mill to work loading trucks, but that he continued in that occupation about "three hours, and was then changed to the live rollers"; that he worked at that employment one "evening and the next day until about four o'clock." Then occur the following interrogations and responses, viz.:

Q. Then what did you do?

A. The next morning I went up to go to work. Did not know what to start at, and stayed around expecting to take my same place at the live rollers.

Q. What occurred then?

mony that he was over twenty years of age, that he was not wanting in the average intelligence of his age, that his duties were explained to him when he entered on his employment, and that he understood the very danger into which he fell (an unblocked frog), and had in mind the purpose to avoid it. *McGinnis v. Canada Southern Bridge Co.* (1882) 49 Mich. 466.

So, also, where the only evidence in the case, including that of the plaintiff himself, is to the effect that he had complete knowledge of the danger which caused his injury. It is the duty of the court to direct the jury to return a verdict for the defendant, and a charge setting forth the character of the obligation of the master to instruct the plaintiff is erroneous and misleading, inasmuch as it has no relevancy to the facts of the case. *Cincinnati, N. O. & T. P. R. Co. v. Mealer* (1892) 6 U. S. App. 86, 50 Fed. Rep. 725, 1 C. C. A. 633.

A rule frequently insisted on in the cases applying the doctrine of assumption of risks, viz., that the material question is not whether the plaintiff was aware of the conditions which produced the danger, but whether he understood the danger itself, has sometimes been emphasized in cases of the type under discussion.

The situation or circumstances may be such that while the character of machinery and its mode of operation may be sufficiently obvious to the senses, yet the risks attending its use may not be appreciated or understood by the employee without proper explanation or warning. *McDonald v. Chicago, St. P. M. & O. R. Co.* (1889) 41 Minn. 439.

It is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed. So, in *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 573, 3 Am. Rep. 506, the machinery which caused the injury was open to view, and probably it was seen by the party injured. But the danger of the position was not explained, as was necessary for the protection of one who had no knowledge of it. *McGowan v. La Plata Min. & Smelting Co.* (1882) 9 Fed. Rep. 861.

The mere general knowledge possessed by a minor that when he engages in a given employment he will be exposed to certain dangers which are not incident to other employments does not constitute that full appreciation of the dangers which will absolve the master of the obligation of instructing him as to the par-

ticular nature of the perils to which he will be exposed. *Nadav v. White River Lumber Co.* (1890) 76 Wis. 120.

Thus, "it is not a conclusion of law from the fact that plaintiff was aware of the existence of the set-screw, and was seventeen years old and sprightly for one of his years, that he was aware of the risk and danger of passing over the shaft while it was in motion." *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298.

The following charge was held appropriate in the case of a servant who was wholly inexperienced in the use of machinery, and was killed owing to his clothes being caught by a rapidly revolving shaft about 1½ inches in diameter: "The servant knowing the fact of machinery being in motion close by the place where he is working, may be entirely ignorant of the risk he would incur by failing against or coming into contact with it. In such a case it is the duty of the master, not only to exercise due care, but good faith, toward the servant, and to inform him of the risks he undertakes." *Pullman's Palace Car Co. v. Harkins* (1893) 17 U. S. App. 22, 55 Fed. Rep. 932, 5 C. C. A. 326.

In *Davis v. St. Louis, I. M. & S. R. Co.* (1890) 53 Ark. 117, 7 L. R. A. 283, we find the following remarks: "Service about the unblocked rails was attended with danger, and the knowledge of the fact that the rails were unblocked did not necessarily imply knowledge of the attendant danger. Knowledge of the danger was itself a question of fact; and, if the jury believed that the deceased, by reason of his youth and inexperience, did not know of or appreciate the danger incident to service about the unblocked rails, and that the company had exposed him to the danger without warning him of it, they should have found that the risk was not one he had assumed by entering the service."

III. *Constructive knowledge of servant as bearing upon the duty of the master to instruct him.*

As to the duty of a master to bring his rules to the knowledge of his servants, and the effect of a servant's knowledge or ignorance of a rule which he is alleged to have violated. See note on "Rules." *Nolan v. New York, N. H. & H. R. Co.* 43 L. R. A. 305, IV., XI. c.

a. *Generally.*

It is a universal principle in jurisprudence that, for the purposes of legal responsibility, imputed and actual knowledge stand upon the same footing.

Knowledge of a risk may be imputed to the

A. The foreman hallooed at me,—Mr. Chester was the foreman,—telling me to take the place behind the edger at the trimmer.

Q. On what day was that?

A. On the 17th of September.

Q. What occurred when you took your place behind the edger at the trimmer?

A. I got back there; had not been there a minute, I suppose, when two pieces of two by fours came through the edger, and I took hold of them. They were crossed so I could not see the saws, and to uncross them I gave them a push, and pushed my hand through the saw.

Q. The saw then cut off your hand?

A. Yes, sir.

Q. Cut it entirely off?

A. Except a little skin.

Q. Up to that time had you ever been em-

ployed in working about the machinery of the sawmill?

A. No, sir.

Q. Did you have any skill or knowledge about working about machinery?

A. None at all; no, sir.

Q. Did anyone instruct you about the duties you were about to perform at the time you were behind the edger?

A. No, sir.

Q. Did any one warn you that it was a dangerous place, or explain the machinery there to you?

A. Not that I remember; no, sir.

Q. Well, you do remember, don't you?

A. I do remember that no one told me.

Q. You say Mr. Chester, the foreman, called you there?

A. He passed by. He was on one side of

servant, either on the ground that the risk is one ordinarily incident to the employment, or that, although extraordinary, it is one of which a person of the servant's intelligence could not have failed to be aware if he had used due diligence in observing his environment.

A master "must warn them [his servants] of all the dangers to which they will be exposed in the course of their employment, except those which the employee may be deemed to have foreseen as necessarily incidental to the employment, . . . or which may be open and obvious to a person of his experience and understanding. . . . [or] as the employer [himself] cannot be deemed to have foreseen." *Wagner v. H. W. Jayne Chemical Co.* (1892) 147 Pa. 475.

The presumption of knowledge in the former case is one which the employer is always entitled to draw unless he has notice that the person he is hiring is inexperienced or of less than average intelligence, the most frequent illustrations of this limitation being furnished by the decisions which deal with minors. (See *V. infra.*)

Precisely the opposite presumption arises in regard to the servant's knowledge of extraordinary dangers. With these dangers the servant is *prima facie* unacquainted, as he has a right to rely upon the master's having so far done his duty that the instrumentalities of his business are in a normally safe condition. Hence, in an action in which the servant seeks to recover on the theory that he was left by the master in ignorance of such a danger, the defendant has the burden of proving that the plaintiff ought to have appreciated the risk without instruction. The effect of entertaining these presumptions will be apparent from the cases cited in the following sections:

The knowledge possessed by a foreman in charge of a piece of work is not imputed to his subordinates, there being no agency in such a case. *Lechman v. Hooper* (1890) 52 N. J. L. 253. Compare *Covey v. Hannibal & St. J. R. Co.* (1887) 27 Mo. App. 170.

b. Ordinary perils of an employment, no duty to instruct as to.

As has just been pointed out, the doctrine that an employer is not bound to give his employee notice of the ordinary dangers pertaining to a particular service is founded upon the presumption that all persons engaged in it are presumed to know them. *Consolidated Coal Co. v. Scheller* (1892) 42 Ill. App. 619.

Similarly, the rule that servants are presumed to contract against the hazards incident to the service has been mentioned as limiting the obli-

gation of the master to instruct his servant. *Chicago & N. W. R. Co. v. Donahue* (1874) 75 Ill. 106.

Hence, as it is one of the natural incidents of the handling of glass in the processes of its manufacture, that it will be broken without violence from, or the fault of, those who handle it, the employer is under no duty to instruct them as to the risk of such fracture. *Myers v. W. C. De Pauw Co.* (1894) 138 Ind. 590.

It is error to instruct a jury that "it is the duty of the master to inform his servants of all danger in and about the premises where they are required, by his authority, to perform labor." *Chicago, R. I. & P. R. Co. v. Clark* (1883) 108 Ill. 118. The court said: "Railroad employees, as all the books lay down the doctrine, assume the ordinary risks and hazards of the employment. The presumption is that the employee understands the nature and dangers of the employment when he engages in the service, and if not, that he will inform himself. It would be wholly impracticable for railroads and manufacturers to employ men of experience to inform each of the hands that any particular act he is required to perform is dangerous. It would be ruinous to such bodies to hire a person to accompany every brakeman and other employees to inform them of danger in the performance of every duty, or of the danger in the manner of its performance. It is impossible that the law can ever impose such requirements—and that is what this instruction in substance asserts as a legal requirement."

In *Missouri P. R. Co. v. Watts* (1885) 63 Tex. 549, the trial judge in substance instructed the jury that, if the appellee was inexperienced as to the operation of the business upon the repair tracks, that it was then the duty of appellant to instruct him as to the rules and regulations respecting the same. This instruction the supreme court held to be incorrect, saying: "By seeking and accepting the service the appellee assumed all the risks incident to the employment. It was not the duty of appellant to instruct him respecting the rules, regulations, and usages by which the service was governed, unless asked for such information, unless the employee was known to be an inexperienced person in the business, and in its transaction subject to danger not open to his observation, known to the employer."

The same result is reached if the situation is viewed from the standpoint of the principle expressed in the maxim, *Spondet peritiam artis*.

By entering an employment in any capacity a man holds himself out as being competent to perform the duties of the position. *McDermott*

the rollers. He pointed his finger at me, and told me to go back there. That was all that passed,—all he said.

Q. What is the custom of the mill about obeying orders?

A. If I had not gone there, I guess I would have had to go home.

Again:

Q. How far was the saw that cut your hand from where you were put to work?

A. I don't know exactly. I never saw the saw; never moved out of my tracks; only gave the planks a little push.

Q. Are you sure you did not follow up the planks?

A. Quite sure.

Q. When you started to put your hand out to follow it up, . . . did anybody say anything to you?

A. If they did, I did not hear it. I could not have heard a shotgun behind that edger when it was running.

Q. Anderson was just the length of the plank from you, on the same side, and working at the machine?

A. Yes, sir.

Q. You did not hear him halloo at you, and warn you to let the plank alone?

A. No, sir.

Again:

Q. Mr. James, I will ask you this question: If you had been warned and instruct-

v. Atchison, T. & S. F. R. Co. (1896) 56 Kan. 319; International & G. N. R. Co. v. Hester (1885) 64 Tex. 401.

Hence, we find it laid down that the rule, that an employer who places a young and inexperienced person in a dangerous situation is bound to warn him of the danger, has no application to a case where an adult servant is injured in the performance of the ordinary duties which he has deliberately undertaken, owing to his own failure to make such use of his senses as is required from a person of average intelligence, when he has the option of doing something in one of two or more ways, involving various degrees of danger. Such a case is governed by the principle that, when an adult person solicits employment in a particular line of work, the act of solicitation is an assertion on his part that he is competent to discharge all the ordinary duties incident to that employment. Union P. R. Co. v. Estes (1887) 37 Kan. 715.

It follows, therefore, that the master has a right to assume that an adult employee possesses that knowledge which is acquired by common experience. Ruchinsky v. French (1897) 168 Mass. 68.

The employer may assume—unless he has knowledge to the contrary—without a critical examination, as was in effect said in Pittsburgh, C. & St. L. R. Co. v. Adams (1886) 105 Ind. 151, that a person who seeks employment in a particular capacity is possessed of sufficient ability and experience, and is of such an age as qualifies him to discharge the duties incident to the service applied for, and that he is competent to apprehend and avoid all the apparent and obvious hazards of the service, as they may appear during its progress. Louisville, N. A. & C. R. Co. v. Frawley (1886) 110 Ind. 18.

That the master is not bound to examine an adult applicant for a position as to his fitness or knowledge of its dangers is also laid down in O'Neal v. Chicago & I. Coal R. Co. (1892) 132 Ind. 110.

In *Guilnard v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 123, however, the court declined to hold that, because the plaintiff, some time after he was employed as an oiler, applied to be retained in that capacity, he thereby represented himself as competent for the position and assumed all the risks, the special ground assigned being that there was no evidence or finding that he was retained in his position on account of his request, or that the request had anything to do with the defendant's action in the premises.

Whether the master at the time of engaging the servant, or afterwards, ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing be-

ing said on the subject by either party, is a question for the jury. *May v. Smith* (1893) 92 Ga. 95.

The fact that an employee asked for no instructions, and gave no sign that he was not familiar with the method by which an order could properly be obeyed, will sometimes strengthen the inference that there was no culpability on the master's part in omitting instructions. *Crown v. Orr* (1893) 140 N. Y. 450.

The express statement of an employee, at the time of the contract of employment, that he is accustomed to the work, will, of course, excuse the employer from explaining to him peculiar dangers ordinarily incident to such work. *Steen v. St. Paul & D. R. Co.* (1887) 37 Minn. 310.

Especially will this result follow where the servant deliberately made a false representation as to his familiarity with the work, in order that he might obtain employment. *Stanley v. Chicago & W. M. R. Co.* (1894) 101 Mich. 202.

An employer has no right to an instruction to the effect that "unless the jury find that the plaintiff was a man of manifest imbecility their verdict must be for the defendant, because the defendant had a right to assume that the plaintiff would protect himself by whatever precautions were necessary." The duty of instruction exists in all cases where it is reasonably required by the youth, or inexperience, or want of capacity of the servant, and is not confined to cases where the servant is "a man of manifest imbecility." *Atkins v. Merrick Thread Co.* (1886) 142 Mass. 431. (The instruction here asked for was an attempted generalization from the remarks made by Judge Holmes in denying the servant the right of recovery under the special circumstances in *Russell v. Tillotson* (1885) 140 Mass. 201.)

The incompetency of a fellow servant is not an ordinary risk in such a sense that the servant is presumed to be cognizant of it merely by reason of the character of the employment. *United States Rolling Stock Co. v. Wilder* (1886) 116 Ill. 100.

c. *Extraordinary risks of employment, master prima facie bound to instruct servant with regard to.*

The risks which are presumed to be unknown to the servant by reason of their extraordinary or unusual character are those which arise from some act or omission on the master's part resulting in the creation of a new environment more hazardous in some respects than that which the servant has a right to expect. The novelty of the environment may be produced in three different ways: (1) The instrumentalities which the servant has been using or the

ed about that machine, would you have put your hand where it could get cut off?

A. I would not; certainly not.

Another witness's testimony is as follows, viz.:

Q. Mr. Morris, were you an employee of the Rapides Lumber Company when this accident occurred?

A. I was.

Q. How long had you been working there?

A. Well, I have been working there, off and on, about four years.

Q. Do you know this trimmer at which Mr. James got hurt?

A. Yes, sir; I do.

Q. Mr. Morris, state whether you would

place in which he has been working may undergo some alteration which brings into existence an additional danger. (2) New appliances may be introduced by the master. (3) The servant may be transferred to new duties or a new place of work. The cases illustrating each of these situations will now be reviewed.

1. Risks arising from a changed condition of the instrumentalities or place of work.

Compare also VII. *infra*.

It is "the duty of the employer to inform the employee of increased danger, created by him in the change of the machinery, unless the employee has notice, or such changes and increased danger are so apparent that he ought to take notice." *Hawkins v. Johnson* (1886) 105 Ind. 29, 55 Am. Rep. 169.

The master of a steamer who causes the spare-wheel, which, in its ordinary condition, rested loosely upon the drum of the steam-wheel, to be lashed so that it would necessarily rotate with the drum, thereby rendering the apparatus dangerous to anyone engaged in cleaning it, and gives no notice thereof to the seaman whose duty it was to clean the apparatus is liable for injuries received by such seaman as a result of his ignorance of the change which had been made in the conditions. *Withcofsky v. Wier* (1887) 82 Fed. Rep. 301.

An employer who changes a dangerous machine used by an employee in such a manner that it becomes more dangerous than it would be as ordinarily used, and demands a different operation, is liable for an injury to the employee resulting from a failure to notify him of the change made in the machine. This is not a slight change amounting to an "ordinary adaptation," such as a skilled employee (here of twenty years' experience) should anticipate. *Ryan v. Chelsea Paper Mfg. Co.* (1897) 69 Conn. 454.

A master who, between the time when his servant was last using an appliance, and the time when he was injured thereby, made an essential alteration in the appliance, and so rendered it more insecure, is bound to notify the servant of the change. *O'Donnell v. Sargeant* (1897) 69 Conn. 476 (spikes removed from the feet of a ladder, the result being that it slipped on the floor when the servant climbed it).

An employer who knows, or whose duty it is to know, that an elevator which an employee is obliged to use on occasions has been undergoing repairs which are not completed, and that the elevator is out of order, and who neglects to inform the employee, who is ignorant of that fact, on a day when, with the employer's knowledge, the employee will have occasion to use the elevator, is liable to the latter for resulting injury. *L. R. A.*

consider that a dangerous machine at which to place an unskilled workman.

A. I consider it quite dangerous. I did not like to work there myself. I call it quite dangerous.

Q. As a sawmill man, would you consider it necessary to instruct and warn the new men that were put there?

A. I would. Yes, sir.

This question was objected to, and the answer of the witness thereto, as eliciting an opinion; and, same having been overruled, the defendant's counsel reserved a bill of exceptions thereto. In our opinion, the testimony sought to be elicited of this witness is not exclusively a matter of opinion, as it is predicated upon the facts about which he had

juris. *Dervin v. Herrman* (1890) 26 Jones & S. 103.

It is the duty of the master not to change the place of work so as to make it more insecure, without notifying the servant of the change. *Clark v. Liston* (1894) 54 Ill. App. 578.

An employee engaged in shoveling coal and removing materials from a dock beneath a trestle does not assume the risk incident to the tearing down of such trestle while he is at work, where no notice is given him that it will be done; but it is the duty of the employer to notify him of the danger. *Northwestern Fuel Co. v. Danielson* (1893) 12 U. S. App. 688, 57 Fed. Rep. 915, 6 C. C. A. 636.

It is the duty of a railroad company to notify an engineer of the opening of a switch, or to place over it the customary warning signals, where, after it has been practically abandoned for a long time, it is reopened for use by the company. *Town v. Michigan C. R. Co.* (1896) 84 Mich. 214.

The liability of an employer for injuries which an inexperienced laborer entirely ignorant of the conditions receives in consequence of his being sent to work in ground where there is an unexploded charge of dynamite is governed by the principle that, where "the master provides the place for his servant to work, and, if his acts create special danger, he is not alone chargeable with the positive duty to exercise the utmost care and every available precaution against possible injury to those who are to work there; but, if danger impends, notwithstanding the precautions taken, he is further obligated to give due information and timely warning to those in his service who are ignorant of its extent before calling upon them to incur the risk." *Burke v. Anderson* (1895) 34 U. S. App. 132, 69 Fed. Rep. 814, 16 C. C. A. 442.

Whether a foreman was negligent in not notifying a switchman that a switch had already been turned, and that it was, therefore, unnecessary for him to cross the track to tend it, depends upon what the foreman should have foreseen the switchman would undertake to do, if he was not informed that the switch had been changed to the required position. *Grant v. Union P. R. Co.* (1891) 45 Fed. Rep. 673.

The fact that one switch at a station was farther from a cattle guard than another does not constitute an unusual danger against which a brakeman is entitled to a special warning when he is ordered to make a coupling. *Robinson v. Chicago, R. I. & P. R. Co.* (1887) 71 Iowa, 102.

The case should be submitted to the jury, where there is evidence tending to show that

been interrogated, and upon which he was requested to express his judgment. He had, in the previous question, been asked whether he considered a trimmer saw a dangerous machine; and, replying thereto without objection, he said he considered it quite dangerous. The present question is, Being by you considered a dangerous machine, "would you consider it necessary to instruct a new man" to that effect? Taken in that connection, it was a proper question.

In the further interrogation of this witness, he stated, in confirmation of the testimony of young James, that Mr. Chester, the foreman, said to him, when assigning him to duty at the trimmer, "You work over that way," pointing in the direction of the edger. He states that this was the direction which was given to young James in his presence.

On cross-examination this witness was asked the following questions, and thereto made the following replies, *viz.*:

Q. Well, are not those two saws on the trimmer in plain view from almost anywhere around the mill?

A. I always saw the saws. I knew where they were. I did not run into them. At the place where this man was working, this board covers the saw, and might worry a person who did not know the saw was there.

Q. Well, is not that saw in plain view of a man standing in the proper place,—there where James was put to work?

A. I do not think it is. These planks may be rather in the way. A man not knowing where to look for the saw might not no-

the defendant's agents put the plaintiff in a place of peculiar danger, of which he had no knowledge or experience, without informing him of the risks, or instructing him how to avoid them. *O'Connor v. Adams* (1876) 120 Mass. 427.

In *Ryan v. Tarbox* (1883) 135 Mass. 207, the servant, while engaged in taking down an old building, was injured by the collapse of a wall which the defendant knew to be unsafe owing to a fissure in it. This being presumably a circumstance which the servant was not in a position to ascertain, the master was held liable on the ground that he had set the servant to work in a place of peculiar danger without giving him due warning.

Compare also *Indianapolis & C. R. Co. v. Love* (1858) 10 Ind. 554, where it was said to be negligence on the part of a railroad company to allow its employee to pass over a defective bridge, the condition of which was known to the corporation and not known to the servant.

If the master finds it necessary, as he may at times, to employ and retain incompetent servants, he should either inform their coemployees of that fact, or give them a reasonable opportunity to acquire knowledge of such fact, before he can screen himself from the consequences of such incompetency. *Chicago, St. L. & P. R. Co. v. Champion* (1894) 9 Ind. App. 510.

2. Risks arising from the introduction of new or abnormally dangerous appliances.

If the employer introduces, without notice to the employee, some new and unusual machinery involving an unexpected or unanticipated danger, through the introduction of which the employee, while using the care and diligence incident to his employment, meets with an accident like that in question, it is not unreasonable to hold that the employer should answer therefor in damages. *O'Neil v. St. Louis, I. M. & S. R. Co.* (1881) 9 Fed. Rep. 337.

A railroad company is not under obligation to its employees to discard the old and adopt all the new appliances that come along, because the new are less dangerous than the old, yet, where mechanical devices, such as hand brakes, are in use, and some of them have stiff and others limber staffs, differing from each other only in the size of their staffs, and the limber ones are shown to be inherently dangerous in the hands of inexperienced brakemen who do not understand how to handle them, it certainly becomes the duty of the employer to adopt and use the less dangerous kind, or, if not, to warn the inexperienced operator, placed in charge of the more dangerous, of their dangers, and thus do what is reasonable and proper to prevent 41 L. R. A.

his being injured in their use. *Louisville & N. R. Co. v. Blanton* (1894) 107 Ala. 645.

A mere difference between the couplings of foreign and domestic cars is not an extraordinary risk in regard to which a railway servant is entitled to receive a notification before he can be charged with assuming the risks of handling them. *Simms v. South Carolina R. Co.* (1886) 28 S. C. 490.

But the duty of enlightening the servant may, in such a case, be predicated from a special circumstance, such as the employer's knowledge of the servant's inexperience. *Illinois C. R. Co. v. Price* (1895) 72 Miss. 862. The court remarked: "Every servant undertakes to assume the known and obvious and ordinary risks incident to his employment, but if the employer require the servant to undertake the performance of a dangerous or extra hazardous work, demanding caution and more than usual skill, the employer must give the servant proper instruction as to the method of executing the service required, and notice of the danger to which he will be exposed, if he knows of the inexperience or ignorance of his servant in and about the service to be performed."

The duty to instruct an inexperienced servant is especially strong, where the couplings are not only materially different from those in use on the defendant's cars, but also from those which are in general use on other lines. *Missouri P. R. Co. v. White* (1890) 76 Tex. 102. Compare also *Grannis v. Chicago, St. P. & K. C. R. Co.* (1890) 81 Iowa, 444.

3. Risks arising from the servant's transfer to new duties.

For other cases presenting the same or analogous facts, see IV. and V. *infra*, especially the latter subdivision.

A duty devolves upon the master of a servant hitherto serving in the capacity of a common laborer, before such laborer is put in charge of dangerous machinery with which he is not acquainted, to instruct and qualify him for such new duty. *Brennan v. Gordon* (1890) 118 N. Y. 489, 8 L. R. A. 818.

If the nature and magnitude of the master's work, whether it be that of construction or otherwise, and the number of men engaged in its execution, are such that the exercise of ordinary care for the safety and protection of the workmen from unusual and unnecessary dangers requires that they be given reasonable orders, and that they be not ordered from one part of the work to another, without warning, into places of unusual danger and risks, which are not obvious to the senses and known to them, but which might be ascertained by the master

tice it. But you can see the saw from where he works.

Q. The plank is high enough up to see under it?

A. He can see under it, or over it, either one. If he undertakes to look for the saw, he can see it.

The board referred to by this witness is the swinging board that is exhibited in the photographs, and is shown by the testimony to be employed as a protection to the employees against injury from the small ends of the planks which are cut off by the trimmer saws.

Q. What particular skill or experience does it require for a man to go there and do

by a proper inspection, the absolute duty rests upon the master to give such reasonable orders. Considerations of justice and a sound public policy impose this duty upon the master as such which he cannot delegate so as to relieve himself from the consequences of a negligent discharge of it. Where a large number of men are employed upon the same work, it is essential that reasonable orders, regulating their conduct, and assigning to them proper places in which to work, should be given. It is the duty and the right of the master to give orders and direct the places where his servants shall work. Their duty is instant and absolute obedience, unless it be obvious to them that such obedience will expose them to unusual dangers. Dispatch, discipline, and the safety of person and property in the execution of work imperatively require that the master should order and the servant obey. It would be practically impossible to carry on a work of any magnitude on any other basis. A workman, when ordered from one part of the work to another, cannot be allowed to stop, examine, and experiment for himself, in order to ascertain if the place assigned to him is a safe one; and therefore, in obeying the order, while he assumes obvious and ordinary risks, he has a right to rely upon a faithful discharge of the master's duty to use ordinary care to warn and protect him against unusual dangers. *Carlson v. Northwestern Teleph. Exch. Co.* (1896) 63 Minn. 438.

A charge to the effect that a foundry superintendent when about to order an extra-hazardous piece of work to be done is under no obligation to warn workmen not then present, but whose duties may call them to the place at any moment, is rightly refused. *Girard v. St. Louis Car-Wheel Co.* (1891) 46 Mo. App. 79.

If the injury was received by the servant while doing work outside the scope of his employment, it becomes a material question whether he was acting under proper authority, for it is clear, upon general principle, that negligence cannot be predicated of the master's omission to instruct a servant as to work which he was neither expected nor ordered to do. *Leis-tritz v. American Zylonite Co.* (1891) 154 Mass. 382; *Gillen v. Rowley* (1890) 134 Pa. 209; *Hinckley v. Horazdowsky* (1890) 133 Ill. 359, 8 L. R. A. 490; *Stewart v. Patrick* (1892) 5 Ind. App. 50.

Thus, where a master does not require his servant to repair machinery used by the latter, when out of order, but has a machinist employed to perform that duty, to whom the servant is required to report in case the machinery becomes out of order, it is not required of the master to instruct the servant as to the manner of repairing or the danger of attempting it, and 44 L. R. A.

that work,—to put the plank on the trimmer?

A. It requires a man who knows something about it. He must know something about it, or he might do like this man, and get his hand cut off.

Mr. Julius Levin, a sawmill proprietor of large experience, was also interrogated, with the following result, *vis.*:

Q. If you should place a green hand [at work] at the machinery, would you not consider it your duty to instruct him as to his danger and duties?

A. I would have him instructed.

Q. State whether or not you consider that position I have just mentioned—at the

in case the servant does attempt it without orders, and is injured, the master is not liable. *McCue v. National Starch Mfg. Co.* (1894) 142 N. Y. 106.

Where the foreman told the plaintiff, who was employed to load cars, to fix up the dump car as a mill temporarily, as well as he could, this order cannot be construed into a direction to incur any danger, or to go to any part of the mill, or to saw a piece of scantling on any saw he might select. The rights of the parties must, in such a case, be determined by the rule that the master is under no duty of specially guarding dangerous machinery, or of giving special warning as to the dangers arising therefrom, as respects persons who, without authority, go into places where such machinery is in operation. *Lindstrand v. Delta Lumber Co.* (1887) 65 Mich. 254.

The absence of any specific order from the master does not, however, operate as a conclusive bar to the servant's action under such circumstances. He may still rely on the duty of the master to instruct him, if the employer knew that he had engaged, or was likely to engage, in the work from which his injury resulted. *Leis-tritz v. American Zylonite Co.* (1891) 154 Mass. 382.

The same principle applies where such knowledge is possessed by a representative of the master. Thus, in *Donahoe v. Old Colony R. Co.* (1891) 153 Mass. 356, the defendant contended that a conductor who left his train before the accident happened was not negligent in omitting to tell the plaintiff of a broken draw-bar, because the movements of the train and the coupling and uncoupling of cars were wholly under his direction, and a brakeman was not expected to uncouple cars without his orders. The court, however, said that, when the conductor permitted it to proceed without him, it might properly be inferred by the jury that he expected and permitted such things to be done as were necessary in the management of the train until he should rejoin it, without a specific order from himself for each particular act; and if so that it might properly be found to have been negligence on his part to omit to tell the plaintiff of the broken draw-bar.

The situation which results when the servant is ordered by the master to perform temporary service beyond and without the scope of that which he has engaged to do, is thus discussed in a recent case: "The master may not lawfully expose his servant to greater risks than those pertaining to the particular service for which he has engaged, and against which the servant, through want of skill, or by reason of tender age or physical inability, could not presumably defend himself, if unapprised of the

trimmer—a dangerous position, particularly for a green hand.

A. All positions behind any saw are dangerous, if a person is not very careful.

Q. It requires a good deal of skill and activity.

A. A great deal of care and watching.

The foregoing is a fair summary of plaintiff's evidence, though there are some general statements of the defendant's witnesses which differ therefrom in minor particulars.

The testimony of Mr. Ohester, foreman of defendant's mill, is of the following tenor, *viz.*:

Q. How long had you been working at

danger. He is bound to warn the servant of the danger if it be not obvious, and to instruct him how it may be avoided. If, however, the servant be of mature years, and of ordinary intelligence and experience, he is presumed to know and comprehend obvious dangers. In such case the master is not liable for injury happening to the servant in the performance of dangerous work without the scope of his engagement for service, merely because he has been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and without objection undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment. *Cole v. Chicago & N. W. R. Co.* (1888) 71 Wis. 114; *Paule v. Florence Min. Co.* (1891) 80 Wis. 350; *Dougherty v. West Superior Iron & S. Co.* (1894) 88 Wis. 343; *Buzzell v. Laconia Mfg. Co.* (1861) 48 Me. 113, 121, 77 Am. Dec. 212. The liability upon the master in cases of injury to the servant received in a dangerous employment outside of that for which he had engaged arises, therefore, not from the direction of the master to the servant to depart from the one service and to engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years, or unable to comprehend the danger." *Reed v. Stockmeyer* (1896) 34 U. S. App. 727, 74 Fed. Rep. 186, 20 C. C. A. 381.

In *Quinn v. Johnson Forge Co.* (1892) 9 Houst. (Del.) 338, the jury were instructed that a master is bound to warn a servant set to work upon machinery of whose management he is ignorant, and which is not part of the work he has agreed to perform, of the dangers incident thereto.

In *Whitelaw v. Memphis & C. R. Co.* (1886) 16 Lea, 391, the court said with regard to the case under review: "If the plaintiff had never in fact been employed in the particular work specified in the declaration, and was ignorant of the proper tools to perform it with safety, and the work was such as only a skilled mechanic could perform without risk, it was the duty of the railroad company to see that he was properly instructed as to the danger of the work, and to furnish him with suitable tools to do the work as an experienced mechanic would do it."

A company is liable for personal injuries to an employee caused by running a heavy crane used in moving machinery against him while he was in a dangerous position under the foreman's orders, where his ordinary duties were those of helper in a boiler shop, and he had never before performed such service, and was 44 L. R. A.

this mill of the Rapides Lumber Company when this accident happened to Mr. Tony James?

A. I had not been there but a short while, probably a month or six weeks. I went to work on the 28th of July.

But he was foreman at the time of the accident. Again:

Q. When you told Mr. James to go in there,—i. e., to the trimmer machine,—and take Boone's place, did he make any objection to it?

A. He did not.

Q. Was it done suddenly, or hurriedly, or in such a way that he was obliged to?

A. I simply told him to take that posi-

tion not warned or instructed by the foreman, and the crane was started without any signal or any lookout provided or precaution taken to warn him of its approach. *Michael v. Roanoke Mach. Works* (1894) 90 Va. 492.

It is not without the scope of the employment of one employed in a car shop to do general work,—such as lifting, carrying timber, painting, etc.,—to assist in lifting a car upon its trucks with a steam winch, so as to render the employer liable for injuries sustained on the ground of failure to warn him of the danger, where the like service had been rendered on other prior occasions by him and his fellows. *Findlay v. Russel Wheel & F. Co.* (1896) 109 Mich. 286.

A street-railway company which puts a servant to work on the spur of the moment to repair a car in a position unfamiliar to him is bound to apprise him as to the dangers of the situation. *Stucke v. Orleans R. Co.* (1898) 50 La. Ann. 188 (switch inadvertently left open allowed car to run against the one under repair).

So, it is negligence of the foreman of a steam sawmill to call upon one of its (here a minor nineteen years old) employees, suddenly and on the spur of the moment, to take a position in the mill that is dangerous, without giving him any instruction or explanation whatever of the movements of the machinery, or the risk and hazard of the employment, with which the employee had neither a previous knowledge nor acquaintance. *JAMES v. RAPIDES LUMBER CO.* (Small trimmer saw cut off plaintiff's hand immediately after he went to work.)

Whether the raising of an immense iron smoke stack, and placing it in position on a base prepared for it, is an operation which requires such special skill or knowledge that a servant previously employed as a blacksmith, who is called upon to assist in pulling upon the rope of the hoisting apparatus, is entitled to instructions as to the dangers of the work, is a question for the jury. *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614.

An employer is not *ipso facto* liable for injuries to an employee employed to do other work, in setting him to work upon a dangerous machine, although he does not understand the danger, where the machine is perfect in its construction and operation. *National Malleable Castings Co. v. Luscomb* (1895) 2 Ohio Dec. 638.

An employer is liable for injuries to a carpenter employed upon the ground from the falling of a chimney stack which was being painted, through the painter's use of a swinging scaffold, notwithstanding he warned the painter that the stack was too shaky to so paint it, where he had reason to anticipate that the painter was going

tion, and he just walked in, and went at it. I went back into the file room, etc.

In conclusion we will refer to the statement of Mr. Anderson, who was the associate of young James, and saw the accident, and thus describes it, viz.: "There were two two by fours, and Mr. James and I caught hold of a piece of lumber; he caught one end, and I caught the other; and we carried it, and put it on the trimmer chains; and one of the two by fours got on top of the other two by four, and Mr. James undertook to shove one off the other, and carried his hand up onto the saw." He then stated that in making this movement young James moved just a little from his position in the effort to push the planks, and that as he did so "he hallooed as loud as he could to

let it alone,—that he just screamed,—but he followed the timber until it got to the saw."

In so doing young James was attempting the performance, ignorantly, of an office which the machinery was provided to do without his aid; and this was evidently the result of his inexperience and want of information as to his duties. No particular analysis of the foregoing testimony is deemed necessary. That the employment to which young James was assigned was dangerous, we make no doubt. We think the dangerous character of the trimmer saw is made clear by the testimony, and is made apparent by the photographs. To our thinking, the mere recital—even as it is related in the defendant's answer—of the occurrence discloses a *prima facie* case of negligence on the part of the defendant. The proof discloses a total

upon the stack with a swinging scaffold, and took no means of warning such carpenter or other employees near the stack. *Olmstead v. Distilling & Cattle Feeding Co.* (1895) 35 Ohio L. J. 133.

d. *Fact that danger was or was not discoverable by the exercise of ordinary care, duty of instruction discussed with reference to.*

See also subd. V. *infra*, as to the constructive knowledge of minors.

In stating the three general prerequisites to the maintenance of an action for a breach of the duty of instruction we referred to a principle which logically connotes the doctrine that a master is under no duty to instruct a servant as to the existence of ordinary perils, and which, in practice, very materially modifies the operation of the rule that a master is bound to instruct a servant as to extraordinary perils. The existence of the duty, as was then pointed out, is necessarily negatived or predicated, according as the servant is or is not legally chargeable with the possession of that information which he would have acquired as a result of the instruction alleged to have been obligatory on the master.

The true scope and force of this principle will be most clearly indicated by considering it under both its aspects,—that which bars the servant's action, and that which permits him to recover.

1. *No duty to instruct where knowledge imputed to the servant.*

Viewed from one side, the principle appears in the form that no duty to instruct a servant can be predicated of a case in which the instruction will not add to the knowledge which under the circumstances is attributed to him. *Rooney v. Sewall & D. Cordage Co.* (1894) 161 Mass. 153.

"In the early cases the doctrine [as to instruction] was applied in favor of boys. In favor of adults it should be applied with great caution. Where the elements of the danger are obvious to a person of average intelligence using due care, it would be unreasonable to require an employer to warn his employee to avoid dangers which ordinary prudence ought to make him avoid without warning. The mere fact that he cannot tell the exact degree of the danger if the nature and character of it can easily be seen is not enough to require warning and instruction to a man of full age and average intelligence. Something may properly be left to the instinct of self-preservation, and to the exercise of the ordinary faculties which every man should use when his safety is known to be

involved—citing *Russell v. Tillotson* (1885) 140 Mass. 201; *Cirlack v. Merchants' Woolen Co.* (1888) 146 Mass. 182; *Goodnow v. Walpole Emery Mills* (1888) 146 Mass. 261, 267; *Carey v. Boston & M. R. Co.* (1893) 158 Mass. 228, 231; *Connolly v. Eldredge* (1894) 160 Mass. 508; *Rooney v. Sewall & D. Cordage Co.* (1894) 161 Mass. 153, 160; *Wilson v. Steel Edge Stamping & Retinning Co.* (1895) 163 Mass. 315." *Stuart v. West End Street R. Co.* (1895) 163 Mass. 391.

No duty to instruct can be predicated in a case where it is only by a want of ordinary care and observation that the servant could have failed to know of the true state of affairs. *Campbell v. Mullen* (1895) 60 Ill. App. 497.

In other words, the employer is under no legal obligation to warn a servant of dangers which "any man of ordinary intelligence in the exercise of ordinary care . . . could not have failed to see and comprehend." *Johnson v. Ashland Water Co.* (1890) 77 Wis. 51.

Or, as the doctrine may also be put, the duty resting on the master to instruct or warn the servant as to the risks of his employment "does not extend to dangers open to ordinary observation, except in cases of youth, inexperience, ignorance, or want of capacity of the servant." *Collins v. Laconia Car Co.* (1895, N. H.) 38 Atl. 1047.

For this reason a charge is erroneous which in effect declares that, given an un instructed, inexperienced employee, not comprehending the danger, but using ordinary care, and an injury to such an employee caused by that danger, a recovery must follow; for, under such an instruction, the employee would be able to recover even though the danger was one which he ought to have appreciated. *Craven v. Smith* (1894) 89 Wis. 119.

So, a charge which leaves to the jury to say whether, as a matter of fact, the plaintiff knew what, according to his own testimony he did know, and whether he could appreciate a danger which he was just as much bound to appreciate as the defendant was,—here the liability of a stool to slip on a greasy floor,—and thus impliedly authorizes a finding that the defendant was guilty of an omission of duty in failing to warn the plaintiff as to the danger, is erroneous and a ground for ordering a new trial, even though the court may also have charged the jury that it was unnecessary to instruct the plaintiff if he knew the conditions and the danger which was likely to result therefrom. *Koehler v. Syracuse Specialty Mfg. Co.* (1896) 12 App. Div. 50.

This principle is applicable, even where the obligation to instruct would otherwise arise, as

want of knowledge on the part of young James of the situation, and of the duties he was expected to perform, and of which he was vouchsafed not a word of information or instruction by the defendant's foreman. Suddenly called upon by the company's foreman to undertake the performance of a delicate and important duty, in a sawmill, in full operation, and supply the place of a sick man who had been engaged thereat for about two years, without warning or precaution, young James was unwittingly cast into the teeth of a small saw, which cut his left hand off within twenty seconds after he had assumed its performance. Plaintiff's counsel graphically describes the situation thus: "Into this trap of flying wheels, machinery, belts, and whistling saws, noise, dust, plank, and rollers, Chester thrust, without a mo-

ment's warning, advice, instruction, or preparation, a boy, a minor, who knew nothing of its dangers." It is quite out of the question for us to affirm, under these circumstances, that young James had assumed the responsibility of the dangers of the position to which he had been assigned. In our opinion his right to recover damages of the defendant is very clear, under the provisions of the Code (Rev. Civ. Code, arts. 2315, 2317, 2320), and likewise under the construction of the general law applicable to master and servant which is given in the decisions cited in *Stucke v. Orleans R. Co.* 50 La. Ann. 188, omitting those appertaining to fellow servants as not pertinent to the issue. Under all the authorities, it is the recognized and bounden duty of the master to provide a reasonably safe place at which his servant is

where there is an increase in the risks of the employment. *Pullman Palace Car Co. v. Laack* (1892) 143 Ill. 242, 18 L. R. A. 215; *Hawkins v. Johnson* (1886) 105 Ind. 20, 55 Am. Rep. 169.

So, it has been said that the rule which makes it the duty of a master not to expose a servant to any abnormal perils without warning is subject to the qualification that, "if the risk and danger to which the service required to be performed exposes the servant are plainly apparent, both the instrumentality to be employed by the servant in performing the required service and the danger to be encountered in the use of the instrumentality being obvious, so as that there shall cease to be necessity for instruction or warning, the employer may remain silent, and leave the servant to avoid clearly seen danger by the reasonable use of his own faculties." *Illinois C. R. Co. v. Price* (1895) 72 Miss. 862.

The omission of an employer to notify a servant of the removal of some tacking supporting the rafters of a building, on which he was working, the result being that the building fell, is not in itself negligence, as he must be held to have known what was clearly visible to his sight. The true question for the jury, under such circumstances, is whether the employer acted with reasonable prudence in compliance with the rule which requires him to provide for the safety of his servants to the best of his judgment. *Sykes v. Packer* (1882) 99 Pa. 465.

The following cases will furnish sufficient illustrations of the various words and phrases used in describing dangers of this class, all of them being clearly expressive of the idea that the failure of the servant to observe them indicates a want of due care:

Dangers which the servant "can at a glance observe for himself." *Slims v. South Carolina R. Co.* (1886) 26 S. C. 490.

Elements of the danger so obvious to a careful person of average intelligence that ordinary prudence should make him avoid them without warning. *Bjbjlan v. Woonsocket Rubber Co.* (1893) 164 Mass. 214.

Danger "so simple that it can as well be ascertained at a single view as at many." *Hathaway v. Michigan C. R. Co.* (1883) 51 Mich. 253, 47 Am. Rep. 569.

Dangers which the servant "may see and guard against as well as could the master himself, if present, or anyone else" deputed by him. *Houston & T. C. R. Co. v. Strycharski* (1894) 6 Tex. Civ. App. 555.

"Obvious" dangers. *Connors v. Morton* (1894) 160 Mass. 333; *Cirlack v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733; *Hoyle v. Excelsior Steam Laundry Co.* 44 L. R. A.

(1894) 95 Ga. 34; *Gibson v. Oregon Short Line R. Co.* (1893) 23 Or. 493; *Bohn v. Havemeyer* (1889) 114 N. Y. 206; *Brady v. Ludlow Mfg. Co.* (1891) 154 Mass. 468; *Rooney v. Sewall & D. Cordage Co.* (1894) 161 Mass. 153; *Costello v. Judson* (1880) 21 Hun, 396; *Mississippi River Logging Co. v. Schneider* (1896) 34 U. S. App. 743, 74 Fed. Rep. 195, 20 C. C. A. 390.

Dangers "obvious even to a casual observer." *Findlay v. Russel Wheel & Foundry Co.* (1896) 108 Mich. 286.

Dangers "obvious to anyone of ordinary capacity." *Connolly v. Eldredge* (1894) 160 Mass. 566.

Dangers "so open and obvious that by the exercise of care he [the servant] would know of them." *Yeager v. Burlington, C. R. & N. R. Co.* (1894) 93 Iowa, 1.

Dangers "open and apparent to casual observers." *Hogele v. Wilson* (1892) 5 Wash. 180.

Dangers "open and obvious to the senses." *Railsback v. Wayne County Turnp. Co.* (1894) 10 Ind. App. 622.

Dangers "plain and open to observation." *Dougherty v. West Superior Iron & S. Co.* (1894) 88 Wis. 343.

Dangers "open to the ordinary observation of any person using reasonable care and prudence." *East Tennessee, V. & G. R. Co. v. Turville* (1892-93) 97 Ala. 122.

"Apparent" dangers. *Wolter v. Harrison Wire Co.* (1883) 14 Mo. App. 592; *Campbell v. Mullen* (1895) 60 Ill. App. 497.

Dangers "apparent to ordinary observation." *Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277.

Dangers "apparent on mere casual observation." *Vilas v. Vanderbilt* (1897) 20 Misc. 51.

Dangers "apparent to the servant and within his comprehension." *Bohn v. Havemeyer* (1887) 46 Hun, 557, Affirmed in (1889) 114 N. Y. 296.

Dangers "apparent from brief observation and experience." *De Souza v. Stafford Mills* (1892) 155 Mass. 476.

The master is not required, in order to relieve himself of liability, to show that the attention of the servant was called to the special risk from which an injury resulted, if the general dangers of the situation were apparent. *Goodridge v. Washington Mills Co.* (1893) 160 Mass. 234.

Thus, where employees of a railroad company know that the road runs through pasture land, and that the road is not fenced, it is not the duty of the company to notify them at what particular place cattle may be expected to be

to work, and to see to it that he is not exposed to unnecessary risks in the course of his employment. And in order that a dangerous service be intelligently undertaken by his servant, it is the duty of the master sufficiently to acquaint him with its risks and dangers, and give him a fair knowledge of the situation at the time of his employment. Failing in either of the foregoing particulars, the master will be held liable for whatever injury results to the servant. *Coolley, Torts*, § 550; *Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315; *Perry v. Marsh*, 25 Ala. 659; *Horner v. Nicholson*, 56 Mo. 220; *Wheeler v. Wason Mfg. Co.* 135 Mass. 294; *Nason v. West*, 78 Me. 253. In *Smith v. Sellers*, 40 La. Ann. 527, this court said that the servant "assumes the risk only of such hazards as are apparently incidental to

an employment intelligently undertaken." In *Erslew v. New Orleans & N. E. R. Co.* 49 La. Ann. 86, we held that if an employee of a steam-railway company knew or ought reasonably to have known the precise danger to him of the guy wire of the electric street-car company in the course of his employment, and saw fit, notwithstanding, to continue in it, he might be held to have assumed the extraordinary risks, as well as the ordinary risks, of his service. But this consequence must rest upon positive knowledge, or reasonable means of positive knowledge, of the precise danger assumed. *Meyers v. Illinois C. R. Co.* 49 La. Ann. 21; *Myhan v. Louisiana Electric Light & P. Co.* 41 La. Ann. 964, 7 L. R. A. 172; *Buswell, Personal Injuries*, §§ 202, 203; *Faren v. Sellers*, 39 La. Ann. 1011; *Helm v. O'Rourke*,

encountered. *Patton v. Central Iowa R. Co.* (1887) 73 Iowa, 306.

Compare also the two last cases cited in IV. b, *infra*.

2. Cases illustrating this general rule.

When the dangerous character of machinery is in plain sight, an employee working near it must ordinarily take notice of the perils to which it subjects him, and no duty rests on the employer to point this out. *Murphy v. American Rubber Co.* (1893) 159 Mass. 286 (case of unboxed machinery which the plaintiff had to pass). *S. P. Collins v. Laconia Car Co.* (1895, N. H.) 38 Atl. 1047 (uncovered gearing).

An employer is not bound to instruct an experienced employee of mature years as to the danger of being caught by a set-screw in a revolving shaft, visible when the shaft is at rest, but not when it is in motion. *Rooney v. Sewall & D. Cordage Co.* (1894) 161 Mass. 153; *Keats v. National Heeling Mach. Co.* (1895) 21 U. S. App. 656, 65 Fed. Rep. 940, 13 C. C. A. 221; *Goodnow v. Walpole Emery Mills* (1888) 146 Mass. 261.

A master is not bound to warn a man of twenty-seven years that, if he attempts to reach over an uncovered gearing to grasp a lever, without looking where his hand is going, he may be injured. *Wilson v. Massachusetts Cotton Mills* (1897) 169 Mass. 67.

A master cannot be held liable for a failure to instruct a youth of nineteen years as to such an obvious danger as that of having his hand injured by striking against a hook near to one upon which he is hanging hot tongues in the cooling room of a packing house. *Ryan v. Armour* (1897) 166 Ill. 568, *Affirming* (1896) 67 Ill. App. 102.

An experienced machinist who is manipulating a drill operated by an uncovered gearing is not entitled to a warning as to the obvious danger that his hand may be injured by being caught in it. *Foley v. Pettet Mach. Works* (1889) 149 Mass. 294, 4 L. R. A. 51.

In *Russell v. Tillotson* (1885) 140 Mass. 201, the plaintiff sought to recover for damage to his person, caused by his apron and jacket catching on a revolving shaft, while he was standing on a ladder and replacing a board upon a belt box into which the shaft ran at right angles. The shaft was plainly visible, and was seen by the plaintiff. If the ladder had been placed on the opposite side of the box, there would have been no danger. He testified that the ladder was standing where he mounted it at the time when he was ordered by the "boss" to go up and nail the board on, and that, at 44 L. R. A.

though he had worked in mills for a long time, and was acting within the scope of the duties which he had undertaken, he did not know any better way to do the work than that which he took. Upon the evidence a verdict for the defendant was directed, and the plaintiff excepted, contending that he was sent into a concealed danger without due warning or instruction. *Holmes, J.*, said: "The exception must be overruled. The plaintiff does not pretend that he was ignorant of the danger of a revolving shaft, nor that the order to him carried any prohibition to put the ladder in such position as he might deem best, nor that there was anything in the form of it to hurry him or disturb his judgment; but simply that he had not sufficient intelligence—for that is what it comes to—to see that he was less likely to come in contact with the shaft if he had the barrier of the belt box between him and the shaft; or, if he took a worse place, to keep away from the danger which he knew. As it is not suggested that he was a man of manifest imbecility, we think that the foreman was entitled to assume that the plaintiff would protect himself by whatever precautions were necessary."

An adult employee, though inexperienced in the work of a sawmill, is not entitled to any special warning that an accumulation of sawdust and refuse matter on the floor will render his footing insecure, and that if he should stumble, he might come into contact with any unguarded saws there might be in the vicinity, and so be injured. *Hazen v. West Superior Lumber Co.* (1895) 91 Wis. 208.

There is no obligation to instruct an employee in a sawmill that a board lying on the dead rollers may be shoved forward and to one side by another board coming from the live rollers, and that if it is thus brought in contact with a revolving circular saw close by it may be thrown off the saw, and injure anyone who may be operating it. *Mississippi River Logging Co. v. Schneider* (1896) 34 U. S. App. 743, 74 Fed. Rep. 195, 20 C. C. A. 390.

That the danger incident to the operation of a buzz saw is deemed to be at once apparent on mere casual observation, and therefore one as to which no instruction need be given, see also *Vilas v. Vanderbilt* (1897) 20 Misc. 51.

A master is not bound to instruct a servant as to the danger of having his hand caught while he is manipulating machinery with moving rollers which nearly touch each other. *Kean v. Detroit Copper & Brass Rolling Mills* (1887) 66 Mich. 277 (injury received while servant was cleaning machine); *Connolly v. Eldredge* (1894) 160 Mass. 566 (injury received while employee was assisting in putting a new

46 La. Ann. 178. See Buswell, Personal Injuries, p. 338. And we take the following extract from *Ciriack v. Merchant's Woolen Co.* 146 Mass. 182, *vis.*: "The duty of the defendant would be sufficiently discharged by pointing out to the plaintiff the situation of the machine, and the rapid revolution of the wheels when in operation, and explaining the probable effect of touching them under these circumstances." This statement of the law we accept as perfectly accurate; but, when it is applied to this case, it is made evident that the defendant's foreman was greatly in fault, in that he gave young James no explanation or instructions of any kind. Indeed, the foreman had, necessarily, an imperfect knowledge of the situation, as he had been in charge of defendant's mill

only for a few weeks at the time of the accident.

With regard to the plaintiff's demand for insurance money, but little need be said. The demand is made of the defendant as a *negotiorum gestor*, and not on a claim arising *ex contractu*, against the insurance company, as being liable for a loss sustained on its policy. We do not think that his demand against the company is well founded, as he avers that it has not yet recovered from the insurance company; and the plaintiff could not, in any event, recover from the insurance company, because his name does not appear as a beneficiary in either one of the policies which were written in favor of the defendant, exclusively. That the defendant had made exactions of young James

covering cloth on the upper roller of an ironing machine).

A fortiori, there can be no recovery for an injury received in handling such machinery where the servant is familiar with the use of machinery. *Richstain v. Washington Mills Co.* (1893) 157 Mass. 538.

A master is not negligent in failing to instruct a female employee thirty years of age, as to the danger of getting her hands caught in cog-wheels on the machine at which she is put at work, where such wheels are in plain sight and the danger therefrom is obvious. *Ruchinsky v. French* (1897) 188 Mass. 68.

It is not negligence for a master not to warn an employee of the danger that a hand kept upon a rope which is running through a sheave will be drawn into the sheave. *Findlay v. Russell Wheel & Foundry Co.* (1896) 108 Mich. 286.

The danger of cleaning machinery in motion is apparent to anyone, and even a common laborer who undertakes to do this, when he knows how to stop the machinery and thus avoid the risk, cannot recover for injuries which he receives while thus employed, on the ground that it was the duty of the employer to instruct and warn him. *Stoll v. Hoopes* (1888) 22 W. N. C. 159.

The failure to warn an adult employee whose duty it is to clean a revolving cylinder that, if a part of the cloth which she wrapped around her hand during the process was allowed to hang down it was likely to be taken up by the cylinder and draw her hand into the machine, is not negligence. *Hoyle v. Excelsior Steam Laundry Co.* (1894) 95 Ga. 34.

The danger of having a coat sleeve caught in gear wheels while cleaning a commutator close to them is one which a motorman is presumed to be able to appreciate without special instruction. *Burnell v. West Side R. Co.* (1894) 87 Wis. 387.

The risk of having the hand caught by revolving knives in a planing machine is a patent danger of which the master is not bound to notify the servant. *Arkadelphia Lumber Co. v. Bethea* (1892) 57 Ark. 76.

It is for the jury to say whether a man who, before hiring himself to the defendant, had worked for about a year in the picker room of a cotton mill, but who testifies that he knew nothing of the internal construction of a picker should have been instructed as to the risk of removing clogs of cotton from the machine while the beater was in motion,—especially where it is also in evidence that the picker boss had, in his presence, removed clogs without stopping the machinery, and had thus set an example which it might have been dangerous

for the plaintiff to follow. *De Costa v. Hargraves Mills* (1898) 170 Mass. 375.

An employer is not bound to instruct a servant as to such an obvious danger as that an iron gate which he has swung back to reach a gearing may shut to and throw him against the gearing, where it is plain that the gate is liable to be set in motion if touched by his person. *Brady v. Ludlow Mfg. Co.* (1891) 154 Mass. 468.

An employee injured by the sudden dropping of an elevator while he was engaged in placing heavy granite sills upon it cannot recover if the danger was as obvious to him as to his employer and the other employees. *Connors v. Morton* (1894) 160 Mass. 333.

Upon the ground that, provided the danger is obvious, instruction is not obligatory merely because the work is new to the servant, it has been held that an action for breach of the duty of instruction cannot be maintained where the complaint merely shows that the servant was injured owing to the sudden jumping of a plank which threw his hand against a rip-saw, although it also is stated that he had never before used such a saw; that his only experience in such work had been with a circular saw which he had used for half a day; and that he had not done any carpentering at all until about three weeks before the accident. *Gaertner v. Schmitt* (1897) 21 App. Div. 403.

In *Reinig v. Broadway R. Co.* (1888) 49 Hun, 269, the court said that there was no decision which required that a master who directs his servant to clean off the snow from a roof should notify him of the existence of a skylight in another roof suddenly covered by a heavy fall of snow. (The evidence went to show that the servant, when he had reached the bottom of the ladder by which he had reached the roof to which he was sent, jumped off on one side to avoid a snow drift and so alighted on the skylight through which he fell. It is not apparent from the report what the court regarded as the controlling feature in the case. For a contrary ruling upon a somewhat similar set of facts, see *Kaffery v. Central Park, N. & E. R. Co.* (1895) 14 Misc. 560, cited in III. d, 3, *infra*.)

A man of mature age and ordinary intelligence who applies for and obtains a position as brakeman cannot recover for an injury caused by the crushing of his arm between the deadwoods on the theory that he had no experience, and that it was the duty of the company to instruct him before sending him to couple and uncouple cars. The danger of such an injury is apparent without any special skill or training. *Dysinger v. Cincinnati, S. & M. R. Co.* (1892) 93 Mich. 646.

monthly, from his wages, in order to keep up the premiums, cannot have the effect of establishing in his favor a beneficial interest in the insurance policy. The contrary doctrine was maintained by this court in *Putnam v. New York L. Ins. Co.* 42 La. Ann. 740. We are of the opinion that so much of the plaintiff's demand as relates to the insurance must be rejected and disallowed, and the amount of the demand for damages be reduced to \$3,000.

It is therefore ordered and decreed that the judgment appealed from be so amended as to reject and disallow the plaintiff's demand for \$1,000 insurance, and, thus reduced to \$3,000, same be affirmed, with costs of appeal to be taxed against the plaintiff and appellee, with the reservation of whatever rights he may have against the de-

fendant upon a *quantum meruit* for an interest in the insurance money when same has been collected.

A petition for rehearing having been filed, *Breaux, J.*, on April 18, 1898, handed down the following response:

Three witnesses for the plaintiff, men of experience in the management of sawmill machinery, stated that there was danger if one without experience or instruction of any sort undertook to work as a hand at the machine known as the trimmer: that it is unsafe to place one at that work who is a green hand without warning or instruction; that the danger should have been explained to him; that it was an act of imprudence to call the plaintiff who had been engaged elsewhere in the mill, and at once give him in

There is no obligation to warn even an inexperienced brakeman that the dangers incident to coupling cars with double buffers are greater than those incident to the coupling of cars with single deadwoods of the common type. The difference between the character of the two styles of couplings is manifest to ordinary observation, and of itself invites the exercise of greater care in handling the double buffers. *Boland v. Louisville & N. R. Co.* (1894) 106 Ala. 641 (1892-93) 96 Ala. 626, 18 L. R. A. 260.

This rule holds even where the plaintiff is a brakeman temporarily employed in the absence of the regular brakeman. *East Tennessee, V. & G. R. Co. v. Turvaille* (1892-93) 97 Ala. 122.

In a leading case upon this particular peril (*Michigan C. R. Co. v. Smithson* (1881) 45 Mich. 212), the court thus discussed the liability of the railroad company: "We have had produced for our inspection, on the argument, a model of the double deadwoods which caused the injury, and it seems impossible to give to the coupler any better or more effectual notification of their presence, and of the difference from those belonging to the defendants than their very form necessarily gives of itself. The difference is very marked and striking, and it is quite impossible to couple the double deadwoods, or to approach them for the purpose with any degree of attention, without observing it. This is so whether the coupling is done in the daytime or in the night-time; for in the night every switchman has his lantern with him, or should have it on all occasions. If, therefore, a switchman were to declare that he had attempted to couple the double deadwoods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him. Moreover, the business of the road was of itself a notification that many differences requiring attention in coupling were to be encountered by the switchmen and brakemen. The Michigan Central is a great common way for the cars of all the railroad companies of the country, and every man in the employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation companies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds, and he cannot assume, as he passes from one to another, that the two will be alike, 44 L. R. A.

much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive, and oftentimes, as above explained, confusing, but it would be a work of supererogation, for any man capable intelligently of performing the duty would be no wiser after the notice than before; and a man who would not heed the information the very nature and course of the business would impart to him, would be protected by no notice. The best notice is that which a man must of necessity see and which cannot confuse or mislead him; he needs no printed placard to announce a precipice when he stands before it."

The danger of placing the hand upon the deadwood of one car at the very place where it had been previously struck twice by the buffer of another car which the servant had unsuccessfully attempted to couple to it is not an extraordinary or concealed danger which it is requisite to point out specially to a person of mature years and ordinary intelligence. *Wormell v. Maine C. R. Co.* (1887) 79 Me. 397.

Where the difference between the couplings of two cars is such that a coupler, if competent for his business, can see at a glance that, if he attempts to make the coupling while standing between the cars, he will be crushed to death, the trial judge is entitled to say, as a matter of law, that the company was not guilty of a breach of duty in failing to notify the servant of the existence of a peculiar danger. *Stimms v. South Carolina R. Co.* (1886) 26 S. C. 490.

Where it is alleged on the one hand, and admitted on the other, that the employee was inexperienced and ignorant in respect to the difference in the construction of deadwoods, and of the hazard of coupling cars equipped with double deadwoods, that the fact of his want of knowledge and inexperience was, or by the exercise of care might have been, known by the railway company, and that the defendant nevertheless, without instructing or warning him of the hazard, required him to make such coupling, and while so engaged the plaintiff was, as is alleged, injured without fault on his part, the facts present a case on which an issue may be made for trial. The gravamen of such a case is the omission of duty on the part of the employer in failing to instruct an inexperienced servant, who, although he may see the danger, may nevertheless be utterly ignorant of the risk, or of the manner of performing the service, so as to avoid injury therefrom. *Louisville, N. A. & C. R. Co. v. Frawley* (1886) 110 Ind. 18, the court remarking that whatever application the case of *Atlas Engine Works v. Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798, may have to the evidence in this case, it was not controlling

charge the work necessary to be done at the end of the trimmer in transferring the lumber from the edger to the trimmer. On the other hand, three witnesses for the defendant testified that the work was not as hazardous as represented; that men without experience and warning sometimes were placed to work at trimmers. The jury and the trial judge, who saw and heard the witnesses, believed the former. Great weight, it is clear, should be given to their finding as relates to the facts of the case. It does seem that the act of the plaintiff in putting his hands on two pieces of timber, 2x4 (crossed one over the other), as they were about to pass the trimmer saws, was an act of the greatest imprudence; that one with the least experience or warning would not have thus exposed himself. The plaintiff, it appears, was not def-

as to the facts stated in the complaint under consideration.

It is not negligence for a foreman to order an employee to paint a machine without informing him that others are also at work upon it, where, by the exercise of reasonable care, he can himself see that other workmen are so engaged. *Williams v. Hensler* (1890) 38 Ill. App. 584.

It is not the duty of an electric street-railway company to notify a conductor, upon his entering the service, of the danger of getting caught in a place 3½ inches wide, between a trail car and a doorway in the power-house, through which the car must be pushed to attach it to the dummy. *Jennings v. Tacoma R. & Motor Co.* (1893) 7 Wash. 275.

The danger that a trackwalker may be caught by a train on a trestle, and the readiest way of reaching a place of safety, *viz.*, by getting on one of the bent caps at either side of the track, are both obvious, and he cannot hold the railroad company liable for a failure to instruct him as to this method of securing himself. *Gibson v. Oregon Short Line R. Co.* (1893) 23 Or. 493.

3. Master bound to instruct, where no knowledge of the danger can be imputed to the servant.

Viewed from the opposite standpoint, the principle we are discussing appears in the form that it is the master's duty "to give [a servant] notice . . . [of] latent defects or hazards incident to an occupation, of which the master knows or ought to know, and which the servant, from ignorance or inexperience, is not capable of understanding and appreciating." *Consolidated Coal Co. v. Haenni* (1893) 146 Ill. 614, *Affirming* (1891) 48 Ill. App. 115.

What dangers are considered "latent" in the sense implied by the rule is indicated by the following decisions:

A mine owner is liable, where he sends a servant into a shaft, knowing that there is a fissure which renders it probable that the roof will fall. *Strahlendorf v. Rosenthal* (1872) 30 Wis. 674.

It is negligence in a mining company to fail to inform its employee of any danger from an unexploded blast in the vicinity of which such employee is working, of which the company or its foreman knows, or by the use of reasonable diligence ought to know. *Kelley v. Cable Co.* (1887) 7 Mont. 70.

It is the duty of an employer before using a highly dangerous explosive to ascertain and make known to his employees the dangers to be reasonably apprehended from its use; and his ignorance is no excuse if knowledge can be ob-

tained by the exercise of reasonable diligence. *Bertha Zinc Co. v. Martin* (1895) 93 Va. 791.

A mechanic employed by, and in the presence of, the inventor of a new machine to move it, who is injured in the hand by the fall of part of the machine owing to its imperfect construction, may recover damages from the inventor, if he did not know or have reason to know that it was dangerous to place his hand as he did. In order to move the machine as directed, and if the inventor knew or ought to have known it, and gave him no warning. *Walsh v. Peet Valve Co.* (1872) 110 Mass. 23.

A request for a charge to the effect that the perils of the work were obvious, and that the master was therefore under no obligation to instruct the servant, should not be granted, where the servant's duty was to dig under a bank which was not expected to fall by the action of gravitation, and which had, up to the time of the accident, been taken down by prying over the top when an excavation of a sufficient depth had been made at the bottom. *Lynch v. Allyn* (1893) 160 Mass. 248, distinguishing the cases where a man is set to work to undermine a bank which is expected to fall by the force of gravitation, and he is required to look out for himself.

In any jurisdiction in which the maintenance of a low overhead bridge is regarded as negligence on the part of the railroad company, it is necessarily liable for injuries which trainmen may receive therefrom, unless it warns them of the danger, or they ascertain from some other source, that it exists. *Louisville, N. A. & C. R. Co. v. Wright* (1888) 115 Ind. 378.

A nonsuit is rightly refused where there is evidence that the defendant ordered the plaintiff, a brakeman, to do work which required him to be on the top of freight cars, without warning him that they passed under bridges too low to admit of his standing erect with safety, he being entirely ignorant of the danger. *Altee v. South Carolina R. Co.* (1884) 21 S. C. 550, note to 53 Am. Rep. 699.

The section of the Alabama Code of 1886 (1144), which requires railroad companies to blow the whistle or ring the bell before coming to and while passing a public crossing, is intended to secure protection for persons crossing on the track itself, and has no application to the case of employees on the top of cars which are passing under a low overhead bridge. *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710.

Where the plaintiff attempts to mount a moving car by putting his foot on the jaw-strap, and is injured in consequence of the absence of the jaw-strap, which the evidence tends to show has been gone for some time, it is for the jury

edge. This contention, as stated by defendant, as relating to visible danger, is supported by several well-considered decisions of courts of other states. From the point of view just stated they recommend themselves as eminently just and correct. But the jury here, substantially, found a different state of facts. They must have concluded, in order to arrive at their verdict, that the instruction which could have been given him would have been given had it not escaped attention; that is, the instruction not to put his hands on the pieces of lumber after having placed them on the trimmer, and particularly after they were being carried on the endless chains to the saws. We have no hesitation in saying, if the facts were as the verdict implies, the judgment was correct and legal. The evidence before us did

not disclose that the facts were not as found by the jury. There is no good reason to infer that the foreman of the mill did not have a proper knowledge of the situation, and that he was not, in every respect, a well-qualified and competent foreman. But the ability of the foreman is not of itself ground to discredit the return of the jury. Under the most careful and experienced foreman an accident may happen for which the employer must be held in damages. It may be stated, also, as related to the lumber mill, that the situation was not more grave and dangerous than it is in all factories in which there are many fast revolving circular saws with white steel surface a few inches above the horizontal line of their shafts. It is not negligence to own and operate such machinery. The demands of commerce require ef-

to say whether the company is liable on the ground that the plaintiff was ordered into a place where there was a concealed danger known to the company, and not known to the plaintiff by a warning or otherwise. *Coates v. Boston & M. R. Co.* (1891) 153 Mass. 297, 10 L. R. A. 769.

An employer is liable for an injury to an employee caused by his falling through a flooring formed partly of glass and partly of wood, the whole of which was covered by dust and the nature thereof unknown to him, upon which he was directed to go without warning by the employer's foreman. Here there was apparent safety, but actual danger. *Rafferty v. Central Park, N. & E. R. R. Co.* (1895) 14 Misc. 560. (See, however, *Reinig v. Broadway R. Co.* (1888) 49 Hun. 269, cited in III. d. 2, *supra*.)

So, an employer who knows the danger to an employee from stepping upon a rotten canvas covering a hole in a third-story floor is required to notify the employee of such danger, where he is ignorant thereof. *Muncie Pulp Co. v. Jones* (1894) 11 Ind. App. 110.

In *Paulmier v. Erie R. Co.* (1870) 34 N. J. L. 151, the court, in upholding a verdict finding the defendant liable on the ground that the structure in question subjected its servants to unnecessary danger, and that no means had been taken to warn the plaintiff, said: "Stripped of all verbal disguises, the argument is this: That by their arrangements they required their employees almost hourly to run their engines to the brink of danger, and that their orders were to stop there. The roadbed over the water was supported by wood-work, which the defendants admit was dangerous to a locomotive, and what they required was, that the locomotive should be stopped on the fast land. As occasion called for it, in pushing the loaded cars out over the water, the engines were brought necessarily to this line between the water and land. Here was a danger constantly recurring—just as imminent as though the requirement had been to run these engines up to the edge of a precipice. And, to make the matter worse, the danger in this case was entirely latent, for there was nothing to indicate that this part of the road extending beyond the land would not support a locomotive. It is obvious that it required the constant exercise of skill and vigilance to avoid this unnecessary risk, and yet it is not pretended that there was any notification to the engineers and other employees of the insecurity of this part of the roadbed. All that is claimed is, that from time to time the engineers were told not to run their engines beyond the edge of the fast land. These orders were merely verbal, and pro- 44 L. R. A.

ceeded from the yard-master, who appears himself to have been ignorant of the greatness of the danger. It is manifest from the evidence on both sides that adequate means to inform the parties in charge of these locomotives of the peril at hand were not used, for several of the engineers themselves testify that occasionally they put their engines upon this insecure structure. Some of them said that they were not aware of its insecurity. These circumstances seem to me to constitute a legal default in the defendants. To require their servants, in the ordinary routine of daily duty, to run these engines up to the margin of this covert danger, was subjecting them to an unnecessary hazard. This, of itself, would be sufficient to sustain the action. So, likewise, I think the omission to use any means of making the danger known to those who were to incur it, would have a like effect. On either of these grounds the jury could rightly rest their verdict."

An employee who is ordered to dig a trench so as to shift a telegraph pole, without being notified that props are necessary to hold it in an upright position, and that another employee has been sent to fetch them, may recover for an injury caused by the fall of the pole. *East St. Louis Connecting R. Co. v. Enright* (1893) 47 Ill. App. 494.

A railroad company is negligent in attempting to use upon its road a car from another road, the drawbar of which differs so much in height from those on its own cars that it will slide past them and permit the cars to come so close together as to endanger the lives of its employees whose duty it is to couple such cars, without notifying them of its condition. Such a danger is not one of which a servant busily engaged in coupling can be required to take notice. *Ohio & M. R. Co. v. Wangelin* (1892) 43 Ill. App. 324.

Carriages running along an overhead wire for the conveyance of parcels in a store, and so adjusted that when pushed backwards they are likely to leave the wire and fall, constitute a dangerous appliance under certain conditions, and the storekeeper is bound to inform the employees of this peculiarity, when he furnishes them with poles to push the carriages. *Stock v. Le Boutillier* (1897) 19 Misc. 112, Affirmed (1896) 18 Misc. 349. The hypothesis underlying the decision apparently was that the danger was not apparent, and that the act which would create that danger was likely to be done for the purpose of loosening the carriages when they happened to stick at some point on the wire. But the precise theory of the court is not altogether clear from its opinion.

The danger caused by the fact that the

fective, improved machinery. In the case here, it was not defective, and not unavoidably dangerous. The fact remains that it was not properly handled, due, as the jury thought, to the want of notice and instruction which should have been given to an inexperienced hand. Under our jurisprudence, until it clearly appears that such a finding is erroneous, we are constrained to accept the conclusion as correct.

Lastly, our decision held that claim for insurance cannot be recovered in this case. Defendant asserts that reservation in the decree invites new and troublesome litigation. In order to put that matter at rest,

"beater" of a machine known as a picker continued to revolve by its own momentum for two or three minutes after all the rest of the machine had come to a standstill is a latent danger of which a servant ordered to clean the machine should be notified. *Hightower v. Bamberg Cotton Mills* (1896) 48 S. C. 190.

A verdict finding the employer guilty of negligence in not instructing a servant as to the dangers of holding red-hot rivets while they are being hammered into boilers will be upheld where the evidence tends to show that he was ignorant of the dangers of the work. *Mannion v. Hagan* (1896) 9 App. Div. 98.

A case which may usefully be contrasted with those cited in the last section to illustrate the circumstances under which the servant is chargeable with a comprehension of the risks caused by moving machinery is *Hanson v. Ludlow Mfg. Co.* (1894) 162 Mass. 187, the special point of which will be apparent from the following passage of the opinion: "The general danger of contact with a circular saw in operation is of course obvious. But the particular danger by which the plaintiff was hurt is not one which is apparent. The saw teeth move with such velocity that they are indistinguishable. Objects which come in contact with the front of the saw in its ordinary use are not thrown upward but by its action are held in contact with the table. The fact that objects which touch the opposite side of the saw will be affected in a different manner, and one attended with danger, although easily understood from explanation and readily learned by experience, is not of itself plain and obvious, but is one of those obscure dangers of which an employer should give warning if he has reason to suppose that a workman who may encounter it in his work does not know of this action of the saw, and is ignorant of this particular danger."

A verdict holding an employer liable will not be set aside where there is evidence tending to show that his agents put a servant to work "in a place of peculiar danger, of which he had no knowledge or experience, without informing him of the risks or instructing him how to avoid them." *O'Connor v. Adams* (1876) 120 Mass. 427 (where the servant was ordered to oil a rapidly revolving machine).

While the fact that if the hands are so placed between the upper portions of revolving cylinders as to be in contact with the surfaces there is danger is obvious to a man of ordinary intelligence after even a day's experience, a court will not say, as a matter of law, that the increased danger arising from their having been left on one occasion further apart by a coemployee of the plaintiff is so patent to a new employee that the master is absolved from the duty of instruction. *Bjbjian v. Woonsocket Rubber Co.* (1895) 164 Mass. 214.

An employer who knowingly furnishes an em-

ployee a kicking horse to work with, without notice or warning, is liable to the employee for injuries from a kick by the horse. Such a peril is not "apparent and visible." *Helmke v. Stetler* (1893) 69 Hun. 107.

Rehearing refused.

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So, it has been held to be the duty of an employer to furnish a driver with a safe team, or inform him of its bad or vicious habits, so that he may guard against them. *Leigh v. Omaha Street R. Co.* (1893) 36 Neb. 131; *s. p.* *George H. Hammond Co. v. Johnson* (1893) 38 Neb. 244. (In these two cases the special point made by defendant's counsel and negated by the court was that the rule where animals were concerned was different from that which prevailed in regard to inanimate appliances.)

In *Lane v. Minnesota State Agri. Soc.* (1895) 62 Minn. 175, 29 L. R. A. 708, it was held that a complaint was not demurrable which alleged that the defendant engaged the plaintiff to ride a running race for horses, which was prompted and controlled by it; that, knowing a certain horse was dangerous and unsafe to run in any race by reason of a vicious habit of track bolting, of which plaintiff was ignorant, it negligently permitted such horse to run in the race in which she rode, pursuant to her engagement with defendant, without warning her of the unusual danger to which she was thus exposed; that by reason of such horse bolting the track during such race, she was thrown from her own horse and injured.

The presence of a solution of potash in a waste-pipe from the toilet room of a saloon is a latent danger against which the proprietor is bound to caution an employee whom he directs to remove an obstruction from the pipe. *Dunn v. Connell* (1897) 21 Misc. 295.

The principle which makes a master liable for exposing a servant without warning to latent dangers in machinery of which he has no knowledge, either actual or constructive, has also been applied in the analogous case of the exposure of the servant to an infectious or contagious disease. *Killegel v. Aitken* (1896) 94 Wis. 432, 35 L. R. A. 249, where the defendant allowed the plaintiff to work in the room in which one of the household was sick with typhoid fever, and omitted to inform her what the malady was.

A carpenter hired to erect a fence on a lot does not assume the risk of being shot by a person who is in adverse possession, unless the employer notifies him beforehand that forcible resistance may be expected. *Baxter v. Roberts* (1872) 44 Cal. 188, 13 Am. Rep. 160. The court said: "The general principle which forbids the employer to expose the employee to unusual risks in the course of his employment, and to conceal from him the fact of such danger, is not affected by the fact that the danger known to the employer arose from the tortious or felonious purposes or designs of third persons

acting in hostility to the interests of the employer and through agencies beyond his control. The employee is as clearly entitled to information of such known danger of that character as of any other, the existence of which is known to the employer. The employer if he knew or was informed of a threatened danger of that character was bound to communicate the information to his employee about to be exposed to it in the course of his employment and in ignorance of its existence. The nature or character of the agency or means through which the danger of injury to the employee is to be apprehended can make no difference in the rule, for the employee is entitled in all cases to such information upon the subject as the employer may possess, and this with a view to enable him to determine for himself if at the proffered compensation he will be willing to assume the risk and incur the hazards of the business; and if the employer have such information or knowledge and withhold it from the employee, and the latter afterwards be injured in consequence thereof, the employer is liable to him in damages therefor."

Where the servant of a corporation does acts in obedience to its orders which are in violation of an injunction restraining such acts, or which amount to a trespass, and such servant has no notice of the injunction or the invalidity or wrongfulness of such acts, or of any liability or danger of arrest likely to be incurred in the performance thereof, and such liability and threatened danger are known to his principal, but concealed from him, the principal is bound to indemnify him for the dangers suffered by him as the natural result of his acts done in obedience to the orders of his superiors. *Guirney v. St. Paul, M. & M. R. Co.* (1890) 43 Minn. 496.

And the liability of the principal does not, in such case, depend upon the ultimate determination of the question whether an alleged trespass by or upon the servant is or is not legally justifiable, or whether the issuance of the injunction is legal and proper. *Ibid.*

IV. *Experience of servant as a special factor bearing upon the master's duty of instruction.*

See also III. c. 3, *supra*, and the cases in V. *infra*.

a. *Generally.*

The extent of an adult servant's experience in the work which he was doing at the time he received the injury has a material bearing upon the question whether any duty of instruction rested on the master.

The "rule which requires the employer to give proper instructions is most frequently applied in cases where persons of immature years are employed about dangerous machinery; but the same principle governs where the person so put to work is of mature years, but without experience in the particular work, and without knowledge of the actual dangers attending it. But, of course, the fact that the person injured was of mature years . . . is a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position." *Ingerman v. Moore* (1891) 90 Cal. 410.

Some presumptions indulged in with regard to this element of the employer's liability operate in his favor. Thus "it is not negligence to employ one who is physically and mentally qualified for the business, merely because he has not yet had experience. It is only by instructing the inexperienced that the necessary supply of experienced help can be secured." *Gorman* 44 L. R. A.

v. Minneapolis & St. L. R. Co. (1889) 78 Iowa, 509 (man twenty-two years of age hired as brakeman).

Again, the want of experience in a certain employment cannot be of any moment in cases where the danger which actually caused the injury was such that no previous special experience was necessary to enable the servant to appreciate it. To this class of cases belong those already reviewed in which the obvious character of the danger was held to negative the existence of any duty to instruct. (See III. d. 1, *supra*.)

When a servant has actually operated, and seen others operate, an implement or machine often enough to enable him, by the exercise of ordinary intelligence and care, to learn how to avoid being injured by it, or when the mode of operating it is so simple as that a person of ordinary intelligence or care can at once perceive the safe and proper mode of operating it, there is no duty resting on the master to instruct him. *Jones v. Louisville & N. R. Co.* (1894) 95 Ky. 576 (said of the danger of "losing the motion" of the lever of a hand car).

An unqualified charge to the effect that an employer is liable for failure to warn an inexperienced employee ordered into a more hazardous position than that for which he was employed, as to dangers attending the same, is erroneous, inasmuch as such a liability does not exist, where they are so open and obvious that by the exercise of care such employee would know of them. *Newbury v. Getchel & M. Lumber & Mfg. Co.* (1896) 100 Iowa, 441.

The rule which absolves the master from liability for his omission to instruct an inexperienced employee as to a danger which is readily observable by anyone of ordinary intelligence may be referred to the consideration that the servant, knowing that there was such a danger, may be expected to proceed with great caution until he becomes familiar by experience with the forces with which he has to deal. *Stuart v. West End Street R. Co.* (1895) 163 Mass. 391, where it was held that the jury should have been directed to return a verdict for the defendant in an action for injuries caused by the plaintiff's allowing his hand to be drawn into the knives of a hay-cutting machine which he was feeding. "It may be," said the court, "that no one could tell the exact degree of the force with which the hay would move forward with the traction of the knives, nor just how great the danger was until he ascertained by actual experiment; but anybody could see at once that there was danger in doing the work unless care was used to avoid letting the fingers be drawn forward to the knives."

A presumption inuring to the disadvantage of the employer is that, although he is, as a general rule, not bound to anticipate that a servant of considerable experience will choose the most dangerous method of doing certain work (see *Keats v. National Heeling Mach. Co.* (1895) 21 U. S. App. 656, 65 Fed. Rep. 940, 13 C. C. A. 221), he is bound to take notice of the fact that a servant's experience may actually be a snare to him—as where the dangerous conditions consist in the unusual construction of an appliance, and that construction is so uncommon that a servant of long experience in the manipulation of such appliances may well have had no opportunity of becoming acquainted with one of that particular kind. Here the experience of the servant will tend to throw him off his guard, and the servant's want of experience strengthens rather than weakens the obligation of the master to give him instructions. See *Missouri P. R. Co. v. Callbreath* (1886) 66 Tex. 526.

Ordinarily, however, the servant's experience or inexperience is dealt with as a fact directly tending to establish or negative his knowledge of the dangers of the work. The importance attached to it in the case of adult employees will be apparent from the following decisions. (As regards the experience or inexperience of minor employees, see *V. infra*.)

b. Circumstances under which no instruction is necessary.

Failure to instruct an employee as to dangers is immaterial if he has worked long enough to learn by the ordinary exercise of diligence the dangers of his employment and the methods to avoid them. *Gulf, C. & S. F. R. Co. v. Wittig* (1896, Tex. Civ. App.) 35 S. W. 357. (The methods referred to were those adopted for securing the safety of persons working on cars standing on a track.)

An employer may assume that no instructions are needed as to the use of a machine similar to that which the employee has handled for two years. *A fortiori* is he exempt from liability for an injury received by him in the ordinary course of his duties, where the person in charge of the machine questioned him as to his familiarity with it before starting it, and watched him operate it, until satisfied that he was a skilled operator. *Keenan v. Waters* (1897) 181 Pa. 247 (employee in steam laundry).

An employee cannot recover in an action for personal injuries received in the use of a "hand edger" in a sawmill, upon the ground that his employers were negligent in allowing him to use such a machine without instruction, where he had been working in the mill for more than a year, and upon this machine for four months when injured, and where its dangers were apparent to a casual observer. *Hogele v. Wilson* (1892) 5 Wash. 160.

Negligence is not imputable to a master failing to notify an experienced employee that a circular saw was dangerous, where the latter, while supplying wood to the man in charge of the saw, was injured by being struck by a piece of wood caught in it. *Delaware River Iron-Ship Bldg. & Engine Works v. Nuttall* (1888) 119 Pa. 149. The court said: "The negligence which the plaintiff imputes to the defendant, and for which a recovery was sought and allowed in the court below, is the failure to inform the plaintiff, when he was sent to carry the lumber, that a circular saw was a dangerous machine, and the failure to provide the saw with an attachment called a "spreader." As to the first of these, it must be remembered that the work Nuttall was asked to do was simply that of a bearer of burdens; work which is done by cheap and unskilled labor. He was a mechanic, and had for weeks been working in the same room in which this saw was operated. All that could have been told him by way of warning was, that there was a possibility of injury from a flying stick, but that during many years no such accident had happened in the defendant's works. That the omission of such a warning to a mechanic under the circumstances of this case was a failure in duty on the part of the employer is simply preposterous. There is risk and liability to accident in all employments, but the law does not require an employer to protect his employees against the possibility of an accident. He is bound to provide suitable machinery and implements for their use, see that they are in reasonable order, and that the usual precautions against accident are taken. The possibility of accident which lies beyond is a risk which every mechanic and every laborer takes and must take, as incidental to every form of activity."

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In *Mississippi River Logging Co. v. Schneider* (1896) 54 U. S. App. 743, 74 Fed. Rep. 195, 20 C. C. A. 390, where a similar accident was the subject of an action, the court thus laid down the law: "If, however, it may be assumed that there was failure of duty here by the master with respect to the safeguard, its absence was an open, obvious fact. That it was wanting should have been observed by one of even slight experience in the business; certainly by one in the exercise of that ordinary care that the law casts upon the servant. The defendant in error was a man of mature years. He had had some six years' experience in this business. He was of ordinary intelligence and was no novice. He knew the operation and the use of every piece of machinery employed. He knew that the service was a dangerous one, and that even with the utmost care accidents would occur. He knew that material striking the revolving saw would be hurled with great force towards the operator. What warning from the master could have given him better instruction than he had,—instruction acquired by the experience of six years in the vicinity of dangerous machinery?" The court then referred to the passage just quoted from the Pennsylvania case, and proceeded thus: "It is said, however, that the servant could not anticipate that the operator at the edger would not remove one piece of lumber before another coming over the live rollers would strike it, force it over the space of dead rollers between the alley and the slab saw, nor that it would be swerved from its natural course by the direction given to it, either by the impinging force or by the operator in striving to secure it. That is true, and is equally true with respect to the master. The possibility was as palpable to the understanding of the one as to the other. The mill had been operated for some ten or eleven years without that safeguard and without accident from that cause. In marshaling the dangers that ordinary care would seek to guard against, it could hardly be anticipated that the piece of lumber would be projected such a distance over dead rollers, and would also be so swerved from its course, that it would strike the slab saw, 22 feet away from the end of the line of live rollers, and north of the line of dead rollers extended westerly upon a direct line from the live rollers. Nor can it be said that the danger was a concealed one, growing out of any defective machinery. It arose from the manner of operation, not because of defective machinery; and therefore was a risk incident to the business."

An adult employee of ordinary intelligence and familiar with the work cannot recover for an injury on the ground that he was not instructed as to the danger of his work, so "plain and open to observation," as the liability of his hand to be caught and drawn in by hay which he is feeding to a revolving spindle. *Dougherty v. West Superior Iron & S. Co.* (1894) 88 Wis. 343.

An experienced employee of full age, who has worked for four months in a room in which a loom having unprotected gearing is situated, assumes the risk of injury from being pushed against such gearing by a person passing him in the aisle, where his duties call upon him to work near such loom, and he has made no objection to the loom's being uncovered. *Goodridge v. Washington Mills Co.* (1893) 160 Mass. 234.

There is no negligence in omitting to instruct a man of ordinary intelligence, thirty-two years of age and familiar with the use of machinery, as to the danger of having his hand drawn under a moving roller on which he is endeavoring to make the loose end of a piece of cloth catch by throwing it over the roller, and

tucking in the end between the roller and another piece of cloth. *Richstain v. Washington Mills Co.* (1893) 157 Mass. 538.

A machinist and engineer is charged with the knowledge that set-screws are in constant use in machinery, and that, from the purpose for which they are employed, it may be expected that the collar of a shaft will be kept in its position by one. If he is caught by such a screw while making some repairs, he cannot hold the employer liable for failing to apprise him of the danger arising from it while the shaft is in motion. *Goodnow v. Walpole Emery Mills* (1888) 146 Mass. 261.

An employer is not guilty of negligence in failing to warn a mechanic of mature years, who has worked upon the premises for some time, of the danger arising from a set-screw upon a revolving shaft, so as to render him liable for injuries from the clothing of such employee catching upon such screw, where he might have performed the work without danger by another method. *Keats v. National Heeling Mach. Co.* (1895) 21 U. S. App. 656, 65 Fed. Rep. 940, 13 C. C. A. 221.

Handling the line at the bow of a tug is a risk assumed by a man employed to do general work on the deck, although he has never previously handled any line but that at the stern. *Williams v. Churchill* (1884) 137 Mass. 243, 50 Am. Rep. 304.

A railroad company is under no duty to give warning of the enhanced risk due to the presence in its train of cars having double dead-woods, received from other companies, to an experienced brakeman who has been in service for seventeen years, where numerous like cars pass daily over the road. *Northern P. R. Co. v. Blake* (1894) 27 U. S. App. 180, 63 Fed. Rep. 45, 11 C. C. A. 93.

It is error to direct a jury to find a railroad company guilty of negligence on the ground of failure to instruct a brakeman specially as to the danger of coupling cars with double dead-woods where evidence has been given which tends to show that the plaintiff had had sufficient experience to dispense with the necessity of such special instructions. *Hughes v. Chicago, M. & St. P. R. Co.* (1891) 79 Wis. 264.

A verdict against a railroad company holding it negligent in failing to warn a brakeman of the danger in coupling cars having double deadwoods will be set aside, where the evidence shows that he saw and recognized the danger, and, on seeking employment from such company, had represented himself as having had twenty-seven days' experience in such work. *Fenlon v. Duluth, S. S. & A. R. Co.* (1896) 108 Mich. 284.

An employer is not bound to instruct an experienced lineman as to the danger of handling live electric wires. *Junior v. Missouri Electric Light & P. R. Co.* (1895) 127 Mo. 79.

Where a workman who has been in the employ of a telegraph company about one month is injured by a current of electricity which passes from an electric-light wire suspended on the same pole as a telegraph wire which he is handling, it is properly left to the jury to say whether the peril from which the injury resulted was one of which it was the duty of the master to warn him. *Western U. Teleg. Co. v. McMullen* (1895) 58 N. J. L. 155, 32 L. R. A. 351.

Any person who has once worked the lever of a moving hand car, or seen another do it, is presumed to know without instruction that it is dangerous to "lose the motion of the lever." *Jones v. Louisville & N. R. Co.* (1894) 95 Ky. 576.

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Failure of a corporation to give warning to the master machinist employed in their establishment that there was danger that the wall or walls of the gas-room would fall in case fire occurred, where he was not ignorant of the danger or of the causes which produced it, will not make it criminally liable for his death, caused by the fall of such walls, while breaking down the door of the gas-room during the fire, under instructions from the superintendent. *Allen v. Augusta Factory* (1888) 82 Ga. 76.

No duty rests on a railroad company to instruct an experienced workman transferred from one machine to another of the same general character. Hence a skilled engineer cannot recover for an injury caused by striking his head against a bridge while leaning out of the car of his engine, on the ground that he should have been notified that this engine was 6 inches wider than those to which he was accustomed. *Bel lows v. Pennsylvania & N. Y. Canal & R. Co.* (1893) 157 Pa. 51.

In *Reed v. Stockmeyer* (1896) 34 U. S. App. 727, 74 Fed. Rep. 186, 20 C. C. A. 381, the plaintiff was called away from his regular work to split stones in a quarry by means of wedges, and, while so engaged, a piece broke off and fell upon him. The court in discussing the question whether the circumstances required a warning said: "The only possible concealed risk arose from the presence of seams in the stone in the quarry. Stockmeyer was no novice in this work. He was a man of mature age of ordinary intelligence, and for several years had been employed in and about quarries. His testimony shows beyond contention that, for some two months during his previous employment by Reed, he had worked at channelling stone; that he knew generally of the existence of seams throughout all the quarries in the neighborhood, and that the stone was liable to break by reason of the seams during the progress of the work of channelling and of cutting out the stone. He did not, it is true, know of seams in this particular block of stone; nor could Drehele or the defendant in error know; and for the like reason, that it was covered with earth and dust. He, however, knew the fact that seams existed in stone throughout the quarries, and the danger therefrom, and had equal opportunity with the master and Drehele of ascertaining the existence of seams in this particular stone, for he, with Drehele, had been at work upon it prior to the injury. All the warning that could have been required of the master, or of the vice principal acting for the master, was to call the attention of the servant to the possible existence of seams in this particular stone. But Stockmeyer knew that fact from his general knowledge of the character of the quarries. It was a fact of which he was bound to take notice. No warning could make the danger more manifest to him. The danger arising from this employment to which he was directed by the master was either obvious to the senses or was known to the servant as most likely to exist; and he had the sense and experience necessary to comprehend the danger and to guard against it. There was consequently no breach by the master of any positive duty owing to the servant which produced or contributed to his injury."

c. Circumstances under which instruction is necessary.

The obligation to instruct a man hired to do certain work as to the peculiar peril of different work requiring special skill is peremptory, as the master is then necessarily chargeable with the fact that he is probably ignorant of

the hazards to be encountered, and the proper methods of obviating them, and there is no room for the application of the doctrine as to obvious risks. Upon this principle it has been held that tightening up the nuts on the generator of a refrigerating machine without reducing the pressure, when there is an ammonia pressure of about 120 pounds which is increasing, is a dangerous work which a carpenter employed as a general laborer or handyman, but unfamiliar with and uninstructed as to the danger of the mode of operation necessary to preserve an equal strain on all parts of the generator, cannot be set to do without rendering the employer liable to him for injury resulting from an explosion caused by his lack of skill. *Ryan v. Los Angeles Ice & Cold Storage Co.* (1896) 112 Cal. 244, 32 L. R. A. 524.

So, a servant is set to work in a dangerous place, within the rule as to the master's liability in such case, where, without being given proper instructions, he is directed to start a fire in a furnace which is safe if the fire is properly made therein, but is dangerous if made by an inexperienced employee. *La Fortune v. Jolly* (1896) 167 Mass. 170.

So, a common laborer who has had no experience in or knowledge of the use or danger of explosives employed for loosening frozen ground which is to be excavated for the roadbed of a railroad is entitled to assume that the representative of his employer will not put him to work with a pick in a place where a blast has been set off, without taking proper precautions to guard against the consequences of a part of the blast being left unexploded, and warning him of the danger to be apprehended from this source. The risk arising from the want of information under such circumstances cannot be held to have been contemplated in the service in which he engaged. *Burke v. Anderson* (1895) 34 U. S. App. 132, 69 Fed. Rep. 814, 16 C. C. A. 442 (distinguishing *Minneapolis v. Lundin* (1893) 19 U. S. App. 245, 58 Fed. Rep. 525, 7 C. C. A. 844, and *Cornellison v. Eastern R. Co.* (1892) 50 Minn. 23, where the injured servants were experienced and hired for and engaged in the use of the explosives).

The danger that a link in a drawhead may prove to be stuck, thus exposing a person engaged in coupling to the danger of having his fingers crushed, if he does not let it go before the cars meet, is in a sense obvious, but it is one as to which the railroad company is bound to warn an inexperienced brakeman known to be ignorant of such danger. *Bonner v. Moore* (1893) 3 Tex. Civ. App. 416.

So, it is negligence in a railroad company to cause a switchman who has been only a short time in its employ to go to a place in the nighttime, over a cattle guard, to couple cars, without warning him that the cattle guard is there and of the danger he thereby assumes; and it is immaterial that it has been the custom to couple cars in that place, and that no injury has before occurred by coupling there. *Fredenburg v. Northern C. R. Co.* (1889) 114 N. Y. 582.

The tendency of a board which is warped to spring back while it is being sawed by a circular saw is not so obvious that an inexperienced workman must be held, as a matter of law, to take cognizance of it without being warned. *Wheeler v. Wason Mfg. Co.* (1883) 135 Mass. 294.

A complaint is not demurrable, which alleges that an inexperienced and ignorant employee was put to work at a machine which had a saw defectively and insecurely fastened to its shaft, which was known to the employer but not to the employee, and that no instructions were

given in respect to the danger. *Greenberg v. Whitcomb Lumber Co.* (1895) 90 Wis. 225, 28 L. R. A. 439.

A special finding that the plaintiff, a common laborer, was assigned without instructions to the work of poking brickbats into a crusher, and was injured fifteen minutes afterwards, is not inconsistent with a general verdict against the defendant. *Chicago Anderson Pressed Brick Co. v. Rembarz* (1893) 51 Ill. App. 543, Affirmed in *Barnes v. Rembarz* (1894) 150 Ill. 192.

An employee who is set to work upon a boring machine with uncovered cogs, and, by his own testimony, without experience, instructions, or warnings, does not, as a matter of law, assume the risk. *Thompson v. Edward P. Allis Co.* (1895) 89 Wis. 523.

A verdict will not be set aside which finds that a rapidly-revolving saw placed under a bench used by the plaintiff in such a position that he could not see it unless he lowered his eye to within 18 inches of the floor, was an appliance on which it was unsafe and improper to set an inexperienced man to work without giving him proper notice and reasonable instructions. *Campbell v. Eveleth* (1890) 83 Me. 50.

It is the duty of a railway company, upon temporarily employing a brakeman to do the coupling in the absence of the regular coupler, to inform him of a rule requiring the use of a stick in coupling, where he is a stranger to the service and not familiar with its rules and regulations. *East Tennessee, V. & G. R. Co. v. Turville* (1892-93) 97 Ala. 122.

See, generally, as to the duty of the master to bring his rules to the servant's knowledge, the note to *Nolan v. New York, N. H. & H. R. Co.* 43 L. R. A. 305.

It is the duty of the proprietor of a lime-kiln to warn an inexperienced laborer who is set to work on the top of the kiln as to the danger of falling into the fire when the stone at the base is removed, and the mass above consequently subsides. *Parkhurst v. Johnson* (1883) 50 Mich. 70, 45 Am. Rep. 28.

If a servant is inexperienced and ignorant of the approaches to a meal conveyor, and the apparent approaches to the same are such as are likely to lead him, on account of his inexperience and ignorance, to undertake to ascend to the meal conveyor in a certain manner, and the danger of ascending to it in that manner was not apparent to him on account of such ignorance and inexperience, and the master's foreman knows or ought to have known these facts, it is his duty to inform the servant how to reach the meal conveyor, and to instruct and caution him sufficiently to enable him to comprehend the dangers, and to ascend to the meal conveyor safely by the exercise of proper care. *Fort Smith Oil Co. v. Slever* (1893) 58 Ark. 168.

Where the testimony justifies the inference that the knives of a planing machine were concealed from one doing the work assigned to the plaintiff, an inexperienced employee, it is error to nonsuit him in an action to recover damages for an injury caused by his stepping into the knives while they were temporarily left without the protection of the hood which ordinarily covered them. *Turner v. Coldsboro Lumber Co.* (1896) 119 N. C. 387.

It is error to direct a verdict for the defendant where a brakeman, new to such work, is injured in coupling a car with double deadwoods, six days after entering on his duties, where the evidence tends to show that he had neither been instructed as to such cars, nor even informed of their existence. *Reynolds v. Boston & M. R. Co.* (1891) 64 Vt. 66.

In *Louisville & N. R. Co. v. Veach* (1898) 20 Ky. L. Rep. 403, the same ruling was made as to a brakeman who had been only a few weeks in the service, and was injured in handling a foreign car so constructed.

In *Ingerman v. Moore* (1891) 90 Cal. 410, where the injury was caused by a projecting set-screw, the plaintiff's own testimony showed that he had worked inside of the mill, taking lumber from the big saw, for nearly two years, and had been employed as assistant on the scantling-machine—that is, in putting the lumber in place to be cut by the saw—for about nine months, and that during that time he had, upon different occasions when the foreman was absent, run the machine in all eighteen days prior to the accident. The court said: "It does not appear that plaintiff's duty as assistant was such as would necessarily give him knowledge of the structure of the machine or of the existence of the projecting set-screw, which was a concealed danger. It is not shown that he had ever been called upon, or that it was any part of his duty, to become acquainted with this machinery, or to adjust it when out of order. It is doubtless true that some men with the same opportunity would have become familiar with its mechanism and fully qualified to take charge of it, but it is a matter of common experience that all men would not. There is a difference in the capacity of men to acquire a particular knowledge of machinery, or of the arrangement of its parts, or manner of construction, some having greater power of observation, and more desire to investigate and understand, than others. The extent of plaintiff's knowledge of this machinery was therefore a question of fact for the jury to determine from the evidence before them, and we think it was fairly submitted to them in the instructions of the court."

A verdict in favor of a servant who is injured in handling a dangerous machine in the use of which he has had no practical experience except such as he has acquired on a few previous occasions during the period of two months which has elapsed since he entered the employment will not be set aside. *Verdell v. Gray's Harbor Commercial Co.* (1897) 115 Cal. 517.

An objection to a charge that it was abstract, in that the jury were told that it was the defendant's duty to warn an inexperienced servant of the hazards and risks of his employment, and did not limit the obligation to the risk which was the actual cause of the injury, will not be allowed to prevail where there is no pretense that warning was given to the deceased about any other danger, and other parts of the charge given at the instance of the railway pointedly limit the jury's consideration to particular risk to which the injury was due. *St. Louis, I. M. & S. R. Co. v. Davis* (1892) 55 Ark. 462.

Where a servant testifies that he had no experience in the management of the machine by which he was injured, and received no instruction or warning as to the dangers incident to its use, it will not be held, as a matter of law, that he appreciated those dangers. *Thompson v. Edward P. Allis Co.* (1895) 89 Wis. 523.

V. Minority of servant as a special factor bearing upon the master's duty of instruction.

See also VI. *infra*.

a. General principles stated.

1. Introductory.

The mere fact that a servant is a minor is not sufficient to affect the master with liability 44 L. R. A.

for an injury received by him, provided he was competent and physically able to perform the duties for which he was hired. *Youll v. Sioux City & P. R. Co.* (1885) 66 Iowa, 346; *Houston & G. N. R. Co. v. Miller* (1879) 51 Tex. 270.

Whether a minor may, without negligence, be set to do dangerous work "depends upon the particular circumstances of each case, upon the character and degree of the danger, and the capacity of the minor to comprehend and avoid it." *Anderson v. Morrison* (1875) 22 Minn. 274.

The minority of a servant, therefore, is material only for the reason that it may in some cases constitute a special ground for predicated the existence of some additional obligation on the master's part to see that the servant is not exposed to unnecessary dangers.

"The almost universally accepted doctrine is that the care to be observed to avoid injuries to children is greater than that in respect to adults. That course of conduct which would be ordinary care, when applied to persons of mature judgment and discretion, might be gross, and even criminal, negligence toward children of tender years. The same discernment and foresight that older and experienced persons habitually employ in discovering defects and dangers, cannot be reasonably expected of them; and therefore the greater precaution should be taken, where children are exposed to them." *Cleveland Rolling Mill Co. v. Corrigan* (1889) 46 Ohio St. 283, 3 L. R. A. 385.

The proper application of the general principle in the present connection is obvious. As has been shown in the preceding subdivisions, a duty to instruct an adult can be implied only in cases where, for some special reason, he is incapable of appreciating the peril of his employment, and the master has actual or constructive knowledge of this lack of appreciation. Similarly the minority of the servant, as a circumstance bearing upon the responsibilities of the master in this regard is important only in so far as it may tend to show that the master knew that the servant did not comprehend the perils of his environment. The obligation to instruct a minor, therefore, is not absolute. Whether the master shall be charged with it is a question to be determined with reference both to the character of the danger under discussion and to the actual age of the servant. As will be seen below, the courts have made numerous rulings on the theory that there are some perils so obvious that even children of tender years will be presumed to understand them, and have also absolved the master from liability where the servant's physical appearance was such that, in the absence of special information, the master was justified in acting on the hypothesis that he was of full age. That this is the real significance of minority as a factor in cases involving the duty of instruction is apparent both from a general survey of the decisions and from several passages like the following which we find scattered through the reports.

Youth is an evidence of inexperience, and greater strictness in the application of the rule as to the necessity of instruction should be required in the employment of minors than in the employment of servants of mature years, even when employed by and with the consent of the parent or guardian. *St. Louis & S. E. R. Co. v. Valirius* (1877) 56 Ind. 511.

In the case of young persons it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate and to which they should not be exposed. *Rummel v. Dilworth* (1890) 131 Pa. 509.

If the youth, inexperience, and incapacity of

a minor, who is employed in a hazardous occupation, are such that a master of ordinary intelligence and prudence would know that he is not aware of, or does not appreciate, the ordinary risks of his employment. It is his duty to notify him of them, and to instruct him how to avoid them. *Bohn Mfg. Co. v. Erickson* (1893) 12 U. S. App. 260, 55 Fed. Rep. 943, 5 C. C. A. 341.

It may frequently happen that the dangers of a particular position for, or mode of doing, work, are great, and apparent to persons of capacity and knowledge of the subject, and yet a party from youth, inexperience, ignorance, or general want of capacity may fail to appreciate them. It would be a breach of duty on the part of a master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely, with proper care on his own part. *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396.

It is "the duty of an employer to take proper precautions for the safety of a person employed in running or tending machinery, and where such person is young and inexperienced, to give him proper instructions so as to enable him to understand and appreciate the danger attending his employment." *Glover v. Dwight Mfg. Co.* (1888) 148 Mass. 22.

It is the duty of one who employs an immature and inexperienced person for a dangerous service to explain to him the perils incident to his work and instruct him how to avoid them. *Hayes v. Colchester Mills* (1894) 69 Vt. 1.

Although the machinery, or that part of it complained of as especially dangerous, is visible, yet if, by reason of the youth and inexperience of the servant, he is not aware of the danger to which he is exposed in operating it, or approaching near to it, it is the duty of the master to apprise him of the danger, if known to him. *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298.

It is not a conclusion of law from the fact that a servant seventeen years old was aware of the existence of a set-screw on a revolving shaft, and was sprightly for one of his years, that he was aware of the risk and danger of passing over the shaft, while it was in motion. *Ibid.*

A master is liable where "an inexperienced youth . . . employed to work about dangerous machinery of whose perils he is known by his employer to be ignorant, and while exercising ordinary care in executing the orders of his superior, is injured by some part of the machinery, of whose danger no warning has been given him, and which is not obvious to a person of his age of ordinary intelligence and prudence." (Plaintiff seventeen years old caught by set-screw in passing.) *Dowling v. Allen* (1890) 102 Mo. 213, Reiterating doctrine laid down in (1881) 74 Mo. 13, 41 Am. Rep. 298.

That the plaintiff was not a child, but was seventeen years of age, would not deprive him of the right to be warned, if, as a question of fact, the employers, or the man representing them, ought under all the circumstances to have inquired of him as to his experience, or taken notice of the probability that he was so inexperienced as to render it proper to give him warning. *May v. Smith* (1893) 92 Ga. 95.

In *Kehler v. Schwenk* (1892) 151 Pa. 505, the court, after citing *Patterson v. Pittsburg & C. R. Co.* (1874) 78 Pa. 389, 18 Am. Rep. 412, proceeded thus: "It will be seen from this decision that, in actions by young persons against their employers, we recognize as sources of liability the inexperience of the servant, and 44 L. R. A.

the want of specific instruction as to the dangers of the service, and we suspend the rule that the servant assumes the risk of the service when he has not knowledge by experience, or by specific instruction. All these sources of liability existed in the present case. The plaintiff was very young; he had no knowledge, by experience or by instruction, as to the dangers of the service; the service was in reality highly dangerous; the plaintiff was not employed to engage in this particular service but in another, and was urged into it against his will; the appliance from the use of which the injury arose was only in partial use; and the testimony disclosed a perfectly simple device, in extensive use, which practically removed all danger. The most of these facts were proved without contradiction, and ample testimony was given as to all of them. In such circumstances the case was clearly for the jury, and, as it seems to us, the verdict was entirely justified by the evidence. We are of the opinion that there was no error in the charge nor in the answers to points, and therefore think the judgment should be affirmed."

It is the duty of one employing a person of tender years (here a boy of thirteen) about machinery to give suitable instructions to him, having reference to his age and capacity, so as to enable him to understand the dangers, whatever they are, of his employment. *Rock v. Indian Orchard Mills* (1886) 142 Mass. 522.

It is the duty of the master to give such warning, advice, and instructions to a youthful and inexperienced employee as will enable him, by the exercise of reasonable care, to perform the duties of the employment with safety to himself. *Whitelaw v. Memphis & C. R. Co.* (1886) 16 Lea. 391.

If the servant, by reason of his youth and inexperience, is not aware of or does not appreciate the danger incident to the work he is employed to do, or to the place he is engaged to occupy, he does not assume the risks of his employment until the master apprises him of the dangers. It would be a breach of duty on the part of the master to expose a servant of this character, even with his consent, to such dangers, without first giving him such instructions and cautions as would, in the judgment of men of ordinary minds, understanding, and prudence, be sufficient to enable him to appreciate the dangers, and the necessity for the exercise of due care and caution, and to do the work safely, with proper care on his part. *Emma Cotton Seed Oil Co. v. Hale* (1892) 56 Ark. 232.

"When a master engages an inexperienced servant, especially if of tender years and presumed ignorance, and places him in a place of latent or obscure danger, it is the duty of the master to instruct the servant how to do the work, and at the same time to be on his guard against the danger," and he is liable for injuries occasioned by failure to give such instructions. *Thall v. Carnie* (1889) 1 Ill. Sup. Ct. 401, cited with approval in *New Albany Forge & Rolling Mill v. Cooper* (1892) 131 Ind. 363.

Where a boy is of that tender age and that lack of capacity that he cannot be held exactly to that accountability which a person of more mature years would be held to, then the failure to furnish him with those appliances which are safe and proper, and the failure to instruct him as to the use of them, is negligence in his employers. *Steller v. Hart* (1887) 65 Mich. 644.

The rule as to the assumption of risk by a servant having equal knowledge with the master of the danger incident to the work "presupposes that the servant has sufficient discretion to appreciate the dangers, and has no antipa-

tion to the case of young and inexperienced children." In such a case it is the duty of the master to warn and instruct the child as to the dangers of the employment and the means of avoiding them. *Fisk v. Central P. R. Co.* (1887) 72 Cal. 38.

It may be safely laid down as a general rule, supported by authority, that persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as are usual among children of the same age, under similar circumstances, and they are bound to use due care, having regard to their age and inexperience, to protect them from the dangers incident to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care in that behalf, it is the duty of the employer to so instruct such employees, concerning the dangers connected with their employment, which from their youth and inexperience they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom. *Cleveland Rolling Mill Co. v. Corrigan* (1889) 46 Ohio St. 283, 3 L. R. A. 385. There exception was taken by the defendant to the following instruction: If the plaintiff was injured in consequence of the defendant's negligence, and he "by reason of his youth and want of judgment as to the perils of his position, did some act in the discharge of his duty, as he understood it, which also contributed to his injury, but which he did not know to be likely to injure him, and he had not been properly advised and instructed in regard thereto," he cannot recover. But the supreme court said: "The instruction negatives any inference of negligence; for, according to it, to enable the plaintiff to recover, it was necessary for the jury to find that he did not know that the act which he did, that contributed to his injury, was likely to injure him, and that this want of knowledge was owing to his age and lack of judgment and the failure of the defendant to properly instruct him, and that the act so done by him was in the discharge of his duty as he understood it.

If it is the duty of persons employing children in dangerous situations, to properly instruct them concerning the dangers, which on account of their youth and inexperience they may not understand, it would seem to follow, as a necessary conclusion, that such employee, who has not been so instructed, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of the employer's negligence, may maintain an action against his employer therefor, notwithstanding that, by reason of his youth and inexperience, and the failure of the employer to properly instruct him, he did some act, in the performance of his duty according to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know, and was not advised would be likely to injure him."

Where a child is employed the employer must look out for the child, and must see that it is not exposed to danger arising from the structure of building or machinery which an operative of ordinary intelligence and experience would perceive. Notice of danger is not enough. The child must have sufficient instructions to enable him to avoid danger. *Wharton on Neg.* § 218, quoted with approval in *Hinckley v. Horazdowsky* (1890) 133 Ill. 359, 8 L. R. A. 490.

While the mere fact of minority is deemed immaterial, it is well settled, in America at least, that any actual incapacity of a minor to understand and appreciate the perils to which

he is exposed is to be fully considered, and that he can recover from his master for injuries suffered from any peril the nature of which he did not know, or could not properly appreciate if he did nominally know, and to which a prudent and right-minded master would not have allowed him to be exposed. 1 *Shearm. & Redf. Neg.* 4th ed. § 218, quoted with approval in *Hinckley v. Horazdowsky* (1890) 133 Ill. 359, 8 L. R. A. 490.

In *New Albany Forge & Rolling Mill v. Cooper* (1892) 131 Ind. 363, the following statement of the rule by Judge Thompson, in his work on *Negligence*, vol. 2, pp. 977, 978, was adopted: "The law imposes upon the master, when he takes an infant into his service, the duty of explaining to him fully the hazard and dangers connected with the business, and of instructing him how to avoid them. . . . The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him and to place him, with reference to it, in substantially the same situation as if he were an adult." (Quoted also in *Taylor v. Wootan* (1890) 1 Ind. App. 188; *Smith v. Irwin* (1889) 51 N. J. L. 507.)

This statement, however, in so far as it seems to imply that there is an absolute duty to instruct an infant, is not worded with entire accuracy, as will be seen from the decisions cited above, as well as from those to be hereafter noticed.

In another part of the New Jersey case just referred to the court approved a change to the effect that the rule that an employee takes upon himself all the risks incident to the employment is modified to the extent of requiring one who employs an infant in work that is "in its nature hazardous to give him such notice of the danger and such instruction as will enable him to comprehend the dangers that are incident" thereto.

But the phrase "in its nature hazardous" is altogether too vague to serve as a basis for differentiating between perils of which the servant should or should not be notified. The only safe ground on which a distinction can be taken is that of the servant's knowledge or ignorance of the actual danger incident to the work. (See *V. c. d. e. infra.*)

A jury may properly be instructed that they may "consider the appearance of the plaintiff [a minor employee] as he has been exhibited before them on the witness stand, in determining the question of his intelligence and capacity to apprehend and avoid the dangers incident to his employment." *Disotell v. Henry Luther Co.* (1895) 90 Wis. 635.

2. Rationale of rule requiring the master to instruct a minor servant.

In *Jones v. Florence Min. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269, the court considered that of the various reasons assigned by the courts for imposing on the master the duty of instructing a minor servant the most satisfactory were these: "(1) That the master owes a duty towards an employee who is directed to perform a hazardous and dangerous work, or to perform his work in a dangerous place, when the employee, from want of age, experience, or general capacity, does not comprehend the dangers, to point out to him the dangers incident to the employment, and thus enable him to comprehend, and so avoid them, and that neglect to discharge such duty is gross negligence on the part of the employer; (2) that

such an employee does not assume the risk of the dangers incident to such hazardous employment, because he does not comprehend them, and the law will not therefore presume that he contracted to assume them."

It would, however, be more correct to say that the second of these reasons merely states the legal result of the first. The proper standpoint, as already indicated, is rather that which permits us to view the more extended duty of instruction which is predicated in regard to minors as a special application of the general principle, that the degree of care which is obligatory upon a person who owes a duty to another varies with the circumstances to be provided for. A servant who possesses less than the average amount of intelligence is clearly more likely to be injured, in any given case, than one whose intelligence comes up to that standard. That the intelligence of a minor usually fails to come up to this standard is, as has been pointed out, a fact of which the master is bound to take notice. The knowledge thus imputed may properly be deemed a sufficient warning to him that a minor servant will be exposed to greater danger than an adult, unless he takes some additional precautions with a view to diminishing the risks of injury. Clearly the additional precaution which is most readily suggested by the situation is that the presumably inadequate and defective information of the young servant should be supplemented by imparting to him that amount of knowledge which will, as respects the work to be done, place him in the same position as a servant of mature years.

Or, to put the same thought in a somewhat different form, it may be said that the essential basis of the rule is that the master is not justified in exposing a servant to any extraordinary risks, and that a servant who cannot, by the exercise of his own unaided intelligence, comprehend the dangers incident to his environment, must necessarily be exposed to such risks, relatively to servants who are capable of comprehending the same dangers.

That the duty of instructing minors is really referable to this consideration is strongly indicated by the language used in the earliest cases in which the liability of a master to servants of tender years was discussed. The significance of these cases in the present connection is due to the fact that, when they were decided, the theory that there was a positive duty of instruction had not found a footing in the courts.

In *Bartonshill Coal Co. v. McGuire* (1858) 8 Macq. H. L. Cas. 311, the Lord Chancellor, referring to the Scotch case of *O'Byrne v. Burn* (1854) 16 Dunlop, 1025, where a young girl was injured while attempting, in obedience to an order of the defendant's foreman, to remove some waste clay from the moving rollers in a clay-mill, said: "It was hardly possible to apply the principle of the servant having undertaken the service with the knowledge of the risks incident to it. She was an inexperienced girl employed in a hazardous manufactory, placed under the control, and, it may be added, the protection of an overseer, who was appointed by the defender and intrusted with this duty. And it might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed."

Compare also the following Scotch cases founded on the increase of obligations which the minority of a servant entails upon the master: *Gemmill v. Gourcock* Co. 23 Dunlop, 425; *M'Millan v. M'Millan*, 23 Dunlop, 1082; *Trull v. Smith* (1873) 11 Macph. 888; *Darby v. Duncan* (1861) 23 Dunlop, 529.
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The same conclusion may be drawn from the remark made, *arguendo*, in *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739, the plaintiff being a mere youth, without experience, and not familiar with machinery, could not be expected to know the peril of the new work which he was ordered to do, and might be supposed to have entered upon the execution of the order without apprehension of danger, owing to his having relied, as he was justified in doing, on the judgment of his superior. The want of knowledge, therefore, may be adduced as a circumstance tending both to disprove assumption of the risk or contributory negligence on the part of the plaintiff, and to prove negligence on the part of the master in giving a servant work to do, where he has reason to suppose that it will be specially perilous for a person of tender years or inexperience. The case just cited was decided on the latter ground.

The converse of the principle formulated above emerges in such a case as *McGinnis v. Canada Southern Bridge Co* (1882) 49 Mich. 466. There the plaintiff had attempted in the trial court to recover on this ground, among others: That he, being immature and inexperienced, was sent by defendant into danger the full extent of which he did not comprehend, and that this was culpable fault on the part of the defendant which should render it liable for all injurious consequences. But this theory the supreme court declared to be inapplicable under the circumstances, saying: "This ground was first shown to be untenable by the plaintiff's own evidence. He was past twenty years of age, was not shown to be wanting in average intelligence of those of his age, and his duties were explained to him when he entered upon his employment. He besides understood the very danger into which he fell, and had in mind the purpose to avoid it. It was thus made to appear by his own examination that he was not sent into unknown dangers, and that he was not exposed to risks which he, through immaturity or for any other reason, failed to comprehend."

3. Special principles applicable in actions by the father of an injured minor.

The fact that the plaintiff in an action to recover for injuries received by a minor employee is the minor's father is immaterial so far as regards the necessity of proving the omission to instruct as one of the prerequisites to the maintenance of the action.

Hence we find it laid down that, where a minor is injured by reason of the alleged neglect of his employer, a complaint by his father for damages must show one of three things: (1) That the child was too young to be put to the service he was required to perform; or (2) that neither he nor the plaintiff had notice or knowledge of the augmented danger caused by the master's neglect; or (3) that the master, knowing the age and inexperience of the child, neglected to give him the necessary warning and instruction. *Brazil Block Coal Co. v. Young* (1889) 117 Ind. 520.

But under some circumstances such an action is barred by the defense of contributory negligence where the minor, if he had been himself the plaintiff, could have recovered.

Thus, the supreme court of Pennsylvania, in holding that a father who suffers his son of tender years to engage or continue in a dangerous service assumes all the risks reasonably incident thereto, including that of the son's indiscretion and rashness due to his youth, and cannot recover for loss of his services where he is killed by going without direction to a dangerous place to comply with a proper order, when

there was a perfectly safe place (*McCool v. Lucas Coal Co.* (1892) 150 Pa. 638), used the following language: "If the unfortunate boy, for the loss of whose services the father seeks compensation in this suit, had escaped death, and were here asking indemnity for injuries received while in the service of the defendant, it might be a question whether the employer did not owe him the duty of exercising such watchfulness and oversight, or at least giving such instruction and admonition, as would, with proper obedience on his part, have insured him against serious harm. But it is not his cause that is to be passed upon; it is that of an adult father, who, if he did not actually place his son in a dangerous service, at least suffered him to engage and continue in such service. Such suzerainty is said to have the sense of permission, and where the danger is great, and the child is of tender years, it is said to be negligence *per se*. *Philadelphia & R. R. Co. v. Long* (1874) 75 Pa. 257; *Smith v. Hestonville, M. & F. Pass. R. Co.* (1888) 92 Pa. 450, 37 Am. Rep. 705. The father owes to his infant child the duty of protection, and this includes restraint from exposure to dangers, with which one of its years and discretion is unfitted to cope. When this duty is neglected the father is said to be *in part delicto* with a negligent defendant, and though the infant may recover against a wrongdoer for an injury caused partly by his own imprudence, the father cannot. *Smith v. O'Connor* (1884) 48 Pa. 223, 36 Am. Dec. 582; *Glasse v. Hestonville, M. & F. Pass. R. Co.* (1868) 57 Pa. 172."

b. Minor employees usually on the same footing as adults, after proper instruction has been given.

The duty of instructing minors being predicated from the fact that, without such instruction, they would be exposed to avoidable dangers of which they are presumably ignorant, it follows that, after they have been properly instructed, their minority will usually cease to be a material factor in estimating the extent of the employer's liability. In other words, the defenses of assumption of risks and contributory negligence will then be available against them, if, under the same circumstances, these defenses would have been available against adults.

A case in which a minor's action was held to be barred, after instructions, on the ground of contributory negligence, is *Probert v. Phipps* (1889) 149 Mass. 258, where a boy fifteen years old was denied recovery for an injury received while walking between the gears of two machines which just gave room to pass, the court taking the ground that, as he had been cautioned as to the danger, he was negligent in not avoiding a danger which he understood perfectly well how to avoid.

In the following cases the defense of assumption of risks was allowed on the ground that instructions had previously been given: *Chicago Anderson Pressed Brick Co. v. Reinnelger* (1892) 140 Ill. 334; *Tinkham v. Sawyer* (1891) 153 Mass. 485 (warning followed by minor's own opportunities for observation); *Jones v. Florence Mln. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269; *Zurn v. Tetlow* (1890) 134 Pa. 213; *Kaufhold v. Arnold* (1894) 163 Pa. 269; *Beckham v. Hillier* (1884) 47 N. J. L. 12; *Prentiss v. Kent Furniture Mfg. Co.* (1886) 63 Mich. 478; *Emma Cotton Seed Oil Co. v. Hale* (1892) 56 Ark. 232; *Fisk v. Central P. R. Co.* (1887) 72 Cal. 38; *Daester v. Mechanics' Planing Mill* (1882) 11 Mo. App. 593.

That the business might have been carried on

in a less dangerous manner is a circumstance which is quite immaterial where the servant has been sufficiently instructed. *Rock v. Indian Orchard Mills* (1886) 142 Mass. 522.

There is no rule of law that a minor may not be employed about a dangerous machine, and the simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed upon such machine. All the law requires is that the minor should be properly instructed as to the danger to which he is exposed, and if he is injured because he has not received such instruction then, as a general rule, the employer may be held responsible. But where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working the machine, the fact that he is a minor does not alter the general rule that the employee takes upon himself the risks which are patent and incident to the employment." *Buckley v. Gutta Percha & Rubber Mfg. Co.* (1880) 113 N. Y. 540.

In *Rummel v. Dillworth* (1890) 131 Pa. 520, the defendant's counsel had questioned the correctness of the following passage from the opinion on the former appeal of the case ((1885) 111 Pa. 343): "The plaintiff cannot be supposed or assumed to have accepted in advance a peril which he could not estimate, and the extent of which for lack of experience he could not have known." The court explained its meaning: "It was not meant to assert that the dangerous character of a piece of machinery, a bridge, or an effort to cross a railroad track in front of a moving train, should be determined by the result of an experiment in each case, but that a workman must know the dangers of his employment by actual experience in the employment, or by the instructions of his employer, before he can be held to have assumed them. In other words, it is not just to the employee to hold him to have assumed dangers of which he has no knowledge by experience in the business, or by the warning and instruction of his employer. Such risks cannot be estimated, because they are not known to exist, or because their real character and extent can only be known by familiarity with the business, or information from one who has such familiarity."

A minor cannot recover in an action under the New York Laws of 1876, chap. 122, "To Prevent and Punish Wrongs to Children," unless the master was guilty of some specific negligence. Hence a master who hires a boy of fifteen to work at a stamping machine is not responsible for such personal injuries as he may receive after proper precautions have been taken and adequate instructions given. *Hayes v. Bush & D. Mfg. Co.* (1886) 102 N. Y. 648.

This rule, however, is subject to one important limitation: "If a person is so young that, even after full instructions, he wholly fails to understand them and does not appreciate the dangers arising from a want of care, then he is too young for such employment, and the employer puts or keeps him at such work at his own risk." *Hickey v. Taaffe* (1887) 105 N. Y. 26.

Hence, an employer remains liable for injuries received by an inexperienced boy seventeen years old, to whom work is assigned which can be performed safely only by skillful and careful mechanics, even though such boy has been duly warned and instructed as to the dangers of the work. *Missouri P. R. Co. v. Perego* (1887) 36 Kan. 424.

This rule applies although the dangers in regard to which the instructions have been given belong to the class known as obvious. *Williamson v. Sheldon Marble Co.* (1893) 66 Vt. 427.

Other forms in which the same principle has been stated are these:

"The giving of proper instructions [at the commencement of the employment] will not relieve an employer from liability to a child, if the work required of him [at the time of the injury] was not within the scope of his employment, and not such as ought to have been required of a person of his capacity." *Hayes v. Colchester Mills* (1894) 69 Vt. 1.

The person employed may be so young, inexperienced, and immature in judgment, that no kind of warning and instruction would relieve the master from responsibility for injuries resulting from putting him at a hazardous and dangerous work. *Pittsburgh. C. & St. L. R. Co. v. Adams* (1886) 105 Ind. 151.

If it appears that the minor was too young to understand even with instructions the dangerous character of a machine, or appreciate the peril of operating it, the master is not shielded from liability merely by the fact that the minor was properly instructed in the use of the machine. *Staller v. Hart* (1887) 65 Mich. 644.

In *Taylor v. Wootan* (1891) 1 Ind. App. 188, the following statement of the rule in *Shearman & Redfield* on Negligence was adopted: "And if he (the master) knows, or, in the exercise of ordinary care and sagacity would have known, that the servant has not capacity enough to understand the warning and appreciate the danger, he will be liable for an injury which such servant may suffer in consequence, if continued at such work."

In determining the question whether an employee understood a warning of the dangerous character of machinery it is proper and necessary to take into consideration, not only his youth and inexperience, but also the nature of the service, and the degree to which his attention while at work would need to be devoted to its performance. *King v. Ford River Lumber Co.* (1892) 93 Mich. 172.

A boy sixteen years old is presumed to have sufficient intelligence to comprehend instructions as to the danger of crossing a railroad yard by creeping under cars which may be moved at any moment. *Chicago, B. & Q. R. Co. v. Eggman* (1895) 59 Ill. App. 680.

c. Constructive knowledge of dangers, when a bar to an action by minor servants.

See also VI. b.

It is well settled that "in respect to all matters wherein a young and inexperienced employee is competent to understand and avoid the dangers, such employee stands upon the same footing with an experienced adult." *Levey v. Bigelow* (1893) 6 Ind. App. 677; *Goff v. Norfolk & W. R. Co.* (1888) 36 Fed. Rep. 299; *De Graff v. New York C. & H. B. R. Co.* (1879) 76 N. Y. 125; *Crown v. Orr* (1893) 140 N. Y. 450; *Jones v. Roberts* (1894) 57 Ill. App. 56; *White v. Wittemann Lithographic Co.* (1892) 131 N. Y. 631; *Hayden v. Smithville Mfg. Co.* (1861) 29 Conn. 548; *Herdman-Harrison Mill. Co. v. Spehr* (1893) 145 Ill. 329; *Probert v. Phipps* (1889) 149 Mass. 258; *Gilbert v. Guild* (1887) 144 Mass. 601; *Luebke v. Berlin Mach. Works* (1894) 88 Wis. 442; *Samborn v. Atchison, T. & S. F. R. Co.* (1886) 35 Kan. 292.

Negligence, therefore, cannot be predicated of an employer's omission to instruct a minor servant, who knows everything that the employer could have told him. *Couillard v. Tecumseh Mills* (1890) 151 Mass. 85.

An instruction which, in effect, requires the master to caution a minor as to all dangers 44 L. R. A.

reasonably to be anticipated is incorrect. *Fones v. Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264.

That it is immaterial for the purpose of this rule from what source the knowledge is derived, see the cases cited in subd. II. *supra*, some of which, as noted, relate to minors.

It is, however, extremely difficult, if not impossible, to extract from the cases any definite and practical rule for determining the circumstances under which a capacity for comprehending the risk of the employment shall be imputed to a minor servant. As in cases involving the liability to adults we find some rather unsatisfactory attempts to impart precision to the subject by the use of such expressions as "obvious," "latent," and the like.

In *Louisville & N. R. Co. v. Boland* (1892-93) 96 Ala. 628, 18 L. R. A. 260, it was said: "The duty of the master in cases of latent defects, to explain, is the same whether the servant be a minor or an intelligent adult; the difference being, however, that as great diligence in observing and comprehending the dangers is not to be expected of the young and inexperienced." Minors, as much as intelligent adults, are held, on entering a particular service, to have assumed the ordinary hazards incident to such service, including the risks of injury from open defects in machinery and appliances. *Louisville & N. R. Co. v. Boland* (1893) 96 Ala. 628, 18 L. R. A. 260.

Compare also *May v. Smith* (1893) 92 Ga. 95, to the effect that the necessity of warning an inexperienced boy of seventeen of the dangers incident to machinery at which he is set at work is not dispensed with by the fact that the machinery is in perfect order, where the danger is not open and obvious.

Minor servants are held to assume, by their contract of employment, those ordinary risks of their service which are obvious to them, or have been pointed out in a manner suited to the comprehension of their youth and inexperience. *Beckham v. Hillier* (1884) 47 N. J. L. 12; *Smith v. Irwin* (1889) 51 N. J. L. 507.

Compare also *Williamson v. Sheldon Marble Co.* (1893) 66 Vt. 427 (apparent); *Crowley v. Pacific Mills* (1889) 148 Mass. 228 (obvious); *Downey v. Sawyer* (1892) 157 Mass. 418 (obvious); *Buckley v. Gutta Percha & Rubber Mfg. Co.* (1889) 113 N. Y. 540; *Crown v. Orr* (1893) 140 N. Y. 450 (plain and obvious); *Tolledo, St. L. & K. C. R. Co. v. Trimble* (1893) 8 Ind. App. 333 (open and obvious); *Fones v. Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264 (patent). (The actual substance of the above-cited decisions is noted elsewhere. See illustrative cases in this subdivision, *infra*.)

But the apparent simplicity and exactitude of such terminology are entirely delusive.

Obviously the line between dangers apparent and latent varies with the varying experience and capacity of the servant employed. Risks and dangers that are apparent to the man of long experience, and of a high order of intelligence, may be unknown to the inexperienced and ignorant. *Bohn Mfg. Co. v. Erickson* (1893) 12 U. S. App. 260, 55 Fed. Rep. 943, 5 C.C. A. 341.

The principle laid down in some cases, that, where the servant is a minor, there is no presumption that he understands and appreciates the ordinary dangers of the employment, takes us on to somewhat firmer ground. *Wolski v. Knapp Stout & Co. Co.* (1895) 90 Wis. 178; *Evansville & R. R. Co. v. Maddux* (1893) 134 Ind. 571.

In *Hayes v. Colchester Mills* (1894) 69 Vt. 1, it was said that the length of time a boy has been employed in a factory, the nature of the work he had been engaged in, and the knowledge he had acquired of the machinery, are all

matters to be considered by the jury, but afford no basis for a conclusion of law, where the question is whether he should have received instructions as to the danger of certain unfamiliar work which he was suddenly called upon to do.

Compare *De Lozier v. Kentucky Lumber Co.* (1892) 13 Ky. L. Rep. 818, where it was laid down that the jury should be instructed [in every case involving the liability of a master to a minor servant] to find for the plaintiff, unless his age, intelligence, and experience were such as to induce a man of ordinary care and prudence to believe him qualified and fitted for the business at which he was employed."

The limits of a minor servant's presumptive knowledge are further defined in the following passage in which the supreme court of Missouri considered the doctrine to be well settled by the authorities "that although the machinery, or that part of it complained of as especially dangerous, is visible, yet if, by reason of the youth and inexperience of the servant he is not aware of the danger to which he is exposed in operating it or approaching near to it, it is the duty of the master to apprise him of the danger, if known to him." *Dowling v. Allen* (1881) 74 Mo. 13, 41 Am. Rep. 298.

So, also, it has been said that the mere fact that an inexperienced minor might, by using his eyesight, have observed the peril to which his injury was due, will not enable his employer to defeat his claim for damages on the ground that he was guilty of contributory negligence. *Hill v. Gust* (1876) 55 Ind. 45; *Haynes v. Erk* (1893) 6 Ind. App. 332.

These statements, as will be remarked, embody the distinction so often applied in cases of this general type, between a knowledge of the material, physical conditions which may produce danger and an appreciation of the danger itself.

But on the whole the true and only reasonable view would seem to be that the minority of the servant is merely one of the circumstances to be considered in determining whether a knowledge of the danger in question shall be imputed to him. In the last analysis, therefore, it would seem that the only rule which can be profitably utilized for the solution of the problems which are involved in this class of cases is the very general and elementary one which, under our system of procedure, controls the settlement of every question of fact. That rule has been thus stated in the present connection.

Ordinarily it is within the function of the jury to say whether a minor servant comprehended a work in such a sense as to absolve the employer from the obligation to instruct him. It is only when the proper inference from the testimony is so clear as to be free from doubt, that it becomes a matter of law for the court. *Wolski v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 178.

The finding of the jury is of course conclusive, whenever there is a conflict of evidence as to whether a minor has received proper instructions, or has by experience or in any other way acquired a knowledge of the danger incident to the appliances he is handling. *Tagg v. McGeorge* (1893) 155 Pa. 368.

But the widely different views entertained by judges as to the precise position of the boundary line between the functions of courts and juries in passing upon the proper inference to be drawn from certain groups of facts have, as will be seen from the following sections, produced in cases of this class an unusually prolific harvest of conflicting decisions.

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d. *Circumstances to be considered in determining whether knowledge of a danger is to be imputed to a minor.*

The question whether a minor is chargeable with that complete comprehension of his environment which is sufficient to relieve the master of the duty of explaining to him the peril of the work must obviously be resolved by considering: (1) the presumable extent of his intelligence and capacity, as inferable simply from his age; (2) the actual extent, observed or observable, of his individual intelligence and capacity, exceeding or falling short of the average; (3) the extent of his opportunities for ascertaining by experience the nature of the hazard incurred by him in entering and continuing in the employment. Of these three factors in the problem, the first and the third are much the most important. But the second has, though rarely, been taken into account, in connection with the others, as corroborating the conclusion that the master should or should not have instructed an infant. Possibly it may be said that a court will be more disposed to lay stress upon this factor when the evidence tends to show the possession of a measure of intelligence less than the average and the inference will therefore be rather in the plaintiff's favor, than when it would have the effect of prejudicing him by making the superiority of his faculties a ground for ascribing to him a knowledge disabling him from maintaining an action. See *Connors v. Grilley* (1892) 155 Mass. 575, noted below in sec. e, *ad finem*.

Before proceeding to state the decisions upon specific groups of circumstances, it will be convenient to notice some general doctrines which have been laid down with respect to the age and experience of minors as an element bearing on the master's liability.

In order to lay a foundation for imputing fault to an employer merely by reason of the servant's minority, the latter must adduce evidence showing that the employer had knowledge of the minority, or, because of his appearance, was put upon inquiry as to his age. This rule is important in cases where the servant is approaching his majority, and has the stature and appearance of an adult. See *Youll v. Sioux City & P. R. Co.* (1885) 66 Iowa, 346.

Thus it has been laid down that if a servant was believed to be twenty-one years old when he was hired, the master is not liable by reason of his minority, even if the employment was without the consent of his parents. *Goff v. Norfolk & W. R. Co.* (1888) 36 Fed. Rep. 299.

A servant of the age of twenty years and four months is not so young as to be within the rule that minors must be warned of the danger of the service into which they are taken, and properly instructed as to the duties required of them. *Vincennes v. Citizens' Gaslight Co.* (1892) 132 Ind. 114, 16 L. R. A. 485.

So, an employer may put an employee nearly twenty-one years old at work on a circular saw, without other instructions than running through one or two sticks, where the employee states that he has run a circular saw a very little, but is not an experienced hand, but makes no direct request for further instructions. *Wilson v. Steel Edge Stamping & Retinning Co.* (1894) 163 Mass. 315 (verdict held to have been rightly directed for defendant).

Of course where a master is misled by an employee to believe he is of age, when he is in fact a minor, and his age contributes to an injury, he is not liable. *McDermott v. Iowa Falls & S. C. R. Co.* (1891, Iowa) 47 N. W. 1037.

By some courts, reasoning from the analogies of other branches of law, a somewhat arbitrary importance has been ascribed to the fact that the employee is under fourteen years.

Thus, it has been held that a servant thirteen years of age has not reached the age when a capacity to see and appreciate danger is presumed, the theory of the court apparently being that as to such a servant the duty of instruction was peremptory. *Nellson v. Hillside Coal & I. Co.* (1895) 168 Pa. 256.

But this theory seems scarcely consistent with sound principles, which rather point to the conclusion that the question whether in any particular case a minor was or was not of such tender age and limited mental and physical development and experience that some particular caution should have been given him respecting the dangers and hazards attending the work at which he is placed, are questions of fact peculiarly within the province of the jury. See *Keller v. Gaskill* (1894) 9 Ind. App. 670.

In determining the master's duty the inquiry is, What instruction does the servant appear to need? Is there reason to believe him ignorant of anything which, for his protection, he ought to know, or incapable of appreciating the risks from what he sees around him? In the absence of anything to show the contrary, the master has a right to assume that he knows those facts of common experience with which ordinary persons of his age and appearance are familiar. In hiring a boy twelve years of age and apparently of average intelligence, an employer is not called upon to tell him that, if he holds his hand in fire, it will be burned, or strikes it with a sharp instrument, it will be cut, or thrusts it between the teeth of revolving cog-wheels in the gearing of a mill, it will be crushed. From infancy and through childhood, as well as in later life, we are all making observations and experiments with material substances and every person of ordinary faculties acquires knowledge at an early age of those familiar facts which force themselves on our attention through our senses. *Cirliack v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733.

In *Atlanta & W. P. R. Co. v. Smith* (1894) 94 Ga. 107, it was held to be a proposition too plain for argument that there is no presumption of law that a minor more than fourteen years of age who applies for a position involving dangerous service is aware of the danger and needs no instruction.

Under appropriate circumstances presumptions as to the intelligence of a minor may be allowed to run backwards. A boy who is dull at fifteen was probably dull at fourteen. Hence, where an action for personal injuries received by a boy fourteen years old is brought upon the theory that he was put to work in a dangerous place without proper instruction, evidence that the plaintiff, who was a foreigner and was examined through an interpreter, had no memory, was not a bright boy, and had to be told once or twice before he understood, and that, if he was asked a question he would answer "something else," is admissible, although the witnesses only knew him after the accident. *Laplante v. Warren Cotton Mills* (1896) 165 Mass. 487.

In *Leislritz v. American Zylonite Co.* (1891) 154 Mass. 382, "two witnesses were asked whether the plaintiff [a boy eighteen years and eight months old] was 'above or below the average intelligence of a boy of his age.' . . . the questions were properly excluded. They did not go to the extent of showing that he was manifestly incapable of undertaking the risk without instruction, so that the defendant knew, or from his appearance ought to have

known, that cautions and instructions were necessary. *Cirliack v. Merchants' Woolen Co.* (1890) 151 Mass. 152, 6 L. R. A. 733. The case does not call for any nice consideration of what might be shown in the case of a young child, or under other circumstances. It is enough to say that under the circumstances of the present case, in view of the plaintiff's age, and of his long examination as a witness in the presence of the jury, the questions were of no material significance."

The mere fact that a minor has had experience in the work from which the injury resulted is not a sufficient ground for barring an action based on the master's omission to communicate certain facts.

A charge, therefore, is erroneous which would relieve a master of liability for injury to his apprentice by reason of hidden dangers, on the sole ground that the apprentice has been in the shop long enough to make him acquainted with the dangers complained of, even if he has never instructed him as to such dangers. *Reisert v. Williams* (1892) 51 Mo. App. 13.

A servant may ordinarily be expected to know when his tools need repairs, but in the absence of experience and instruction a lad cannot be expected to know intuitively, or as fully as his experienced master; and it is reasonable that he should be warned against such deterioration of them as endangers his safety, especially when it is of such a nature as requires instruction to arrest his attention or excite his apprehension. *Heavey v. Hudson River Water Power & Paper Co.* (1890) 57 Hun, 339.

e. Illustrative cases in regard to the constructive knowledge of minor servants.

See also VIII. b. *infra*.

The result of the various rulings upon particular groups of circumstances will, it is conceived, be most clearly exhibited, if we bring together the cases which involve the use of the same or analogous appliances. This juxtaposition indicates in a very striking manner the utter absence of anything like uniformity in the views of the courts. That the practitioner may the more clearly realize the extent of the divergence, care has been taken to state the precise extent to which the appellate tribunals have undertaken to interfere with the verdicts of juries. The Massachusetts cases are especially suggestive as to the inconsistencies in which courts are apt to be entangled when they arrogate to themselves extensive powers in deciding issues of fact.

Injuries received from contact with unguarded cog-wheels.

The dangers of contact with moving cog-wheels being obvious even to a boy of twelve years, they need not be pointed out to him when he is ordered to put in place a cylinder belonging to the same machine. *Buckley v. Gutta Percha & Rubber Mfg. Co.* (1889) 113 N. Y. 540 (declaring that plaintiff should have been unsuited, the evidence showing that he was injured owing to an accidental slip).

On the same grounds a verdict has been held to have been rightly directed for the defendant where a servant sixteen years old was injured by coming into contact with moving cog-wheels the same day that he began work. *Downey v. Sawyer* (1892) 157 Mass. 418.

In *Sullivan v. India Mfg. Co.* (1878) 113 Mass. 306, where the defendant had a verdict, the court remarked, in discussing the correctness of the charge given by the trial judge, that, where a boy fourteen years old is injured by moving cog-wheels, it is competent for him

although he obeys the order, to show that the employer was negligent in exposing him to perils which he was incapable of appreciating without proper instructions.

In *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506, the plaintiff had introduced evidence tending to show that at the time of the injury he was less than fourteen years old, and had been in defendant's service but a single day; that he knew nothing about machinery and had never been in a similar employment before; that his work consisted in filling cans with strands of hemp, poured out in a continuous stream from a drawing machine, which required his constant attention, in a room containing many such machines, and in which the noise was two or three times as loud as in the railroad cars; that he had to see that the strands went into the can, press them down and fill the can, and then break off the strand and remove the can to the place where it was required for the next process, and set another can under the machine for the repetition of the operation; and that he had been instructed, and, in the condition of the work at his machine at the time, it was necessary, to break off the strand by taking it in both hands and separating the fibres by drawing it apart between the hands, which would naturally occasion him to extend his arms and hands in such manner as to bring his fingers very near to the cogs of another drawing machine also in full operation, in plain view indeed, but without any guard, and by the side and somewhat in the rear of the place where the plaintiff would properly stand in tending his machine—thus producing a danger which had not existed in the place where he had worked on the single previous day of his employment in the defendant's service, and which, as he testified, no one had pointed out to him or cautioned him in regard to; and that, while standing in his proper place, tending and watching his machine, and in breaking off the strand with both hands after filling the second can, his left hand was caught in the cogs of the next machine and badly injured. This evidence it was held, warranted the jury in finding that "he was manifestly incapable of understanding and appreciating the danger to which he was exposed by the gearing, or manifestly incapable of performing the work there with safety, and that, taking the machines as they were in the places they were in, the defendants were guilty of negligence in setting a boy to work in that place without proper and reasonable precautions that he should be so informed and instructed, in regard to his work there, and the danger to which he would be exposed, as to enable him, with proper care and attention on his part, to avoid that danger." It was remarked, however, that the case was one very near the line.

In *Cirliack v. Merchants' Woolen Co.* (1888) 146 Mass. 182, the court held, as a matter of law, that no negligence could be predicated of the master's failure to instruct a boy twelve years of age as to the danger of contact with revolving cog-wheels in a room where he had been working for two months. (*Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 598, 3 Am. Rep. 506, was distinguished on the ground that the plaintiff there had only been at work one day, and that, under these circumstances, the evidence of the nature of the work, and the position in which he was to do it, warranted a finding that he was incapable of appreciating the danger).

The verdict for the plaintiff in this case being set aside, there was a second trial upon a somewhat different theory, and another verdict for the plaintiff was sustained (1890, 151 Mass. 152, 6 L. R. A. 738), on the ground that the 44 L. R. A.

case was for the jury, because the master was aware that the boy possessed less than average intelligence, and had sent him on an errand requiring haste, to a dimly lighted place, where the cog-wheels were likely to catch his clothes, and because the plaintiff, although he had worked in the room which contained the cog-wheels and was undoubtedly familiar with them in a general way, had never worked so near them as to have had occasion specially to consider the risk of getting his clothing caught in it.

In *White v. Witterman Lithographic Co.* (1890) 58 Hun, 381 (1892) 131 N. Y. 631, a verdict for the defendant directed by the trial court was affirmed in a case where an uninstructed boy thirteen years old was injured, after working three months, by placing his hand where it came into contact with moving cog-wheels.

In *Rummel v. Dilworth* (1890) 131 Pa. 509, the plaintiff was a lad of about seventeen years, having very little acquaintance with the business or its dangers. He went into the employ of the defendants on Tuesday, and was injured on Friday of the same week. He was employed as a "drag-down," but was hurt while performing the duties of a "roller," in opening and closing the gate between the first and second pairs of rollers. The cog-wheels by which the rollers were moved were covered along the whole length of the train, except at the point over which Rummel had to reach to open and close the gate. If they had been covered at that point the accident could not have happened. The court said: "In view of the youth and want of experience in the business on the part of Rummel, it was necessarily a question for the jury whether his employer had sufficiently warned and instructed him about the dangers of the employment, and how to avoid them, or had done all that was reasonably necessary to protect him from injury."

In *Nadav v. White River Lumber Co.* (1890) 76 Wis. 120, a verdict for the plaintiff was upheld, in a case where the injury was received only five days after the servant began work, on the ground that the owner of a sawmill who hires an inexperienced youth nineteen years of age to do work which requires him to keep moving along a narrow alley-way only 19 inches in width, with revolving cog-wheels behind him is bound to warn him as to the nature of the perils to which he will be exposed.

Whether a boy ten years of age, who was injured by being caught in uncovered machinery, had a sufficient understanding of the hazard of the employment to bar his recovery was held to be a question for the jury, in *Hayden v. Smithville Mfg. Co.* (1861) 29 Conn. 548.

The following instructions formulated in *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506, were expressly approved in *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396, as "carefully guarding the rights of employers and employees," in a case involving facts similar to the above. "Upon the new trial of the case at bar, the jury should be instructed that the defendants had the legal right to run their machinery without fencing or boxing it, unless by so doing they exposed persons in their employment, or other persons who came upon the premises by their procurement or invitation, to danger of which they gave no sufficient notice; that if, by the fact that the cogs were in sight, and the danger from them apparent, the jury should be satisfied that the plaintiff had reasonable notice of the peril to which he was exposed, and, understanding it, chose to undertake the employment which exposed him to it, he cannot recover; but that, if, on the other

hand, they should be satisfied that the defendants knew or had reason to know the peril to which he would be exposed, and did not give him any sufficient or reasonable notice of it, and if he, without any negligence on his own part, from inexperience or reliance upon the directions given him, failed to perceive or appreciate the risk, and was injured in consequence, they would be responsible to him in this action."

Injuries caused by saws.

A minor sixteen years old was held to have been rightly nonsuited in an action to recover damages for injuries caused by the contact of his hand with a buzz saw, where his own testimony shows that he had operated such saws long enough to know their nature and the dangers attending their use, and was therefore in the same position as if the master had informed him of the dangerous character of the machine. *Ogley v. Miles* (1893) 139 N. Y. 458.

The case should be taken from the jury where a youth eighteen years old is seeking to recover on the ground that he should have been instructed as to the danger of allowing his fingers to come in contact with a buzz planer. Such a danger is obvious to a much younger boy. *Mackin v. Alaska Refrigerator Co.* (1894) 100 Mich. 276.

In *Smith v. Irwin* (1889) 51 N. J. L. 508, a verdict against the employer was allowed to stand, where he had failed to instruct as to the dangers of a circular saw a youth of seventeen years who had had no experience in the use of such a machine.

Where a youth seventeen years old, who has had an experience of several years in sawmill work, is injured a day and a half after beginning to use a circular saw in a manner which he declares to be unfamiliar. It is for the jury to say whether he knew or ought to have known of the particular danger incident to such use. *Hanson v. Ludlow Mfg. Co.* (1894) 162 Mass. 187.

Whether an employer is negligent in failing to instruct a boy sixteen years of age as to the dangers of removing a tub placed underneath a rapidly revolving saw to catch the scraps and sawdust which fell from it is a question for the jury. *Barg v. Bousfield* (1896) 65 Minn. 355.

In *Bohn Mfg. Co. v. Erickson* (1893) 12 U. S. App. 260, 55 Fed. Rep. 943, 5 C. C. A. 841, it was declared that, as to a boy of fifteen years, the fact that the revolving knives of a wood-working machine create a strong suction tending to draw articles into them is a latent danger, with respect to which he is entitled to instruction. (The judgment was reversed on the ground that the trial court had not asked the jury to say whether there was actually a suction.)

See also the subsection relating to the cleaning of machinery, *infra*.

Injuries caused by machines for cutting.

The risk of injury in obeying an order to hang a hood in front of the knives of a planing machine, at a distance of 8 inches from them, is obvious to an employee nineteen years old after three weeks' work and therefore assumed, as a matter of law, by him if he obeys the order without instructions. *Crown v. Orr* (1893) 140 N. Y. 450.

In *Palmer v. Harrison* (1885) 57 Mich. 182, a case of injury to a boy of sixteen, caused by contact of his hand with revolving knives of a jointer, it was held that a verdict for the defendant had rightly been directed, inasmuch as, upon the testimony of the plaintiff himself, and the undisputed fact, no notice or warning could

have helped him. The court said: "[He] the plaintiff was in his seventeenth year; had resided several years . . . [at the place where he was injured]; had known the defendant and his place of business for years. Had worked in the shop where the jointer was located for two weeks previous to receiving his injury, and had seen the machine in which the accident occurred every day during the period, both standing still and when in use; knew all about its location and use, and worked about it every day. He was not engaged in its use at the time, and was doing nothing calling or requiring him to be in any place in dangerous proximity to the jointer. The revolving knives were in plain view, and open to the observation of all persons coming near them. The plaintiff also says in his own testimony he 'knew the jointer was there;' that if he came in contact with the running knives they would be likely to hurt him; that if he had looked at the jointer he would have known whether it was running or not; that he did not look at it because he supposed it was still; that if he had not placed his hand (which had a mitten on) on the table in which the jointer worked, he would not have been caught; that he 'did not pay any attention to whether the jointer was going or not;' if he 'had known he was going to get hurt he would have looked out for it. It was an accident.'"

In *Adams v. Clymer* (1893) 1 Marv. (Del.) 80, it was left to the jury to say whether the manipulation of a pony-planer with knives running at the rate of 3,500 to 4,500 revolutions a minute involved dangers which were latent as respects a youth sixteen years of age after two and a half months of experience in the use of it.

In *Fones v. Phillips* (1882) 39 Ark. 17, 43 Am. Rep. 264, the court reasoned upon the assumption that it was for the jury to say whether recovery could be had by a boy of fourteen years who had been instructed as to the proper manner of operating a planer, but was injured through allowing his hand to come into contact with the knives while he was removing chips, a position which required him to work with his back to the machine, and which involved a danger as to which he had received no caution. The verdict for the plaintiff was, however, reversed because the trial judge had told the jury that the master owed a duty of instruction as to all dangers reasonably to be anticipated, and made no exception in regard to patent dangers.

In *Connors v. Grillee* (1892) 155 Mass. 575, a girl seventeen years old was set to work in the afternoon by her employer, without instructions, on a machine for skiving leather, and she undertook to run it as another operator had done. It was not unusual for the machine to be stopped by the leather catching in it, and the rule was that a workman should then be called. She called this workman the next day and he relieved the machine. A few minutes later she called him again, and, upon his relieving the machine, he swore at her in her employer's hearing, and told her, "If this machine gets stuck again, fix it yourself." She was going to ask a few questions of her employer, but he shook his head and hands, and refused to listen, saying, "No, no, no, if you do not work fast, I will send you home." This frightened her and she worked faster, and when the machine was stuck again she tried to relieve it, as she had seen the others do, and was injured. In an action against the employer for such injuries, the evidence was that she was a very dull girl, and was slow in her work as compared with the other girls; and she was cross-examined at great length before the jury. It was held that the questions whether the defendant was negligent in thus setting

her to work, and whether she was in the exercise of due care, were properly submitted to the jury.

A verdict for the plaintiff has been set aside on the ground that an employer is not negligent in setting to work on a hay cutter an employee twenty years old, of ordinary intelligence, without warning and instruction, the danger of permitting one's finger to be caught in a tuft of hay about to pass between the knives being, as to a person of that age, perfectly apparent even though he has never done any work of the same description before the day when the injury is received. *Stuart v. West End Street R. Co.* (1895) 163 Mass. 391.

Injuries caused by revolving cylinders or wheels.

Negligence will not be imputed as a matter of law to an employee thirteen years of age, injured by having her arm caught between two cylinders of a mangle revolving toward each other, upon the ground that the danger was obvious. *Kilkeary v. Thackery* (1895) 165 Pa. 584.

An employee fourteen years of age and of less than ordinary intelligence, who was injured while obeying peremptory orders to assist in operating a machine with revolving cylinders at which he was not employed to work, the danger attending which was partially concealed from his view, cannot be said, as a matter of law, to have failed to exercise due care. *Patnode v. Warren Cotton Mills* (1892) 157 Mass. 283 (distinguishing earlier cases in which the danger was obvious and known to plaintiff).

In *Kaillen v. Northwestern Bedding Co.* (1891) 46 Minn. 187, the contention of the plaintiff, a boy fourteen and a half years old, was that it was negligence to put him without experience to work on the machine without cautioning him and explaining to him the danger of allowing his hand to come in contact with the revolving rollers; while the contention of defendant was that this danger was self-evident to anyone who used his senses: that, in the exercise of ordinary intelligence, even this boy ought to have known that if his hand came in contact with the rollers it would be drawn in, crushed, and otherwise injured, just as happened in this case; that no amount of instruction on part of defendant would have communicated to plaintiff any knowledge regarding these dangers which he had not, or should not have, already acquired by the use of his senses. The court said: "At first sight the position of defendant seems plausible; but, when we consider the fact that the surface of the rollers was smooth, and the space between them very small, we think it not improbable that there may be a great many boys, and even men of ordinary intelligence, without experience with machinery, and with a limited knowledge of the principles of mechanics, who, while knowing and seeing that the rollers drew in wool compressed almost to the thinness of paper, would yet, like this boy, fail to realize or appreciate that they would suddenly compress and draw in, as quickly as it came in the slightest contact with them, an object like the hand or fingers, many times thicker than the aperture between the rollers. This, in our opinion, is the controlling consideration in this case, and one which fairly distinguishes it from the case of *Berger v. St. Paul, M. & M. R. Co.* (1888) 39 Minn. 78, and other cases cited and relied on by defendant. While the facts do not make out a very strong case for the plaintiff, yet we are not prepared to say, as matters of law, that the defendant owed this boy no duty to caution him as to the danger of

allowing his hand to come in contact with these rollers, and that he ought to have understood this without being told."

A verdict for the plaintiff, a youth of twenty years, was set aside in *Nugent v. Kauffman Mill Co.* (1895) 131 Mo. 241, where, after working for six months near machinery with moving rollers, he allowed his hand to be drawn between them, and asked for damages on the ground that this was a danger as to which he should have been instructed. The court said: "It would be a thing of folly to say that defendant was negligent because he failed to tell the plaintiff, a young man twenty years of age, that the revolving cylinders or rollers onto which he had been feeding wheat and sweepings from the mill floor, for six months, in order that it might be pulverized to flour, would be dangerous to the hands if they came in contact with them."

A servant nineteen years old is presumed to appreciate a danger so "open to the senses" as that of putting his hand between the rollers used to flatten boiler-plates. *Berger v. St. Paul, M. & M. R. Co.* (1888) 39 Minn. 78 (verdict for plaintiff on theory that instructions should have been given, set aside).

A verdict has been set aside, which found a master negligent in failing to instruct a minor fifteen years old, who had been working four days at the time when he was injured through allowing his shirt sleeves to rest on the rough surface of the card-cloth on the revolving cylinder of a carding-machine, the result being that the sleeve, and with it his arm, was drawn between the rollers. *Truntle v. North Star Woolen-Mill Co.* (1894) 57 Minn. 52.

A boy fourteen years of age and of ordinary understanding, who has for three weeks been familiar with the operation of machinery with revolving wheels, must be taken to know that his hand will be injured if allowed to come between the wheels. *Patnode v. Warren Cotton Mills* (1892) 157 Mass. 283.

A master is, as a matter of law, free from negligence in failing to give instructions to a youth who has worked for six months on a machine substantially the same as that which caused the injury, and nearly one month on the latter, in reference to the danger of injury from allowing his hands to be caught between a roll of cloth and one of the cylinders between which it has to be passed. *Crowley v. Pacific Mills* (1889) 148 Mass. 228 (verdict for defendant should have been directed).

The fact that a girl fourteen years old, who is injured by having her hand drawn between the ironing rollers in a laundry, has received no instructions as to the dangers of the work, will not entitle her to recover, where, at the time of the accident, she had been feeding the machine for a period of six weeks. *Hickey v. Taaffe* (1887) 105 N. Y. 26 (holding that plaintiff should have been nonsuited).

It is for the jury to say whether a girl of fourteen years, hired to feed paper to a mangle in a paper mill, should be instructed how to perform the work. *Allen v. Jakel* (1898, Mich.) 4 Det. L. N. 937, 73 N. W. 555.

A master is not bound to give an intelligent boy of fifteen years warning that his hand, if inserted too far between a belt of felting and a hot cylinder over which it runs, will be drawn in and brought into contact with the cylinder. *Locock v. Franklin Paper Co.* (1897) 169 Mass. 313.

In *Grissle v. Frost* (1863) 3 Post. & F. 622, a case involving facts similar to those in the cases just cited, *Cockburn, Ch. J.*, left the determination of the employer's responsibility to the jury, charging them as follows: "I am of

opinion that if the owners of dangerous machinery, by their foreman, employ a young person about it quite inexperienced in its use, either without proper directions as to its use or with directions which are improper and which are likely to lead to danger, of which the young person is not aware, and of which they are aware; as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery." (This ruling was never questioned in any court of review.)

In *De Souza v. Stafford Mills* (1892) 155 Mass. 476, the court held that, upon the whole case, a verdict for the defendant should have been directed, where the plaintiff, who was a foreigner nineteen years old, speaking no English, and had been working only sixteen days, had his hand drawn into the roller of a beater picker and mutilated by the beater which revolved at a high rate of speed behind the rollers. The evidence was declared not to support the contention of plaintiff's counsel that his client had stopped the rollers before attempting to clear them of the cotton which was clogging them, but that, on the contrary, there was an absence of testimony that would authorize a jury in finding that the plaintiff's hands were not drawn in by the rollers. Since this danger was obvious and the plaintiff also knew that the beater revolved in close proximity to the rollers, the principle was applicable that it is not a breach of duty to omit to give instructions as to elements of danger which may be appreciated by a person of the plaintiff's age after a brief period of experience in the work.

Evidence that there was a shadow over the box of a wheel which a boy sixteen years of age was examining when his hand was drawn into the wheel is admissible as part of the *res gestæ*, and as a fact to be considered in determining whether the boy observed, and therefore assumed the risk, and whether the master was negligent in not guarding the wheel and in not warning the plaintiff of danger. *Kucera v. Merrill Lumber Co.* (1895) 91 Wis. 637.

Injuries caused by shafts and beltings.

A court will not disturb a verdict which finds an employer who fails to give an inexperienced servant seventeen years of age, special instructions as to the dangers of coming into contact with a set-screw in a revolving shaft, guilty of negligence where he orders him to perform an act connected therewith. *Keller v. Gas-kill* (1894) 9 Ind. App. 670; second appeal (1898) 20 Ind. App. 502.

In *Cleveland Rolling Mill Co. v. Comgan* (1889) 46 Ohio St. 283, the court affirmed a verdict absolving from the charge of contributory negligence a youth fourteen years of age who, without instructions, had been put to work in close proximity to a revolving shaft from which hung a loose belt, the result being that he was caught in the belt while performing one of his duties and whirled round the shaft.

It is error to give an instruction which permits the jury to find for a minor servant over fourteen years of age, and with six months' experience, provided they find that he was directed to go up a ladder and put a belt on a pulley without being notified of the danger of doing so. It cannot be assumed that a person of that age and that experience is incapable of forming a judgment as to the risks of such an act. *Greenway v. Conroy* (1894) 160 Pa. 185.

It is for the jury to say whether instruction should have been given, where a boy of fourteen years, who had previously been engaged in a spinning room in such general work as was suited to his capacity, was required to take his

stand on an ordinary stepladder, and hold a belt away from a revolving shaft, to prevent it from crawling while it was being mended, the position thus occupied being one in which he was exposed to a considerable draught of air produced by the rapid motion of a large drum and the belt which connected it with the gearing of a water-wheel. *Hayes v. Colchester Mills* (1894) 69 Vt. 1.

To let a young man of seventeen years, without experience, and to whom the foreman has given erroneous instructions, undertake the work of lacing a broken belt without stopping the shaft over which it hangs, is negligence for which the employer is responsible, where in consequence thereof the employee is caught in such belt and drawn around the shaft. *Archbald v. Yelle* (1897) Rap. Jud. Quebec, 6 B. R. 334.

Where a minor seventeen years old was engaged to work in a foundry, and after three weeks was injured through having his leg caught by a set-screw projecting from the collar of a revolving shaft, while he was shutting off steam from an engine, it was held that an instruction was proper which left it to the jury to say whether he was aware of the danger to which he was exposed. *Dowling v. Allen* (1885) 88 Mo. 293.

The fact that a boy of fourteen years, who had been employed in a factory to do such general work in the spinning room "as should be within his capacity," had been so employed about two years, and had a general knowledge of the machinery in the factory, raises no presumption, as matter of law, that he had such a knowledge of the danger of a service so essentially novel as the replacing of a misplaced belt, that he was not entitled to be cautioned and instructed in regard thereto. *Hayes v. Colchester Mills* (1894) 69 Vt. 1. "It is evident," said the court, "that this is not a case in which it can be said as matter of law that the service the plaintiff was called upon to render was or was not such as it was his contract duty to perform. This new service had come within the line of his employment if his advancing years and experience had prepared him to undertake it. It had not come within the line of his employment if it was still beyond his capacity. It was therefore proper . . . to treat the question of the defendant's negligence in requiring the service as depending simply upon plaintiff's capacity."

Injuries received in oiling or cleaning machinery in motion.

In *Flak v. Central P. R. Co.* (1887) 72 Cal. 88, the court said, *arguendo*, that it was the duty of a master to warn a child about twelve years of age as to the dangers of such work as cleaning a drill in rapid motion.

A boy twelve years old, employed to take lumber away from a flooring machine and load it on a wagon, who is injured in attempting, under orders of the foreman of the mill, to oil dangerous machinery while in motion and without proper instructions, may recover damages from his employer. *Hinckley v. Horazdowsky* (1890) 133 Ill. 359, 8 L. R. A. 490, 492 (verdict upheld). The controlling feature here was the essential danger of the work, not that it was outside the scope of the plaintiff's employment).

A verdict is not improper which declares an employer to be liable for injuries received by a girl thirteen years of age who testifies that she was not instructed as to the manner in which a wheel at the end of a spinning frame might be cleaned safely by giving a peculiar motion to another part of the machinery and thereby securing a partial revolution of the wheel. *Glover v. Dwight Mfg. Co.* (1888) 148 Mass. 22.

A court cannot say, as a matter of law, that a boy twelve years old does not need instruction as to the danger of having his hand drawn between cog-wheels, where his only experience had been with cog-wheels arranged in a manner much less likely to lead to an accident of that kind. *Chopin v. Badger Paper Co.* (1892) 88 Wis. 193 (a case where the plaintiff, after working for a year in oiling a single row of cog-wheels, was set to work upon a double row).

The danger incident to wiping the cogs of a gearing is not so plain and open to a boy of fourteen years, wholly unacquainted with the working or use of machinery, that he can be held, as a matter of law, to have assumed the risks attendant thereon, where he has received no caution or warning from the master. *Nelson v. Marinette & M. Paper Co.* (1890) 75 Wis. 579.

A complaint is not demurrable which alleges in effect that the plaintiff, a minor sixteen years of age, was without skill and experience in handling machinery, that this fact was known to the defendant, and that the plaintiff was injured by reason of his being set to work in wiping that machinery, without any warning as to the danger of doing this while it was in motion. *White v. San Antonio Waterworks Co.* (1895) 9 Tex. Civ. App. 465.

A verdict has been set aside by which it was found that an employee was negligent in having failed to caution an inexperienced youth nineteen years of age, who had been injured after five days of work, as to the dangers of allowing the ends of a piece of cotton waste with which he is wiping the top of a machine to hang down so that they are liable to be caught in uncovered cog-wheels revolving underneath. *Atlas Engine Works v. Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798.

A complaint should be dismissed which is framed on the theory that a master was negligent in failing to instruct a youth of eighteen years, who has worked for him three years, as to the danger of cleaning a revolving shaft. *Smith v. Martin* (1891) 89 N. Y. S. R. 126.

Whether a boy fourteen years old fully appreciated the risks involved in oiling a machine with uncovered cog-wheels after working round it for six months is a question for the jury. *B. F. Avery & Son v. Meek* (1898, Ky.) 45 S. W. 355, holding that the general knowledge of the danger of the work which, as the court had declared on the previous appeal (1894, 96 Ky. 192), which must be imputed to the servant, did not necessarily imply that he realized the actual danger to which he was exposed in doing the act from which the injury resulted.

The rule under which a master is required to instruct a minor of tender years who is set to work on a dangerous machine has no application where a boy seventeen years old is injured by unfenced cog-wheels which he is engaged in oiling, after he has been already doing this work for a year and ten months. *Sanborn v. Atchison, T. & S. F. R. Co.* (1886) 35 Kan. 292 (sustaining a demurrer to the evidence).

In *Stewart v. Patrick* (1892) 5 Ind. App. 50, it was held that a general verdict for the plaintiff would not stand where the jury had found specially, in answer to interrogatories, that the appellee was a bright, intelligent boy, sixteen years of age; that he had knowledge of the dangerous condition of the machine [a planer] he was operating, and knew that he must be careful in order to avoid injury; that he had received from the appellants some instruction and caution as to the use of the machine and its hazards, though not as much as they should have imparted to him; that he had been using the machine from five to eight weeks before the injury, and that he had no other experience in

connection with such machinery; that he was hurt by the machine while wiping its platform, in front of the revolving knives, with pieces of cotton waste; that it was not necessary for the appellee to do this in the performance of his duty in operating the machine; that he knew how to stop the machine and could easily have done so; that he was not ordered or directed by the appellants to do the work in which he was so engaged when his fingers came in contact with the revolving knives."

Injuries caused by the operation of counterbalancing weights.

A jury is justified in finding that one who employs a boy between fourteen and fifteen years of age at a steam-power nunching machine is guilty of negligence in failing to notify him that, if he keeps his foot on the treadle, the press will keep coming down and going up, and to tell him how to take his work from the press after it is punched. *Armstrong v. Forg* (1895) 162 Mass. 544.

Whatever danger is incident to the work of removing the margins cut from calendars by a knife applied by hand, and suspended by a slowly operating counterpoise weight, is presumed to be apparent to a bright boy of fourteen years. *Malsky v. Schumacher* (1894) 7 Misc. 8 (dismissal of complaint held proper).

A minor fifteen years old, who, after working two and a half days, is injured while cleaning a hinged apron belonging to a cotton picker, which sprang up under the action of the weight by which it was held in a certain position except when it was pulled and kept down, cannot recover damages. *Couillard v. Tecumseh Mills* (1890) 151 Mass. 85. *Holmes, J.*, said: "The plaintiff . . . knew that the iron apron which caught his fingers would spring back if pulled down and released. He knew its position relatively to the front opening, between the edge of which and the apron his fingers were caught. Knowing these facts, he knew that, if he put his hand through the opening and let the flap spring up while it was there, it would get pinched. He also knew by experience the degree of force necessary to hold the apron down. We do not see what the defendant could have told the plaintiff that he did not know before, if he possessed the ordinary intelligence of boys of fifteen." (Verdict for plaintiff set aside.)

Injuries received in the handling of lumber.

There is no presumption that a lad eighteen years old who has usually been employed as a cook in a lumber camp, but who, at the time of the accident, had been engaged for five days in "skidding logs," appreciates the danger of undertaking to stop a rolling log by a "back-cant." *Wolski v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 178 (verdict for defendant set aside).

In *Sims v. East & West R. Co.* (1889) 84 Ga. 152, the court affirmed a nonsuit, where a youth seventeen years old was injured while loading a flat car with lumber of uniform length, after he had worked seven days in the railroad yard and helped to pile one car. Such work, it was said, required no special skill or antecedent training from which an obligation to instruct him could be implied.

Injuries received in the performance of a brakeman's duties.

In an action by an employee seventeen years old for personal injuries received while coupling cars, it is a question for the jury whether the service is so dangerous and its danger so obscure, or the plaintiff's information so limited or mind so immature, as to render it necessary

that instructions should have been given before the injury. *Atlanta & W. P. R. Co. v. Smith* (1894) 94 Ga. 107. (The report does not state what experience the plaintiff had had.)

In *St. Louis, I. M. & S. R. Co. v. Davis* (1892) 55 Ark. 462, the court upheld a verdict holding the company liable for an omission to instruct a youth of eighteen years who had been injured, after working four months as a brakeman, through having his foot caught in an unblocked guard-rail.

In *Yeager v. Burlington, C. R. & N. R. Co.* (1894) 93 Iowa, 1, a verdict was held to have rightly been directed for the defendant, where an uninstructed youth of nineteen years, who, to the knowledge of the company's officers, had had no previous experience, was injured on the day he began work while attempting to mount a moving car by the side-ladder.

It is error to direct a verdict for a defendant railway company where a youth who has received no instruction is injured on the day he begins work, while engaged in the performance of such a dangerous duty as the making of a "kicking switch." *Williams v. South & North Ala. R. Co.* (1890) 91 Ala. 635.

Injuries received in moving cars on a railway track.

A boy of nineteen employed in work which is in its nature hazardous, such as moving cars along a descending tramway from a coal mine to a place where the cars are emptied by machinery, should be warned of the cars becoming uncontrollable from the steepness of the grades. *Alabama C. Coal & Coke Co. v. Pitts* (1892-93) 98 Ala. 285 (complaint alleging these facts shows good cause of action).

In *York v. Kansas City, C. & S. R. Co.* (1893) 117 Mo. 405, the duty of going with a push-car down a grade to fetch a load of ties was pronounced to be one "of the simplest character," and the trial court was held to have rightly directed a verdict for the defendant, where a boy sixteen years of age was injured in performing that duty, although the accident occurred on the same day that he began work.

Injuries received in mining.

In *Jones v. Florence Min. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269, the evidence showed that the plaintiff was less than fifteen years old when he entered into the employment of the defendant, and that up to the date of his injury he had been engaged above ground at work which was apparently not hazardous. There was no evidence that he ever before worked under ground in a mine, or that he was at all familiar with the dangers of such employment. That the work under ground was not considered proper work for a boy of his age to perform was a fair inference from the fact that the defendant's captain and pit boss both testified that they had forbidden him to go down into the mine for any purpose. The other evidence showed that the mine was a dangerous place to work in, from the fact that blasting was constantly going on in it, and that the consequence of such blasting was to loosen the ore and rock in the roof and sides of the mine so that there was danger from the falling of such ore and rock. The court said: "We are very clear that, upon the evidence in the case, the question should have been submitted to the jury, whether the plaintiff was at work in the mine at the time of the injury by the direction of the pit boss or of the captain of the mine; and, if so at work by such direction, then whether he was of sufficient age and experience, or had sufficient information from the captain or pit boss, or from

any other source, to comprehend the dangers incident to such employment. Had the jury found that plaintiff was sent to work in the mine by the pit boss or captain of the mine on the day the accident happened, and that, from his age, inexperience, and want of information he did not comprehend the dangers attendant upon such employment, then the plaintiff would have been entitled to recover, although the injury was the result of the negligence of the miners who were his fellow servants."

Injuries received on ships.

In *Williams v. Churchill* (1884) 137 Mass. 243, 50 Am. Rep. 304, it was urged that the plaintiff was under age and inexperienced, and that the behavior of a loose end of a taut rope was a hidden danger. But as the plaintiff was over nineteen years old, had lived on the seashore all his life, had been to sea three summers, and had been on this boat four months, the time which it took his brother to become familiar with the duties on board and to get promoted, the court held that, taking these facts in connection with the nature of the employment which he had accepted, the master had a right to assume that the plaintiff knew how to handle a line, and to order him to do so without special warning or instructions, and that a verdict for the defendant had rightly been directed.

Injuries caused by the use of improper tools for a certain work.

A complaint is not demurrable which alleges in effect that the plaintiff, a minor nineteen years old, after being engaged in a machine shop for two years, was set to work at the repairing of an engine, that he was injured through using a cold chisel in a case in which a skilled mechanic would not have used it, that he had no experience which would have given him a knowledge of the correct method of doing the work, and that the defendant had never instructed him touching the same. *Whitelaw v. Memphis & C. R. Co.* (1886) 16 Lea, 391.

Injuries received in removing or replacing parts of a machine which is in motion.

The danger involved in attempting to remove an inking roller from a printing press by getting within the frame of the press, while the belt through which motion is communicated to the machine is revolved on the loose pulley, and the shifter left unsecured, is open and obvious, and therefore presumed to be appreciated, without any instructions, by an employee seventeen years old, after he has been working round the machine for several months and has removed the rollers several times. *Levey v. Bigelow* (1893) 6 Ind. App. 677 (verdict for plaintiff set aside).

Where a boy twelve years of age, who has received no instructions as to the proper method of putting in its place a roller of a "scutching machine," is caught by a cog-wheel revolving close by, the question whether he is entitled to recover should not be taken from the jury. *Vicary v. Keith* (1873) 34 U. C. Q. B. 212.

Injuries received owing to the deterioration of appliances.

A nonsuit should not be granted in a case where the plaintiff, a boy fifteen years of age, without any previous experience, fell into a vat of heated liquor, owing to the fact that the end of a wooden pole had become soggy with use and slipped on the surface of a movable pipe which he was pushing. Under such circum-

stances the jury might properly find that he ought to have been instructed as to the proper treatment of the pole in case the end should become soft. *Heavey v. Hudson River Water Power & Paper Co.* (1890) 57 Hun, 339.

Injuries received through losing one's footing.

In *Casey v. Chicago, St. P. M. & O. R. Co.* (1895) 90 Wis. 113, it was held that a verdict should have been directed for the defendant on the ground that there is no negligence in omitting specially to instruct a youth eighteen years of age that, if he loses his balance while running a wheelbarrow alone, a narrow plank over a pit about 12 feet in depth, he may fall off and be hurt.

In *Williamson v. Sheldon Marble Co.* (1893) 68 Vt. 427, a verdict was held to have been rightly directed for the defendant where a boy of sixteen years (experience not stated) had been killed through the "apparent" danger of slipping on a sheet of ice which had formed on a rock in a quarry.

An employee sixteen years old cannot be said, as a matter of law, to know of the peril to which he is exposed where he is sent up to a platform on which there are boards liable to turn over, where he had never been sent there before, and is not cautioned in regard to the danger. *Mulfin v. California Horseshoe Co.* (1894) 105 Cal. 77.

The failure of a master to caution a boy of sixteen years who is operating a punching machine, against the danger from the slippery condition of the floor, does not render him liable for injuries to the boy's hand from its coming into contact with the lever by which the punch was released as he attempted to save himself from falling when his stool which he placed in a tilted position slipped on the floor, where the condition of the floor and the danger from slipping were perfectly apparent. *Koehler v. Syracuse Specialty Mfg. Co.* (1896) 12 App. Div. 50.

VI. What knowledge of scientific facts is imputed to servants (adults and minors).

a. In the case of adults.

The obligatory knowledge of the servant is not limited to facts which are ascertainable by the direct use of the senses. Everyone old enough to fill a position in which wages can be earned is presumed to be acquainted to some extent with the properties of matter and the laws to which it is subject. How far the presumption should be carried will, of course, depend, not only upon the nature of those facts, whether simple or recondite, with a knowledge of which it is sought to charge the servant, but upon his opportunities for acquiring that knowledge, and upon his capacity for utilizing that knowledge. Each case, therefore, must be decided with reference to the actual circumstance which it involves, the lines upon which the investigation should be conducted being indicated by the subjoined illustrative rulings.

On the one hand, a servant of mature age and of experience is charged with knowledge of obvious dangers, and of those things which are within common observation and are according to natural law. In such a case the knowledge of both parties is equal, and the master need not give warning of possible danger. *Mississippi River Logging Co. v. Schneider* (1896) 34 U. S. App. 743, 74 Fed. Rep. 195, 20 C. C. A. 390.

The rule as to the duty of instruction does "not require the employer to become responsible to the servant for any injury he might receive while in the employment of the master. 44 L. R. A.

resulting from those dangers which are the subject of common knowledge, or which can be readily seen by common observation. Such risks, and the danger therefrom, are always assumed by the servant when he engages in the service." *Smith v. Peninsular Car Works* (1886) 60 Mich. 501.

The effects produced upon various materials, under different conditions, by the operation of a familiar physical law like that of gravitation is presumed to lie within the knowledge of at least every adult employee. Hence a master is not under the duty of warning a servant that a clay bank will fall when undermined. *Griffin v. Ohio & M. R. Co.* (1890) 124 Ind. 326; *Railsback v. Wayne County Turnp. Co.* (1894) 10 Ind. App. 622.

Nor that the sides of a trench dug in an embankment of made ground are more likely to cave in than the sides of a trench in natural soil, the line between the fill and the natural soil being perfectly plain owing to a marked difference of color. *Carlson v. Sioux Falls Water Co.* (1895) 8 S. D. 47.

This rule, however, is modified to the extent of necessitating the submission of the case to the jury, where, by reason of some peculiarity of the soil which is undergoing excavation the danger is increased to an unusual degree.

"It is true," said the court in *Thompson v. Chicago, M. & St. P. R. Co.* (1883) 14 Fed. Rep. 586, "that, ordinarily, every person of mature years and common intelligence is bound to take notice of the law of gravitation, and is presumed to be aware of the danger that earth in an embankment, when undermined, will cave in and fall. But the amended complaint avers that the particular embankment at which Olsen was employed was peculiar and unusually dangerous by reason of the character of the earth; and that this peculiar and extraordinary danger was known to Cavinaugh, and was not communicated to Olsen. These allegations being admitted by the demurrer, I am of the opinion that a question is presented for the consideration of a jury, and that therefore the demurrer must be overruled."

The result of imputing a knowledge of the effects of the law of gravitation is also observable in the ruling that there is no obligation to warn a laborer that a water-pipe may roll off the blocks on which it is laid when one of its ends is raised by a lever. *Johnson v. Ashland Water Co.* (1890) 77 Wis. 51.

So, a shoveler in a sugar refinery cannot hold his employer liable on the ground that he was not warned against such an apparent danger as that of falling through holes in sugar bins over which the sugar may have formed a crust. *Bohn v. Havemeyer* (1899) 114 N. Y. 296, *Affirming* (1887) 46 Hun, 557.

The danger that a stake used for pushing a car along a track adjoining the one from which the power is applied may slip or break is so obvious that an employer cannot be held liable for failing to warn the servant of it. *Watts v. Hart* (1893) 7 Wash. 178.

On the other hand, when the danger to be avoided depends upon the operation of certain chemical laws which are known only to men who have received a special training, the obligation to instruct arises in all cases where the master has good reason to believe that the servant has not had such a training.

Such a danger is that which is due to the expansive force of steam generated by the fall of molten metal upon a sheet of ice. *Smith v. Peninsular Car Works* (1886) 60 Mich. 501. The court said: "I do not think the court can presume that the common laborer in a foundry or machine-shop, such as this was, is possessed

of the scientific knowledge necessary to enable him to comprehend and avoid any such danger as overtook Mr. Smith on that icy way, resulting in his death; and I think before he was called upon to perform the hazardous undertaking by Mr. Hoban, the foreman in charge, he should have been informed somewhat of its dangerous character. This, however, was not done, and there is no pretense that the death of Mr. Smith was not caused by the explosion which followed the contact of the molten iron with the water and ice covering the dangerous passage over which the same was required to be carried."

In *Rilliston v. Mather* (1891) 44 Fed. Rep. 743, it was held that this case "was rightly decided and is not in conflict with the decisions of the Supreme Court of the United States."

A few years previously a like conclusion had been reached by another Federal court which allowed a servant to recover on the ground that his master had not warned him as to the danger to which he would be exposed by the contact of hot clay with water. *McGowan v. La Plata Min. & Smelting Co.* (1882) 3 McCrary. 393, 9 Fed. Rep. 861. The following passage from the opinion is worth quoting: "It is contended that the rule cannot be applicable to the case at bar, as it relates only to facts withheld from the servant, and not to instruction in the principles of natural philosophy. The water in front of the furnace and the act of overturning the hot slag, may have come of the negligence of the plaintiff. Indeed, the evidence points to that conclusion; and the explosion which followed was the natural result of which plaintiff should have been informed: or, at all events, defendant was under no duty to inform him. This is the argument against the verdict. And certainly, within limits, the law will assume that everyone has knowledge of destructive forces in the world and the powers of the earth and air. Of such is the knowledge that comes to every man of sound mind, in the ordinary course of his life, that fire will burn; that water will drown; that one may fall off a precipice; and the like. Recently in this court it was said of one who mounted a push car on a railroad, and went down a steep grade to his hurt, that, knowing the grade, it was his own folly not to heed the law of gravitation; because it is known to all men of sound mind and of all degrees of intelligence that wheeled vehicles go down hill with increasing speed if left to themselves. And in this case the jury were told that the plaintiff could not have recovered for a burn caused by spilling the slag on himself. But the explosive power of hot slag when cast into water is not within the intelligence of ordinary men. It is doubtful whether many people of education know the force and violence of such an explosion; and, if fully informed, how many of them, when put to service at a smelting furnace, would recall their learning without a suggestion from some source."

So, also, the tendency of a "boll" of molten iron to explode when punctured is one which is latent as to an inexperienced person. *Holland v. Tennessee Coal, I. & R. Co.* (1890) 91 Ala. 444, 12 L. R. A. 232. The court said: "The evidence tended, in some degree, to show two distinct elements of danger incident to the work, upon which the plaintiff's intestate was engaged when the injury was suffered—one open to ordinary observation, and capable of being measured and judged of by men of no special knowledge or instruction in the premises; and the other latent in character with nothing which could be seen and understood by the unskilled and uninstructed to give warning of its presence, or suggest means of avoiding it. The 'boll' of iron,

while its lower part had sunk down considerably—2½ or 3 feet, may be—into the earth, yet protruded above the surface, and was visible to those engaged in cutting the trench. It was common knowledge, appreciable by inexperienced as well as experienced persons, that, if the ditch was open entirely up to the melted mass, its bottom being below the lowest estimated point of the 'boll' the iron would immediately flow into and along the trench, thus imperiling those who should be in there at the time. This was the open and unobscured danger, which was sought to be guarded against by leaving a wall of earth between the trench and the 'boll' of from 8 to 12 inches thick, the purpose being to break down this wall by piercing it with a long crowbar after the laborers had left the trench. Of such a patent danger there was no duty on the defendant to give the employees warning. The other peril arose from the fact, supported by a tendency of the evidence here, that a 'boll' of iron upon being punctured, and having its shell broken, bursts, and throws out molten metal in all directions—'explodes,' as some of the witnesses stated as to this one, though this term was said to be inapt and inaccurate by others. Of this peril—the danger of the flying molten iron—resulting from unseen and unappreciated conditions and forces, the inexperienced man would know nothing by the exercise of his senses. It was a state of things which would not address itself to his comprehension, and of which he could only come to a knowledge by being instructed in regard to it. We are of the opinion that plaintiff's intestate and his fellow servants should have been advised of this latent danger, when they were put to work so near the 'boll' as that the lack of ordinary prudence and care on their part might not only have started the flow of iron into the trench,—this they could see, and perhaps could have escaped from,—but also have instantly enveloped them in the flying metal, which they could not anticipate, and from which there was no time to escape"; citing *Smith v. Peninsular Car Works* (1886) 60 Mich. 501.

Similarly, a knowledge of the dangers arising from the formation of poisonous fumes in the process of manufacturing chemicals cannot be imputed to a common laborer hired to do the mere drudgery of the establishment. *Wagner v. H. W. Jayne Chemical Co.* (1892) 147 Pa. 475. This case was decided on two grounds: (1) That the danger was not so obvious that the defendant could be said, as a matter of law, to have been free from negligence in exposing the plaintiff to the fumes without proper warning; (2) that the plaintiff could not be said, as a matter of law, to have been negligent because he had on a former occasion quit work, saying, "I can't stand this," there being nothing to show that he knew the fumes would do him a permanent injury,—especially where he was assured by the master's representative that the fumes were not injurious.

The court distinguished *Beittemiller v. Bergner & E. Brewing Co.* (1888) 22 W. N. C. 83, a case in which the servant was injured by a jet of ammonia, on the ground that there the plaintiff knew the danger to which he was exposed, having previously tested it, and retreated; and that the superintendent merely assured him, at the time he was ordered to return to work, that the ammonia was not so bad as it had been, thereby implicitly admitting the existence of some danger. As the plaintiff must have observed that this statement was not true as soon as he entered the room, the real state of facts being apparent to the dullest apprehension he was properly deemed to have assumed the risk.

It cannot be presumed, as a matter of law, that the danger from the sudden recoil of a trolley-wire when it is cut is known to an inexperienced man in such a sense that his employer is free from negligence in failing to inform him as to the proper manner of cutting and removing the wire. *Walker v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 606, citing *Smith v. Peninsular Car Works* (1886) 60 Mich. 501.

The fact that a considerable suction is produced by a cooling fan is one not readily ascertained except by a person possessed of special knowledge, and a servant who is hired merely to oil such a fan should therefore be warned of the danger to which he will be exposed if he puts his arm in a place where it will be affected by the suction. *Swift v. Fue* (1896) 66 Ill. App. 651.

In *Mather v. Rillston* (1895) 156 U. S. 391, 39 L. ed. 464, one of the grounds on which the employer was held liable was that he had not notified the plaintiff of the danger that dynamite might explode from overheating or the jarring of machinery.

In *Saxton v. Hawksworth* (1872) 26 L. T. N. S. 851, Willes, J., referred with approval to an unnamed case in the court of common pleas, where the master was held liable for his omission to inform the servant of the dangerous character of a carboy of nitric acid which he was employed to carry.

b. In the case of minors.

A blacksmith who fails to warn an apprentice fifteen years old of the danger arising from heaping fresh coal on the furnace without the precaution of taking measures to prevent the gases thereby generated from escaping into the bellows is liable for injuries to him from the bursting of the bellows by such gas. *Reisert v. Williams* (1892) 51 Mo. App. 13.

A complaint is not demurrable, which alleges that the employer, knowing that the clothing of a young and inexperienced boy had become saturated with dangerous and inflammable oils and gases in the course of his employment, ordered him to warm himself at a hot stove, not only without instructions as to the hazard arising therefrom, but with an assurance that his clothes were no more liable while in that condition to take fire than if wet with water, the result being that the boy's clothing ignited, and he was burned to death. *Wallace v. Standard Oil Co.* (1895) 66 Fed. Rep. 260.

In *Latorre v. Central Stamping Co.* (1896) 9 App. Div. 145, the plaintiff's intestate had been burnt to death after working three days, by the ignition of a vat of turpentine into which it was his duty to insert heated spoons for the purpose of removing a coating of grease. The court said: "It may be that it was necessary to place them in the turpentine before they were entirely cooled, because in the latter case the grease would become hard and not to be so easily removed. But, at the same time, it seems plain that they should have been allowed to cool sufficiently to prevent any danger of igniting the turpentine. We think the jury might properly find that a mere boy of the age of the deceased [fourteen years] could not have been expected to know this danger and the means of avoiding it, and that he should have been instructed, not only to see that the spoons had sufficiently cooled before bathing them in the turpentine, but that he should have been given some practical standard for him to apply, or that there should have been some regulation or rule on the subject, and that the fire was caused by the failure to give such instruction or prescribe such regulation." 41 L. R. A.

VII. Duty to warn servant against transitory and sporadic dangers.

a. Introductory.

Questions analogous to, and yet in some respects unlike, those discussed in the case cited in the preceding subdivisions are presented, where it is sought to impose a liability upon the master for omitting to warn the servant against perils arising, not from a more or less permanent and continuous condition of the instrumentalities, but from the manner in which those instrumentalities are affected by isolated events which occur at intervals during the performance of the servant's work. The distinctive feature which is common to actions to recover for injuries caused by such perils is that the environment of the servant undergoes some temporary change. A warning appropriate to such circumstances may be given in the shape of a general instruction. It must, then, be such as to put the servant upon his guard, either by notifying him of the time and place where he may expect the change to occur, or by notifying him that within certain limits, the change may occur, at any time, and any place. Or the warning may take the form of some signal informing the servant that the change is imminent. In either case, the danger to be provided for will often be such that the servant's safety can be effectively secured only by directions in the nature of rules promulgated beforehand for the guidance of all the servants, both those who are to be protected against sporadic dangers and those whose acts may produce such dangers. This branch of our subject, therefore, must be studied with due reference to the doctrines which have been laid down in regard to a master's duty to provide a safe system for the carrying on of his business. See the note on "Rules," lately published in this series. (43 L. R. A. 305.)

It may be said, perhaps, that the essential distinction between the instruction which is contemplated by the decisions so far reviewed and the instruction which is contemplated by those about to be cited is that the former relates to the quality of the instrumentalities while the latter relates to their use. But the two classes of cases fade almost imperceptibly into each other, and the dividing line between them cannot be fixed upon this basis with any great precision.

The various doctrines invoked by the courts in determining the rights and liabilities of the parties seem to be merely different forms of the one simple principle, that the servant is entitled to warning only where the danger to which he is exposed is not one of those assumed by him, or, what is essentially the same proposition, if the circumstances are viewed more directly from the standpoint of the positive obligations of the master, the existence of a duty on his part to notify a servant of the approach of a transitory danger depends upon whether he was or was not justified in supposing that the servant possessed such information as would enable him to protect himself against that danger by the exercise of due care. Such inconsistency as may be observable in the decisions upon this point results, as in those reviewed from the diversity of opinion which prevails among judges as to the capacity of the servant for obtaining the requisite information. The rulings of the courts may be conveniently stated under three heads.

b. Cases involving customary methods of doing business and departures from such methods.

The master is not bound to warn the servant as to dangers arising from the customary way of doing business. A brakeman is bound to

know that, among the cars for the storage of which a side-track may be used, may be some loaded with iron projecting over the ends. When, therefore, he is ordered to take certain cars out of a side-track, he must be on his watch for any cars of the description that may be standing there, and is not entitled to be warned as to their presence. *Jackson v. Missouri P. R. Co.* (1891) 104 Mo. 448.

Where the rules adopted by companies operating the largest portion of the railway mileage of the country do not provide for notifying the crews of different trains as to the whereabouts of each other's trains, the *rationale* of such omission being that the obligation of keeping a vigilant lookout at all times will tend to make employees more cautious and so diminish the risks of accident, a court is entitled to say, as matter of law, that it was not negligence to fail to give the engineers and conductors of an extra and a regular freight train notice as to the positions which they held relatively to each other at a certain point on the line. *Little Rock & Ft. S. R. Co. v. Barry* (1898) 56 U. S. App. 37, 84 Fed. Rep. 944, 28 C. C. A. 644.

The fact that in a few instances a railroad company has departed from its usual practice of allowing trains of the same class to run along the same section of track without notifying either of the other's movements will not justify the engineer of the following train in relying upon notice as to the position of the one in front. *Illinois C. R. Co. v. Neer* (1899) 31 Ill. App. 128.

So, where it is the established practice of a railway company, and such practice is known to trackmen, to run special trains without notice, they are not entitled to a special warning that a snowplow has been sent out over the division of the road on which they are at work. *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117.

In *Perry v. Old Colony R. Co.* (1895) 164 Mass. 296, where the plaintiff was injured by the "blowing down" of a locomotive underneath which he was working, it was contended that, when the foreman sent the plaintiff to do the job, he should have given notice to the engineer or fireman that he had been sent. But the court said: "Both the engineer and fireman knew that someone would be sent by the foreman to do the repair; and it hardly would seem necessary for the foreman to notify them that he had done what, in the ordinary course of things, they had every reason to expect he would do. There was nothing to show that there was anything unusual about the job, or manner or place of doing it. The place was dangerous, but the plaintiff knew that. He also knew that the engine would have to be blown down if a check was ground in, and that that was done over the asphalt as commonly as anywhere. There was no negligence on the part of the foreman in failing to notify the plaintiff of what he well understood himself. There was nothing to show that it was customary, when men were sent to grind in checks, to notify the engineer or fireman, or anybody else, of the fact, and that they must be careful about blowing down, or that it had ever been done before, or that anything was omitted in this case on which the men habitually relied or had a right to rely. There was testimony that the workmen looked out for themselves, as they needs must in many things. Some details a foreman may safely ignore, or leave to the men over whom he has charge. We discover no evidence of negligence on the part of Noyes [the foreman]."

On the other hand, where an employer has adopted a system for the purpose of notifying servants of the approach of a certain kind of

recurrent peril, a departure from that system will render him liable for any injuries which a servant may receive in consequence of his having relied upon the receipt of the customary warning, and thus failed to keep as careful a watch out as he would otherwise have kept.

Hence, where employees are working in such a position that the sudden tightening of a cable is likely to injure them if they are not on their guard, the failure of the master's vice principal to warn them in accordance with a custom established by himself, that the cable is about to be tightened, is negligence for the consequence of which the master must answer. *Richmond Granite Co. v. Bailey* (1896) 92 Va. 564.

So, where the work of one employed in a saw-mill to remove and pile in the yard lumber as fast as it is sawed is such as to bring him upon a part of a platform frequently made dangerous by the descent of heavy timbers upon the platform from the saws above, with great velocity and at irregular intervals, it is negligence for the mill-owner, who had adopted a custom of warning the men of the coming of these timbers by means of a signal to omit the customary and cautionary signal; and it is not negligence for the employee, when engrossed in his work, to rely wholly upon the giving of such signal. *Anderson v. Northern Mill Co.* (1890) 42 Minn. 424.

In *Anderson v. Ogden Union R. & Depot Co.* (1892) 8 Utah. 128, the following charge was held correct: "If you find it was the custom and practice of the defendant, within and for a period previous thereto, to give timely warnings to the employees at such times only as earth was pushed down the bank, or when there was danger, and not at other times, and the plaintiff knew of this custom, and relied upon it, then the plaintiff would have a right to have expected such warning when danger was imminent from such cause, and he would not be expected to keep so constant a watch to detect danger, or so high a degree of care to avoid it, as he otherwise would be required to do at this time."

In *Cincinnati, N. O. & T. P. R. Co. v. Barber* (1895) 17 Ky. L. Rep. 424, the court in commenting on the evidence which was held to justify the conclusion that the plaintiff's intestate, not being warned of a train's approach, and being near the track, if not upon it, attempted, in order to prevent a wreck, to remove certain obstructions and in this way was killed, owing to the fact that the men on the train failed to see him until it was too late to check up, said: "Warning signals had been given by this very train, prior to that time, of its approach to the place where the work was being done. This train passed there every day, and knew the necessity of giving notice of its approach, for the safety of the train and those on board, if not for the safety of the laborer. The trainmen evidently believed this to be their duty, and the deceased had the right to believe it would be performed, and, when hearing the alarm signal, in the attempt to prevent what might have resulted in a wreck of the train, as well as loss of life, lost his own life; and we think the evidence authorized a recovery, based on the alleged wilful neglect."

The same rule is applicable where the servant injured was in the employ of a person other than the defendant. Thus the employees of a contractor engaged, to the knowledge of a railroad company, in the grading of a new track alongside the main track, in such close proximity as to be liable to be struck by passing trains, are not bound to keep a constant lookout for approaching trains, where it is the uniform practice of those operating the trains to give warn-

ing of their approach. *Erickson v. St. Paul & D. R. Co.* (1889) 5 L. R. A. 786, 41 Minn. 500. The court said: "Although in the employment of a contractor and not of defendant, the plaintiff was lawfully at work along defendant's railroad, with its knowledge and by its authority. The character of his work was such that, under the facts, it owed him the duty of active vigilance to the extent of giving him signals, by way of warning of approaching trains, and he had a right to rely on its doing this, instead of keeping a constant lookout for himself, at least in view of the fact that the company had adopted and practised the custom of giving such warnings, and which he had every reason to suppose would be continued. Had plaintiff been employed by the defendant itself to work on its track, there probably would have been no question raised that defendant would have owed him this duty of active vigilance, and that he would have had the right to become engrossed in his work to such an extent as not to notice the approach of trains, and to rely upon the performance by the defendant of its duty to give him signals to warn him of the fact. But it can make no difference in principle whether a person be at work immediately upon the track or so near it as to be struck by passing trains. Neither does this duty depend, as appellant seems to claim, upon the fact that the person is a servant of the company, and the employees running the trains his fellow servants. It is a duty growing out of the fact that he is lawfully working there under the authority and with the knowledge of the company, and depends upon the general principles of law requiring the exercise of ordinary care not to injure another."

It is a breach of duty on the part of an engineer not to look out before starting his engine and give the usual signals for the purpose of warning any employee who may be working on the track. *Britton v. Northern P. R. Co.* (1891) 47 Minn. 340 (decision rendered in regard to an accident in Wisconsin where, under Wis. Anno. Stat. 1880, § 1816a, a railroad company was liable for the negligence of an engineer).

A usage which is itself an evidence of a want of due care cannot be utilized as a defense. Thus, a custom of moving an engine immediately upon the covers being placed over the manhole after taking water, leaving the fireman to get down over the coal without signal to him, will not relieve the railroad company from liability to a fireman for personal injuries while getting down, occasioned by such movement, where the character, quantity, or location of the coal was such as to make his position unusually perilous, or where the engine moved more suddenly than usual. *Knott v. Dubuque & S. C. R. Co.* (1892) 84 Iowa, 462.

c. Perils due to transitory changes in the condition of the place of work.

See also VII. a, *supra*.

The implied engagement of an employer to make the service of the employee a reasonably safe one includes the obligation of providing "a safe place for the employee to work at or upon, and no order with respect to change of position of the subject of the work shall be executed without due warning to the employee." *Stewart v. Philadelphia, W. & B. R. Co.* (1889) 8 Houst. (Del.) 450. (From charge to jury in a case where the plaintiff recovered upon evidence showing that a car on which he was working was set in motion without warning, thereby causing him to be crushed between the top of the car and a girder).

So, an inexperienced employee set at work 44 L. R. A.

with a pick to undermine a high embankment of earth does not, as matter of law, by continuing the work, assume the risk attendant upon the temporary absence of the superintendent, although he knows of his absence and that he is no longer watching the bank, since he has the right to assume that the superintendent will return in time to warn him of the danger of the bank's falling. *Lynch v. Allyn* (1893) 160 Mass. 248.

In *McCann v. Kennedy* (1896) 167 Mass. 23, "the plaintiff was at work upon a house in which the defendant was making some changes. He went up a ladder, stepped through a window, and then, in order to avoid a man who was working behind it, stepped to the left upon a joist which had been sawed nearly through for a well-hole, and fell. The plaintiff knew that the customary way to make well-holes was to lay the joists and then cut them out, and so far as appears, knew where this well-hole would be. It would be seen from the plaintiff's testimony that the joist had been cut very recently. Another witness stated, without contradiction, that he had cut it a moment before the accident, and had gone to get an axe to knock the joist out." It was held that the employer was not liable, the court saying: "The only ground on which the plaintiff could recover is that, while the joist remained it was a trap, and that he ought to have been warned. But the danger was momentary, and it would be impracticable to require employers to warn their men of every transitory risk when the only thing the men do not know is the precise time when the danger will exist."

Again, the rule as to the duty of the master to warn a servant about the hidden dangers of his employment is not applicable where the actual danger which caused the injury was due to a transitory occurrence of such a nature that the plaintiff must have known that it would probably happen from time to time. *Flynn v. Campbell* (1893) 160 Mass. 128, where the plaintiff, after four and a half years of experience in the work of wheeling coal from a coalshed to a fire room, was struck in the foot by a load of coal which had been dumped through a hatchway in the roof, after being discharged from a lighter, the position of which could easily have been ascertained, and whether it was ready to unload or not.

So, also, there is no duty to warn a servant as to the incidental use of appliances producing conditions which he could have ascertained merely by looking. *Young v. Miller* (1897) 167 Mass. 224, holding that a master owes no duty to give a servant who knows of the existence of a trap door, and that it is liable to be open at any time, notice or warning that it is open at any particular time.

This principle is especially applicable where the risk is not only transitory and obvious, but is essentially incident to the very work which the servant is ordered to do. Hence, an employer is not required in formal language to notify an employee sent into a room in which a flywheel has exploded to clear away rubbish, that no one has as yet examined the room to see that nothing is likely to fall upon him. Under such circumstances the servant has no right to assume that he is not the first to be sent into the room. *Kanz v. Page* (1897) 168 Mass. 217.

So, the fact that a roof will be in an insecure condition up to the time when a certain piece shall have been put in place is presumed to be known to one familiar with the construction. *Campbell v. Mullen* (1895) 60 Ill. App. 497.

In *Burns v. Matthews* (1895) 146 N. Y. 386, the court, in denying the right of a laborer to recover for injuries caused by the collapse of

the walls of a trench, said: "Had the foreman known that the walls of the trench were likely to give way it doubtless would have been his duty to have warned Burns, but masters are not insurers against accidents, and they ought not to have extraordinary and unexpected burdens imposed upon them. They are required to be careful and prudent, and to exercise the care and caution over the men in their employ that careful and prudent men ordinarily exercise. A foreman, having fifty men under him, cannot be expected to keep his eye constantly upon every man and see that he does not step into a place of danger, nor can he, having the care of so many, be expected momentarily to think of every danger that may befall them. Each man is expected to have some judgment and care with reference to the preservation of himself from danger, and of necessity much has to be left to his care in this regard. Burns was not set at work upon a dangerous machine about which he had no knowledge, but instead he was directed to dig a trench for a sewer. He had done such work before, and so far as appears was a man of reasonable intelligence, and must have known something of the dangers of working in deep trenches without curbing. He was at liberty to select his own place to work in the trench, and he might have commenced where it was but a foot deep. He knew that curbing had been put in up to the manhole, and that it must have been the intention of the foreman to curb north therefrom."

d. Perils due to the recurrent movements of railway cars and other heavy bodies.

A class of cases involving features which to some extent resemble those presented by the decisions cited in the last two sections deals with injuries of a type very common in the great industrial establishments of modern times; injuries, that is to say, produced by the fact that some heavy object not under the control of some particular servant passes at intervals along certain lines through the space in which he is required to work. The special danger to be anticipated from such an event arises from the fact that the servant's coemployees whose duty it is to regulate the movement of the heavy object, be they ever so vigilant, will often find it impossible to save him from injury by a warning given immediately before the entrance of the object into the space where it was likely to come into contact with his person, and that the servant himself will often be unable, consistently with giving adequate attention to his duties, to keep a proper watch for the approach of the object. The situation, therefore, is one in which the highest degree of care on the part of the servants themselves cannot always avert a catastrophe, and in which the adoption of suitable precautions by the master is calculated to diminish very greatly the risk of such a catastrophe. Under such circumstances it is reasonable to infer the existence of an absolute duty on the master's part to make arrangements for imparting a timely warning to any servant who may be imperiled by such a cause.

Accordingly, we find it laid down that a master is bound to give a servant working in a place which may become dangerous by reason of perils arising from the doing of other work pertaining to the master's business, such warning of the additional dangers as will enable him, in the exercise of reasonable care, to avoid them or to guard against them, and such duty cannot be delegated so as to relieve the master from liability for negligence in its performance. *Felice v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 345, holding that a railroad company is liable for not providing a system of signals for 44 L. R. A.

warning the laborers in a tunnel of the approach of trains.

So, also, it is the duty of those operating a freight train which is being backed onto a switch to station a man on the rear car to warn employees rightfully on the track as to its approach, and it is no excuse for the failure to perform this duty that the rear car was a box-car, which did not conveniently admit of this precaution being taken. *Illinois C. R. Co. v. Mahan* (1896) 17 Ky. L. Rep. 1200. (See, however, the cases cited toward the end of this section.)

So, also, in a state where the doctrine of common employment has been abolished as regards railway servants, it has been held that a railroad engineer who knows that a brakeman is standing on the pilot to make a coupling is negligent in suddenly and without warning increasing the speed of the train when about 6 feet from the car to which the engine is to be coupled. *Strong v. Iowa C. R. Co.* (1895) 94 Iowa, 380.

The broad principle that the failure to warn in culpable where such failure may fairly be expected, in the normal course of events, to cause injury, has been relied upon as a ground for holding a conductor guilty of negligence, if, knowing that a sudden and unexpected starting of a train without notice to a brakeman engaged in coupling a car will probably endanger his safety, he orders it to be moved without giving warning to him. *Purcell v. Southern R. Co.* (1896) 119 N. C. 728. (It should be noted that a conductor is a vice principal in North Carolina.)

The following rulings also exemplify the principle:

Where it is essential to the safety of laborers, whose duties in the loading of a ship require them to be in the hold, that a "hatch-tender" should be stationed at the hatchway to warn them when bales of cotton are about to be thrown into the hold, it is the duty of the company to supply a person to be stationed at the hatchway for that purpose. *Cheaney v. Ocean S. S. Co.* (1893) 92 Ga. 728.

A jury is justified in finding a master guilty of negligence in employing a boy only thirteen years old to give the signals by which the operation of hoisting machinery is regulated, when the circumstances are such that the duty can only be performed efficiently by a person of prudence, caution, and constant watchfulness and attention to his duty. *Molaske v. Ohio Coal Co.* (1893) 86 Wis. 220.

In *Greenwald v. Marquette, H. & O. R. Co.* (1882) 49 Mich. 107, the liability of the defendant was denied on grounds thus stated: "The plaintiffs can fully prove that decedent knew that the locomotive was moving or about moving back, and it also shows that there was room enough for him to perform his duties without being hurt. But this is not all. The order to back up was a proper one beyond question; and as decedent was participating in the operations connected with the backing up of the locomotive and knew what was going on and what to expect, he does not seem to have stood in need of warning by bell or whistle. He already knew enough to admonish him to keep out of the way."

On the ground that a master "is not required to keep special watch over every employee, and warn him of common dangers to which he may be subjected in the performance of his ordinary duties," it was held in *Ring v. Missouri P. R. Co.* (1892) 112 Mo. 220, (1) that an engineer on a locomotive is not guilty of negligence in failing to stop the train, or warn of danger a

section hand who stands in a safe position, several feet from the track, until after the engine passes, and (2) that a foreman of a gang of section hands is under no duty to warn each of them of the danger from each passing train, where they are so familiar with the work as to be presumably capable of looking out for themselves, and there is no unusual danger, and no rule exists imposing upon him such duty.

Compare *Greenwald v. Marquette*, H. & O. R. Co. (1882) 49 Mich. 197, referred to in *X. infra*. See, however, *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 875, reviewed in *X. infra*, where another principle was applied to analogous facts with the result that the company was held liable.

This theory that it is not negligence to omit to warn a servant to take precautions which it may be presumed the servant will take without such warning has been made the basis of a ruling that the person in charge of a switch engine in a railroad yard, used for the purpose of moving cars, has a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, will take reasonable precaution against their approach; particularly where the cars are moving so slowly that ordinary attention on their part would enable them to avoid them. *Aerkfetz v. Humphreys* (1892) 145 U. S. 418, 36 L. ed. 758.

This is also the principle which underlies the ruling that the starting of a freight train unexpectedly to a brakeman on the top of a car at the rear end of train, but not suddenly, violently, or negligently, gives him no cause of action for injuries caused by his being thrown from the train thereby. *Johnston v. Canadian P. R. Co.* (1892) 56 Fed. Rep. 886 (decided on demurrer).

As there is no duty to warn a servant against a danger which he can see and from which he can save himself, as well as the master himself, or anyone deputed by him, it has been held that a railroad company cannot be made liable for an injury to an employee, caused by backing and recoupling cars to another car which plaintiff is filling with water while standing upon a ladder leaning against it, on the theory that the company should have made a rule making it the duty of someone to warn him of the return of the cars, where plaintiff knew that they would return before the tank was filled, and by simply using his eyes could have avoided the danger. *Houston & T. C. R. Co. v. Strycharski* (1894) 6 Tex. Civ. App. 555.

So, also, as track repairing or track cleaning after a snow storm in the vicinity of moving trains is intrinsically a dangerous occupation, the fair presumption is, not only that men who engage in it take the risks of the employment, but that they are competent to keep themselves out of manifest and unnecessary danger. Hence, representatives of a railroad company have the right to assume that one of a gang of men employed to release a snow-bound train on one track will not place himself in danger of being struck by a train on another track 7 feet from the former. *Nye v. Pennsylvania R. Co.* (1896) 178 Pa. 184.

The court in this case also relied on the consideration that it would under the circumstances have been impracticable for the division superintendent to have communicated any warning in regard to the movements of the passing train, as the men to be notified "might have moved 100 feet or a mile in ten minutes."

On the ground that, as the plaintiff had already received warning independently of signals, no other notice was required, it has been held that failure to blow the whistle of the engine

attached to a construction train so that the hands thereon could prepare to protect themselves against the sudden jerk of the train in stopping is not imputable as wilful negligence, where they had been informed by the boss that the train would stop at that place, and knew where the train was before and at the time it stopped. *Stimmons v. Louisville & N. R. Co.* (1892) 13 Ky. L. Rep. 941.

The fact that a servant's failure to observe an approaching danger was due to a justifiable relaxation of his vigilance in consequence of his having relied upon receiving a warning from some other employee will under certain circumstances constitute a controlling element in cases of this kind. Thus, a section hand is not, as a matter of law, guilty of contributory negligence, preventing recovery for injuries from being struck by a train while working upon the track in a stooping position, for the reason that he failed to keep a lookout for trains where he may have relied to some extent upon warning from the section foreman or from the engineers of approaching trains. *Comstock v. Union P. R. Co.* (1895) 56 Kan. 228. (Appeal was on demurrer to evidence. In Kansas a railroad company is liable for the defaults of the employees named).

VIII. What instruction and warning will be sufficient.

a. In the case of adults.

"The notice which the master gives to the servant must be such as to enable a person of his youth and inexperience to appreciate the nature of the danger." *King v. Ford River Lumber Co.* (1892) 93 Mich. 172.

Stated in the most general terms, the extent of the master's obligation in regard to imparting information to a servant is to give him "such instruction as will enable him to avoid injury unless both the danger and the means of avoiding it while he is performing the service required are apparent." *Atlas Engine Works v. Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798.

Merely going through the form of giving instructions, by the employer, is not sufficient. *Hickey v. Taaffe* (1887) 105 N. Y. 26.

If the master relies on the fact that he admonished the servant of the danger which caused the injury, he must show that the warning was timely and explicit. *Powers v. Calcasieu Sugar Co.* (1896) 48 La. Ann. 483.

What particularity is demanded in the form of the instruction will, of course, depend upon the character of the risk and the presumed capacity of the servant for comprehending and acting upon the notification which he receives.

Considerable particularity would seem to be required in warning a servant as to the danger incident to handling dangerous chemical compounds. Thus, it is held not to be sufficient merely to notify a servant that Paris green is a poison. He should also be informed of the precise effects which it may produce in persons engaged in its manufacture, and also of the precautions necessary to be taken for obviating these effects. *Fox v. Peninsular White Lead & Color Works* (1891) 84 Mich. 878.

In some cases the test applied is whether risk was what is called patent or latent.

Thus, notice that a car received by a railroad company from another company, and directed to be returned as out of order, is out of order, is sufficient to a brakeman or switchman, unless the defects are not obvious and involve more than the usual danger to those employed in returning the car. *Atchison, T. & S. F. R. Co. v. Meyers* (1896) 46 U. S. App. 226, 76 Fed. Rep. 443, 22 C. C. A. 268.

And it is also held that a railroad company having had transient cars of other companies in its use or employment regularly inspected, condemned, and ordered to be sent to the shops for repair and had them regularly tagged so as to warn employees of that fact, has not fully discharged its obligation of due care towards one engaged in the performance of night service as a car coupler, unless the tags are of such size and character as to bring the condemnation of the cars to his attention, or he is otherwise informed of the fact. *Meyers v. Illinois C. R. Co.* (1897) 49 La. Ann. 21.

Provided it is understood that by the words "patent" or "hidden" or the like it is merely intended to signify that the risk is presumed or not presumed to be within the comprehension of a servant of a certain grade of intelligence, who has certain means of information within his reach, and that the question whether the servant appreciates the risk is therefore the one which is ultimately to be determined in view of all the circumstances of the case, no harm can result from the use of such vague expressions. (See III. d. *supra*.) But that they are likely to mislead if the essential signification is lost sight of is shown by the fact that two courts have reached diametrically opposite conclusions as to such a simple matter as to the extent of the duty to instruct a brakeman with respect to the danger of coupling foreign cars with double deadwoods.

On the one hand, it has been held that a brakeman twenty-six years of age and of average intelligence, who had never seen double deadwoods before he was injured, was insufficiently warned of the increased danger in coupling cars with such deadwoods which sometimes passed over the road by a caution that railroad-ing was dangerous, and that coupling cars is specially so, requiring very great care, where he was further notified that cars with different coupling apparatus are hauled over the line. *Louisville & N. R. Co. v. Boland* (1892-93) 96 Ala. 626, 18 L. R. A. 260. The court said: "As to latent risks, the duty of the master is not discharged when he simply instructs the servant in a general way that the service engaged in is dangerous, and especially is this true where the servant is a person who from inexperience or want of education would not likely have knowledge of such latent risks. In such cases he should not only be instructed that the service is dangerous; but, where extraordinary risks are to be encountered, he should be warned by the master, as far as possible, of their character and extent, if known to the master, or should be known to him. But, as we have said, this duty is required only as to latent dangers or risks, and we know of no rule or principle of law that requires the master to give any express or particular instructions to guard against such dangers as are manifestly obvious."

On the other hand, we find it laid down in a case involving similar facts that a railroad company which merely warns a brakeman who is just entering on his duties that the business is highly dangerous, does not fully discharge its duty as to instructing him. He should be told in what the hidden dangers consisted, and how to avoid them. *Reynolds v. Boston & M. R. Co.* (1891), 64 Vt. 66.

The true doctrine, it is submitted, is that the master's obligation to instruct is or is not deemed to have been adequately discharged, according as the instruction given is such as will enable the servant to comprehend the proper steps which he should take in order to guard himself against the perils of his environment. This doctrine seems to be a necessary corollary

from the fact that the object of imparting information to the servant is to put him on the same footing as a servant who, in consequence of his possessing certain knowledge, is held to have undertaken the responsibility of protecting himself against the risks to which such knowledge relates.

The master is only bound to give such instructions as are reasonably necessary in order to enable the servant to understand the perils to which he is exposed by reason of his employment. A servant is held to take the risk of such dangers as are known and understood. *Cirlack v. Merchants' Woolen Co.* (1888) 146 Mass. 182.

The master's duty to provide a suitable place for work may be modified by a sufficient warning of danger, so that, after it, an employee will be held to assume the risks of which he knows, and to which his attention has been directed. *Honohan v. New American File Co.* (1890) 17 R. I. 141.

The notice which the defendants were bound to give the plaintiff of the nature of the risks incident to the service which he undertook must be such as to enable a person of his youth and inexperience in the business intelligently to appreciate the nature of the danger attending its performance. The question indeed on this branch of the case is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which he knowingly assumed the risk, or one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences. *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506.

To what extent the master should enter into details in giving the instruction will therefore depend upon the presumed capacity of the servant to utilize the information which he receives intelligently and effectively for the purpose of securing his own safety. On the one hand, the obligation of the defendant is not discharged "by informing the servant generally that the service engaged in is dangerous; especially where the servant is a person who neither by experience nor education has, or would be likely to have, any knowledge of the perils of the business, either latent or patent, but that in such case the servant should be informed, not only that the service is dangerous, and of the perils of a particular place, but, where extraordinary risks are or may be encountered, if known to the master, or should be known by him, the servant should be warned of these, their character and extent, so far as possible." *Smith v. Peninsular Car Works* (1886) 60 Mich. 501.

Compare *Chicago, Anderson Pressed Brick Co., v. Reineger* (1892) 140 Ill. 384, holding that a trial court had properly added to a charge a clause implying that the instruction must be so full that the servant actually understands and appreciates the danger.

The duty of instruction is not adequately performed unless the information respecting the dangerous qualities of the appliances is imparted in words devoid of ambiguity. Hence, it has been held that warning that a horse is vicious is not conveyed by the statement that it is "high-lived," since that expression is frequently applied to horses of the very opposite character. *Wilson v. Sioux Consol. Min. Co.* (1898) 16 Utah, 292.

On the other hand, it is not necessary that a servant should be warned of every possible manner in which injury may occur. He must ex-

amine his surroundings and take notice of obvious dangers and operations of familiar laws. *Mississippi River Logging Co. v. Schneider* (1896) 34 U. S. App. 748, 74 Fed. Rep. 195, 20 C. C. A. 390.

An employer is "not required to exercise the highest possible diligence to instruct the plaintiff in every conceivable particular of the circumstances in which he might be placed, or in every possible detail of his conduct in the performance of his duties. The requirement in this respect is only that the master exercise ordinary and reasonable care to see that the servant possesses a competent knowledge of the peculiar dangers to which he is exposed in doing his work, and of the precautions necessary to be taken to guard himself against those dangers; and in the exercise of that care the master has the right to assume that the servant brings to the work ordinary intelligence and powers of observation, and the capacity to learn something from observation and experience."

Moreover, the duty to instruct against dangers incident to the work extends only to such dangers as are known to the master himself, or which are reasonably to be apprehended from the nature of the employment." *Benfield v. Vacuum Oil Co.* (1894) 75 Hun. 209.

An employer who "gives such general instructions and cautions as will enable the employee by the use of his intelligence to comprehend the dangers which threaten him in his work must be held to have discharged his duty," although he does not anticipate in advance every possible risk or accident. *Thompson v. Edward P. Allis Co.* (1895) 89 Wis. 523.

In *Chicago, R. I. & P. R. Co. v. Clark* (1883) 108 Ill. 113, the trial judge gave an instruction to the effect that it was the duty of the master to inform his servants of all danger in and about the premises where they are required, by his authority, to perform labor. The court said: "This was manifestly wrong. Railroad employees, as all the books lay down the doctrine, assume the ordinary risks and hazards of the employment. The presumption is that the employee understands the nature and dangers of the employment when he engages in the service, and if not, that he will inform himself. It would be wholly impracticable for railroads and manufacturers to employ men of experience to inform each of the hands that any particular act he is required to perform is dangerous. It would be ruinous to such bodies to hire a person to accompany every brakeman and other employees, to inform them of danger in the performance of every act of duty, or of the danger in the manner of its performance. It is impossible that the law can ever impose such requirements,—and that is what this instruction in substance asserts as a legal requirement."

In *Fisher v. Delaware & H. Canal Co.* (1893) 153 Pa. 379, the following instructions of the trial judge were affirmed: "There is another duty which the employer owes to a child or infant, and that is to inform him of the dangers connected with the services in which he is employed. If that information, taken in connection with what the employee must know from his personal and constant observation, is sufficient to enable him to understand clearly the dangers to which he is exposed, then that duty is discharged on the part of the employer."

In *American Strawboard Co. v. Foust* (1895) 12 Ind. App. 421, the contention of the defendant was that a general verdict for the plaintiff was inconsistent with the special findings to the following effect: "That appellee was over twenty-one years old, a person of ordinary intelligence, and in full possession of his senses, at the time he received the injury; that he had

been warned, just prior to the injury, to be careful, to look out for his hand, and that he had been frequently warned of the dangers of passing the paper up between the dryers; that the dangers and perils of appellee's general employment, and of the particular task in which he was engaged when hurt, were apparent and obvious to a man of experience; that by reason of the peculiar condition of the machinery, and the appellee's inexperience in connection with the employment, the appellee could not have avoided the injury if he had paid closer attention to his work." The court, however, said: "Granting that the findings show that the appellee had been sufficiently warned of the perils and dangers attending the performance of his duties, it still remains true, as found by the general verdict, that he was ignorant of the nature of his work, and of the manner of the proper performance of the same. There is nothing in the answers returned by the jury to indicate that appellee had received such instructions as he should have been given in order to understand fully the character of the work he was to perform, and the proper manner of performing the same. It may have been true, therefore, that just prior to the injury the appellee was warned 'to be careful' and 'look out for his hand'; and yet, with the reasonable exercise of his faculties, he might still have been unable to so perform his duties as to avoid the danger. Simply warning the appellee of danger generally by the appellant did not excuse the latter from pointing out the particular danger of this employment, and to so instruct the appellee as to enable him to avoid such danger. Nor is the finding that the appellee was so warned in conflict with the implied finding in the general verdict that appellee did not receive any instructions from the appellant or its servants concerning the duties he had to perform and the dangers and hazards attending his employment, at the time of the injury. A warning to an ignorant and inexperienced man, under such circumstances, would be of little avail."

Sometimes a general instruction which will put the servant on inquiry and observation represents the standard of the master's duty. On the one hand, therefore, a person employed as a brakeman on a section of 4 miles of railroad, and notified that there were stone piles beside the road, and so near to it that a person on the side of a car passing them would be struck, is to be deemed to have assumed the risk from that cause, although the precise location of the danger was not stated to him. *Smith v. Winton & St. P. R. Co.* (1889) 42 Minn. 87.

On the other hand, a brakeman placed on a freight train on a road with which he is not familiar must be given sufficient notice of the danger of low highway bridges over the road to enable him, by proper attention and diligence, to learn where the points of danger are. *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710.

Bulletin boards and placards, printed or posted, are proper methods of giving notice of such a danger to railroad employees, but not the only methods; and where a party has been expressly notified, he cannot complain that no placard or bulletin board was posted. *Louisville & N. R. Co. v. Hall* (1890) 91 Ala. 112.

A railroad company owes no duty to a brakeman in its employ to build a fence from a cattle guard to the line fence in order to give him notice of its existence. Fences are not supposed to be built in such places for this purpose, and a brakeman has no right to expect to receive information in such a manner. *Fuller v. Lake Shore & M. S. R. Co.* (1896) 108 Mich. 690.

Whether a railroad company is under the duty of providing means for warning trainmen as to the proximity of low overhead bridges, such as "whipping straps" or cautionary lights, is a question to be determined by utility and the custom of well-regulated railroads. *Louisville & N. R. Co. v. Hall* (1888) 87 Ala. 708, 4 L. R. A. 710.

Whether the servant has been adequately instructed is a question for the jury. *Reynolds v. Boston & M. R. Co.* (1891) 84 Vt. 66.

At all events, when the testimony offered by the defendant is of an inconclusive character. *Wolski v. Knapp-Stout & Co. Co.* (1895) 90 Wis. 178.

It is merely necessary that notice of an unassumed danger should be given before the service involving it is required, not that it should be given at the time of the contract of employment, but where no notice was given at any time, a charge declaring that instruction fixing it shall be given at the time of employment is not prejudicial. *Salem Stone & Lime Co. v. Griffin* (1894) 139 Ind. 141.

Liability may, of course, be predicated from the giving of erroneous instructions, as from the entire omission to give any instruction. *Owens v. Ernst* (1892) 1 Misc. 388.

Where the issue is whether the plaintiff has been sufficiently instructed as to the dangers of a machine, evidence that the machine might at a slight expense have been set up so as to be less dangerous is irrelevant. *Rock v. Indian Orchard Mills* (1886) 142 Mass. 522.

b. In the case of infants.

To the case of infants the principles stated in the foregoing section are equally applicable in all essential respects, the sole distinction of importance being that, owing to the more restricted capacity of young persons for understanding the perils of their employment, the law implies an obligation to give them detailed and special instructions in many instances in which a general notification would have been an adequate warning to an adult.

It is impossible to lay down any inflexible rule applicable alike to all cases where minors are employed, as to what warning will be requisite; and, without doubt, in some cases even minors are not necessarily entitled to any warning at all as to the character of the machinery about which they are at work, or as to the proper method of operating it and avoiding obvious dangers. Much depends upon the nature of the machinery, the age, capacity, intelligence, and experience of the employee, as well as all the surrounding facts and circumstances. *Davis v. Augusta Factory* (1893) 92 Ga. 712.

A youthful employee must be instructed so fully, that, as a matter of fact, he actually understands and appreciates the danger. *Chicago, Anderson Pressed Brick Co., v. Reinnelger* (1892) 140 Ill. 334, holding that the last clause was properly added to a charge.

Notice of danger is not enough. The child must have sufficient instruction to enable him to avoid danger. *Wharton, Neg. § 216*, quoted in *Brazh Block & Coal Co. v. Young* (1899) 117 Ind. 520.

In putting a person of immature years at work at machinery which in some respects may be termed dangerous, an employer is bound to give the employee such instructions as will cause him to fully understand the difficulties and dangers of his position and the necessity of the exercise of care and caution; and in such case mere formal instructions are not sufficient, but the person employed must be brought to an actual understanding of the dangers, and be made to appreciate them and the consequence of want 44 L. R. A.

of care. *Ogley v. Miles* (1889) 28 N. Y. S. R. 893.

The notice and instruction should be graduated to the age, intelligence, and experience of the servant. They should be such as a master of ordinary prudence and sagacity would give under like circumstances, for the purpose of enabling the minor, not only to know the dangerous nature of his work, but also to understand and appreciate its risks and to avoid its dangers. They should be governed, after all, more by the experience and capacity of the servant than by his age, because the intelligence and experience of men measure their knowledge and appreciation of the dangers about them far more accurately than their years. *Bohn Mfg. Co. v. Erickson* (1893) 12 U. S. App. 260, 55 Fed. Rep. 943, 5 C. C. A. 341.

The notice which the defendants were bound to give the plaintiff of the nature of the risks incident to the service which he undertook must be such as to enable a person of his youth and inexperience in the business intelligently to appreciate the nature of the danger attending its performance. The question, indeed, on this branch of the case is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which he knowingly assumed the risk, or one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences. But in determining this question, it is proper and necessary to take into consideration, not only the plaintiff's youth and inexperience, but also the nature of the service which he was to perform, and the degree to which his attention, while at work, would need to be devoted to its performance. The obligation of the defendants would not necessarily be discharged by merely informing the boy that the employment itself, or a particular piece or machine in the building or room in which he was set to work, was dangerous. Mere information in advance that the service generally, or a particular thing connected with it, was dangerous, might give him no adequate notice or understanding of the kind and degree of the danger which would necessarily attend the actual performance of his work. *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 3 Am. Rep. 506.

In *Honahan v. New American File Co.* (1890) 17 R. I. 141, the defendant requested the trial judge to instruct the jury that, if the boss told the plaintiff to put his files on a steam pipe to be dried at another place, and not to get on the tank into which he fell, and the boy disobeyed the order, by reason of which the accident happened, the jury should find a verdict for the defendant. The judge allowed this request, with the qualification that the warning or direction must have been such as to give notice of the danger. The defendant excepted to the qualification. The supreme court said: "We think the instruction as given was correct. The master's duty to provide a suitable place for work may be modified by a sufficient warning of danger, so that, after it, an employee will be held to assume the risks of which he knows, and to which his attention has been directed. It may also be modified, in some cases, by a disobedience of orders on the part of a workman. But this duty, in the case of children, is always to be considered with reference to their years and understanding. It is not to be expected that a child of eleven years will bear in mind and always follow a mere direction to put his work in one place, when he knows no reason why he may not put it in another place, near

by, as well. Common experience teaches us not to look for such implicit obedience to orders from him as may be required from adults. The direction to a child, therefore, must be accompanied with such explanation of danger as to enable him to understand it."

In *Taylor v. Wootan* (1891) 1 Ind. App. 188, where the proof was that the servant was but twelve years of age at the time he was injured by coming in contact with a planer in connection with which he had been hired to work, and that he had worked but two days and a half for the appellant, and was wholly inexperienced in the operation and running of the machinery, the court held that, under these circumstances, it could not be declared, as a matter of law, that the employers absolved themselves from responsibility by simply telling the employee of the dangerous character of the machinery and warning him to keep away from it while it was in motion.

In *Costello v. Judson* (1880) 21 Hun, 396, where a boy of fourteen years possessing the average amount of intelligence was injured through allowing his foot to project beyond the platform of an ascending elevator, it was held that it was for the jury to say whether an instruction by the defendant's foreman to the effect that, if the plaintiff went on the elevator, "he must be careful and not fool with it," was sufficiently explicit.

Whether an employer had reasonable cause to believe that a boy fifteen years old needed more than ordinary instruction, and whether he had been misled in this respect by the boy's father, are questions for the jury. *Laplante v. Warren Cotton Mills* (1896) 165 Mass. 487.

In *Bibb Mfg. Co. v. Taylor* (1894) 95 Ga. 615, there was evidence of the fact that the plaintiff, a boy eight years of age, had been repeatedly advised that the machinery on which he was at work, consisting in part of rapidly-revolving cog-wheels, was dangerous, and that he himself knew it; and, under this state of facts, the jury was charged, in effect, that the mere notifying him through another employee that the machine was dangerous would not be sufficient to relieve the defendant, unless that employee pointed out to him in what the danger consisted. The court, in ordering a new trial, said: "The vice of this instruction consists in the expression by the court to the jury of an opinion upon the weight of the evidence. The question of negligence is one for the jury exclusively, and the law does not undertake to point out how, nor in what manner, a master shall instruct a minor servant in the handling of dangerous machinery. If, as in this case, the danger be manifest and obvious, the jury might have found, had they been free so to do, under the charge of the court, that no instruction at all was necessary, and if necessary, that the precautionary words of a coemployee were sufficient to apprise the boy of the danger to which he was then exposing himself, and in consequence of which he ultimately suffered injury. Whether such instruction would suffice, would depend to a very great degree upon the character of the machinery. If it were exceedingly intricate, invested with many latent dangers, a jury would probably find that a more detailed instruction was necessary than was given by the master to the servant in this case. But if it were a simple contrivance, easily understood, more general instructions might suffice to satisfy them. At all events, whenever the jury find that the master, with reference to this particular matter, has exercised ordinary and reasonable care, he is entitled to an acquittal."

A master is not bound to give a special caution to a boy every time he is sent on an errand

which requires him to pass moving machinery the peril of which is obvious to a person of his intelligence. *Ciriack v. Merchants' Woolen Co.* (1888) 146 Mass. 182. The court said: "It seems to us that it must fairly be assumed that the plaintiff had all such knowledge as it was the duty of the defendant to impart to him. There was no peculiar or secret source of danger. Anybody seeing the machine in motion must soon become aware of the danger which would arise from coming in contact with it. The duty of the defendant would be sufficiently discharged by pointing out to the plaintiff the situation of the machine, and the rapid revolution of the wheels when in operation, and explaining the probable effect of touching them under these circumstances."

In *Tinkham v. Sawyer* (1891) 153 Mass. 495, the court was "unable to discover in this case any ground on which it can be held that the defendants are liable," under the following state of evidence. The plaintiff at the time of the accident was somewhat over sixteen years of age, and of at least ordinary intelligence, and had been in the employ of the defendants about a month. Up to the forenoon of the day before the accident, he had been attending to cards in the carding room of the defendant's mill. He was then set to work to help tend the machine on which he was injured, the accident occurring about the middle of the forenoon of the next day. He was told by the man who set him to work on it that the machine was a dangerous one, and not to touch it when in motion. This was repeated to him by the man who was running the machine. He himself testified that he knew the machine was dangerous when it was going, and that it was going at the time of the accident. During the day and more that he worked on the machine, he helped to clean it a number of times, and had therefore the knowledge thus acquired in addition to the warning and instruction which he had received. He had to sprinkle the wool with oil before it was put into the machine, and this made the floor very slippery, so that, as he testified, he had to walk carefully. It was a part of his duty to gather up the wool from the floor as it was blown out of the machine, and put it back, so that it would go through the machine again. The opening out of which the wool came was about 2 feet from the floor, and was 4 feet horizontally by 1 foot in height. Two or 3 inches inside of it was a large revolving cylinder with teeth in it. At the time of the accident he was gathering up wool from the floor so near to the machine, as he testified, that if he slipped he would go into it. He did slip, and his arm went into the opening and the injury complained of resulted.

In *Pratt v. Prouty* (1891) 153 Mass. 833, the danger to be guarded against was that the plaintiff's fingers while serving pieces of leather to the cylinders of a "skiving-machine" would be caught between them and drawn through against the knife. The court said: "This was an open and apparent, and not a hidden, danger. Not only were the cylinders and their movements plain to see, but their operation and effect, in drawing in against the knife whatever came between them were obvious, and were constantly demonstrated in their use. That the plaintiff was a boy of at least ordinary intelligence is manifest, and is not denied; and if he could fail to see and appreciate the danger, all the information and caution that was needed was given to him by the defendants, and his own evidence shows that he knew and understood the danger. He says that the defendants told him that, if he got his fingers in, he would get hurt, that he must look out about his fin-

gers, and, what testimony was not needed to prove, that he knew that, if he put his fingers where the leather went, they would get caught as soon as the leather would. He said, indeed, that he did not realize the danger that it would draw his whole hand in. He may not have realized all the possible consequences of the danger, but that he knew and appreciated the danger of being hurt by having his fingers caught between the cylinders is obvious. That he was inattentive to his work, and careless, was not evidence that he did not know the danger. He was told, and knew, that if he was inattentive and careless he was liable to be hurt, and there is no evidence that the injury was not the result of his own want of care. There is no evidence of negligence on the part of the defendants, and no evidence that the plaintiff did not know and appreciate the danger."

Partial instruction as to the danger of an environment will be sufficient to charge a minor with a sufficient knowledge and appreciation of the perils incidental to his employment, provided the perils as to which he received no instruction are such that a person of his age and intelligence ought to have understood them.

A boy nineteen years old, of ordinary intelligence, must be presumed to understand the danger of keeping hold of the shipper rod outside an elevator well, by which the elevator is set in motion, until the cross beam of the elevator catches his hand between it and the edge of the floor through which the elevator is descending, and cannot recover for an injury due to this cause, although he was not informed how near the cross beam passed to the edge of the floor in descending through it. *Rood v. Lawrence Mfg. Co.* (1892) 155 Mass. 590.

So, a youth of seventeen years who is injured because he attempts to adjust a piece of rubber in a vise without moving it back from a saw, where the danger is perfectly obvious and he has been warned to look out for his fingers, is guilty of such contributory negligence as to prevent recovery, even though he has not been fully warned of the danger. *Burke v. Thomson Meter Co.* (1892) 45 N. Y. S. R. 272.

c. As to sporadic and transitory dangers.

The danger of striking a person coming up from the hold of a vessel in swinging barrels into the hatchway requires, so long as shipwrights are at work in that part of the hold and their work makes it necessary for them to come on deck through the hatch into which the loading is going on, that means should be taken by those in charge of the loading to ascertain when some one is coming up the ladder, or that some one should be stationed at such a place near the hatch that those coming up may be properly and seasonably warned, and a general warning at the commencement of work is insufficient,—especially as to one who does not go to work until after it is given. *The Pioneer* (1897) 78 Fed. Rep. 600.

A railroad employee who cannot reasonably protect himself by watching out for the return of a switch engine with cars attached to be coupled to a car at which he is employed, while standing on a ladder resting upon it, is entitled to some warning other than a mere general instruction that he must look out for himself when the cars are switched against it,—especially when there is a change in the method of making up the train of which he is ignorant, whereby the cars come from a different direction. *Houston & T. C. R. Co. v. Strycharski* (1896, Tex. Civ. App.) 35 S. W. 851.

An employer who undertakes to give his employee warning of the approach of an engine

and cars into a shed where the latter is at work is bound to give such warning as may be heard by a person of ordinary hearing, considering the distance between the person giving the warning and the employee. *Mississippi Cotton Oil Co. v. Ellis* (1894) 72 Miss. 191.

A railway company which knows that a large number of its employees are engaged in work requiring them to cross its tracks, and that there is a blinding snow storm at the point where they are working, and that trains pass such point at frequent intervals, is required to give such men something more than the usual warning given by an approaching engine. *Illinois C. R. Co. v. Gilbert* (1894) 51 Ill. App. 404.

The blowing of a whistle by the engineer of a railroad train 50 yards or more before reaching the place where the track is obscured by dense smoke for 250 or 300 yards is not, as matter of law, a sufficient exercise of care toward other employees who may be coming on the track from the opposite direction. *Woodward Iron Co. v. Herndon* (1896) 114 Ala. 191. (Action under Code, § 2590, subs. 5.)

A railroad company, having had transient cars of another company in its use regularly inspected, condemned, and ordered to be sent to its shops for repairs, and had them properly tagged so as to warn them of that fact, has not fully discharged its obligation of due care towards one engaged in the performance of night service as a car-coupler unless the tags are of such a size and character as to bring the condemnation of the car to his attention or he is otherwise informed of the fact. *Meyers v. Illinois C. R. Co.* (1896) 49 La. Ann. 21.

In *Watson v. Houston & T. C. R. Co.* (1883) 58 Tex. 434, the court, in discussing the sufficiency of the notice given to the servant under analogous circumstances, said: "If the usage of the company, in giving notice of such defect, consisted in chalking upon the car the words 'Out of order,' and placing them upon a side track for removal, then it will be held that appellant engaged in the service subject to such usage or custom, and if the notice in this case was given in the usual and customary manner, then it was sufficient. His incapacity to read the notice would not affect the result. He could only secure exemption from such usage or custom by contracting against it; for his incapacity to understand the nature and extent of the business he engages to perform is not chargeable to the fault of the company. It is immaterial whether such incapacity arises from a want of sufficient education to read and understand the purport of the usual 'Out of order,' or from want of skill in the performance of other duties pertaining to the employment."

When a minor thirteen years of age, employed to pick out the slate from coal cars after they have been run down an incline from the place of loading, has been told to be on his guard when cars are being run down, and also to be on his guard against the jerking of the cars when the train was being started, and is subsequently injured by being thrown off a car by the sudden impact of another car which has thus been run down against the one on which he is working, it is for the jury to say whether the master's duty of instruction has been sufficiently discharged. *Flaher v. Delaware & H. Canal Co.* (1893) 153 Pa. 379.

IX. No recovery by servant unless failure to instruct was efficient cause of injury.

The subjoined rulings illustrative of the principle which extends through the whole law of negligence, that an action cannot be maintained unless the defendant's want of care appears to

have been the proximate or efficient cause of the injury complained of, are self-explanatory.

The master is not in fault in failing to communicate a fact which is immaterial to the servant's safety, and which, if he had known it, would not have affected his action. *Henderson v. Williams* (1891) 66 N. H. 405, where the court held that a verdict for the plaintiff based on the theory that the defendant's superintendent was negligent in not informing him that an unexploded charge which he was ordered to drill out had a wet fuse could not be sustained, as there was no evidence going to show either that it was more dangerous to extract a charge which had failed to ignite on account of the wetness of the fuse than one which had failed to ignite owing to one of the several causes from which such an occurrence may result, or that the method of extracting the charge would have been at all different if the nonexplosion had been due to some other cause than the wetness of the fuse.

A minor servant cannot recover on the ground that he was not instructed as to the dangers of his employment, where the injury resulted from a mere accident, from which no amount of cautioning would have saved him. *Buckley v. Gutta Percha & Rubber Mfg. Co.* (1889) 113 N. Y. 540. (Plaintiff slipped, and in making an instinctive movement to recover himself put his hand between revolving cog-wheels. Compare as to the facts, the case of *Tinkham v. Sawyer* (1891) 153 Mass. 485, cited in VIII. b. *supra*.)

A jury is justified in finding that the omission of a conductor to inform a brakeman of the fact that a draw-bar was broken was the proximate cause of an injury received by such brakeman, while making a coupling with it, although the conductor was no longer on the train when the accident occurred. *Donahoe v. Old Colony R. Co.* (1891) 153 Mass. 356. The argument by which the defendant undertook to support the theory, *vis.*: It was not to be expected that the plaintiff would attempt to uncouple the car without a specific order from the conductor,—was thus disposed of by the court: "The jury were not bound to assume that the conductor expected the whole work to stop because he had temporarily left the train for the purpose stated. The jury might well find that what was done by the plaintiff and the other men upon the train was done in the ordinary course under the circumstances, and that the injury to the plaintiff was a natural and proximate result of the omission to inform him of the broken draw-bar. It was admitted at the trial that the plaintiff 'was injured in attempting to uncouple the car from the engine, so that the engine might go and do something else.'"

The negligence of a master in putting a common laborer at work about a machine, without instructing him as to its operation, does not render him liable for an injury to the latter which does not result from his unskillfulness. *Arizona Lumber & T. Co. v. Mooney* (1895, Ariz.) 42 Pac. 952.

A master is not bound to give warning and instructions to a young and inexperienced servant concerning dangers of the employment, where they are of such a nature as to render injury very improbable, and only come from negligence which the master has no reason to expect. *Siddall v. Pacific Mills* (1894) 162 Mass. 378.

Negligence in failing to instruct a boy seventeen years of age as to the danger of his work cannot be predicated of a case where he falls off a hand-car in running it back to a switch to get out of the way of an approaching train, from which, as it has been properly flagged, the men on the hand-car are in no danger. If his fall was caused through his head being affected

by his position, that is a result which the employer was not bound to anticipate. *Briggs v. Newport News & M. V. Co.* (1894) 15 Ky. L. Rep. 618.

Failure of a railroad company to give an employee at work on its tracks notice of the approach of a train, and the running of the train at a prohibited rate of speed, does not render the company liable for the death of such employee, where he at first got out of the way, and afterwards got in front of the engine when it was only a few feet distant. *East St. Louis Connecting R. Co. v. Eggman* (1895) 58 Ill. App. 69.

A boy about fourteen years old, who was injured by coming into contact with uncovered cog-wheels revolving alongside a narrow passage, through which his duties took him, is not entitled to have the jury charged as follows: "If no instruction was given the plaintiff as to the route in going to and from the machine at which he was injured, except 'to do as the other boy before him did,' and he did so and was injured, there was negligence on the defendant's part." It might have been that, though thus injured, he was injured by no negligence on the part of the defendant, but by negligence on his own part. *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396.

In *Fordyce v. Yarrowborough* (1892) 1 Tex. Civ. App. 260, a charge was disapproved which failed to indicate that the liability of a railway company for its negligent omission to inform its servants of extra hazards to arise from the use of a car of an unusual and more than ordinarily dangerous construction depended on whether such omission proximately caused the injury sued for.

A finding of the jury that the efficient cause of the injury was the plaintiff's own negligence will, of course, prevent him from recovery on the theory of the employer's breach of his duty to instruct. *Adams v. Clymer*, 1 Marv. (Del.) 80.

The same principle is assumed in many of the cases already cited, in which the defense raised was contributory negligence.

X. Duty of instruction considered with reference to the doctrine of common employment.

It is well settled that the duty of instruction, wherever it exists, is to be classed among the positive, absolute, or non-assignable duties of the master.

The master cannot escape the responsibility, if there was one upon him, of notifying the servant of the risks of the work by merely delegating it to one of the other servants, but if the duty thus delegated was performed the plaintiff had all the notice requisite for his safety. *Sullivan v. India Mfg. Co.* (1873) 113 Mass. 396; *Verdell v. Gray's Harbor Commercial Co.* (1897) 115 Cal. 517; *Lebbering v. Struthers* (1893) 157 Pa. 312; *Felice v. New York C. & H. R. Co.* (1897) 14 App. Div. 345; *Emma Cotton Seed Oil Co. v. Hale* (1892) 56 Ark. 232; *Pullman Palace Car Co. v. Laack* (1892) 143 Ill. 242, 18 L. R. A. 215; *Atlas Engine Works v. Randall* (1885) 100 Ind. 293, 50 Am. Rep. 798; *Keller v. Gaskill* (1898) 20 Ind. App. 502; *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117; *Consolidated Coal Co. v. Wombacher* (1890) 134 Ill. 57.

In *Wheeler v. Wason Mfg. Co.* (1883) 135 Mass. 297, the defendant presented the question whether a master's duty of giving notice to his servant of risks and perils to which the latter will be exposed in the course of his employment, when such duty exists, is an absolute one, or whether it is merely the duty of taking reason-

able and proper pains to inform the servant of them. This question arose in three forms: (1) In the refusal to instruct the jury that, if the defendant's foreman directed a coservant of the plaintiff to give proper instruction and caution to the plaintiff, the latter could recover by reason of such coservant's failure to do so, if he was a competent person for that purpose; (2) In the instruction, that, if there were dangers in the business known to the defendant, which by reason of the plaintiff's inexperience were unknown to him, and which by the exercise of ordinary care he could not have known, the defendant is bound at its peril to give him reasonable warning of them; and (3) In the exclusion of the evidence of what the foreman told the coservant to do, in instructing the plaintiff. The court said: "That question was somewhat considered in *Coombs v. New Bedford Cordage Co.* (1869) 102 Mass. 572, 596 [3 Am. Rep. 506]. But the question here is the more general one, whether it is an affirmative, positive duty resting upon the master, for the nonperformance of which he will be liable, or whether it can be delegated to a proper substitute, and he be thereby relieved from responsibility. We are of opinion that the duty resting upon the master is not merely one of reasonable care and diligence to give a proper notice; but that he is responsible in case the servant suffers through a want of receiving a proper notice of the risks to which he is exposed. The servant does not assume, and is not to bear the risk of, unknown and undisclosed perils; but he is held to take those risks which he knows, or which, by the exercise of ordinary care, he ought to know, to be incident to the nature of the business in the place where and the manner in which it is carried on. The master's duty is to provide machinery which is reasonably safe and proper; and if the use of it is attended with special peril, such as his servants ought to know, and if there is, accordingly, under the circumstances of the particular case, a duty resting upon him in respect to giving notice to the servants of such special peril, that duty is not discharged by delegating the performance of it to a third person. The servants should not be held to assume and undertake to bear the risk of latent and concealed perils, merely because the master takes reasonable care and pains to give notice of them. It is more reasonable to hold that, where the danger is known to the master and unknown to the servant, the master should be held to see to it that the servant, when put upon work which exposes him to danger, should be informed of it. The master must not expose his servant to an unreasonable risk. Where the servant is as well acquainted as the master with the dangerous nature of the machinery or instrument used, or of the service in which he is engaged, he cannot recover. But where the master employs a servant in the use of machinery which he knows, but the servant does not know, to be attended with peculiar danger, we are all of opinion that he must be held responsible for an injury which occurs in consequence of his failure to see to it that a proper notice is given."

The fact that a track-walker has failed to do his duty in giving notice of a possible danger to trains from the falling of a rock near the track will not excuse the company, if it does actually fail. The company being bound to remove such a danger, a breach of its duty in this respect is not to be condoned because the servant deputed to look out for the danger has also failed in his duty. *Bean v. Western N. C. R. Co.* (1890) 107 N. C. 731.

In *Brennan v. Gordon* (1890) 118 N. Y. 489, 8 L. R. A. 818, it was held that there was error 41 L. R. A.

in a charge given at the request of defendant that "if the jury find, as matter of fact, that the plaintiff was put under instruction of a competent instructor, and that the instructor, was as well acquainted as defendants with the nature and character of the service which he undertook to perform, he cannot recover." The court said: "The jury could not otherwise understand this instruction than to mean that the defendants' whole duty to the plaintiff was performed when they assigned as competent an instructor to plaintiff as the defendants were. This was erroneous in two respects. The degree of the instructor's competency was gauged by the competency of the defendants. The plaintiff was entitled to have, and the defendants were bound to provide him with, an instructor competent to teach the art of managing an elevator, regardless of the competency of the defendants in that respect, and of which there was no proof whatever in the case. But the defendants were not only bound to furnish plaintiff with an instructor absolutely competent to manage an elevator, but the defendants were also bound to provide such an instructor for a reasonable length of time to teach the plaintiff how to manage the elevator, and that the instructor should be guilty of no negligence to the injury of the plaintiff while he was being instructed. These relations spring from the fact that during this period the instructor is doing the work and standing in the place of the defendants, the masters."

Evidence that an employer referred a servant to an experienced fellow employee for information as to the proper manner of dealing with a mispent charge of dynamite, and that, in consequence of following the instruction given, the servant was killed, is insufficient to support a charge of negligence on the employer's part. *Welch v. Grace* (1897) 167 Mass. 590.

Some superior employees are treated as representatives of the master in respect to this particular duty, though in other respects they may be mere servants.

Thus, it is held that one who has power to employ and discharge laborers, and is the foreman in his department, has the duty of the master devolved on him to instruct employees as to the danger of the employment. *Fort Smith Oil Co. v. Slover* (1893) 58 Ark. 168.

In another state where the courts apply the same doctrine as to the effect of vesting a superior servant with the power of employing and discharging his subordinates, it has been held that the superior servant is none the less a vice principal in respect to the duty of instruction because the employing and discharging are subject to the consent and approval of the superintendent. *International & G. N. R. Co. v. Hinsie* (1891) 82 Tex. 623, where the plaintiff was ordered to paint cars without being instructed as to a rule requiring men working on side-tracks to set out signal flags.

Compare *Olson v. St. Paul, M. & M. R. Co.* (1888) 38 Minn. 117 (foreman of gang shoveling snow,—vice principal in regard to the duty of notifying his subordinates of rules); *Consolidated Coal Co. v. Wombacher* (1890) 134 Ill. 57 (night pit-boss in a mine—a vice principal in regard to warning miners of the dangers from a loose overhanging rock); *Bjbjian v. Woonsocket Rubber Co.* (1890) 164 Mass. 214 (man in charge of machine like that which plaintiff was handling—vice principal when deputed by the foreman to instruct the plaintiff).

Similar rulings have been made as to the obligation to warn in regard to sporadic, transitory dangers affecting the safety of the place of work.

The duty of keeping the employees on a sec-

tion of a railroad informed as to the movement of trains over that section either under a general or temporary time table is positive and non-assignable. *Northern P. R. Co. v. Charles* (1892) 7 U. S. App. 359, 51 Fed. Rep. 562, 2 C. C. A. 380; *Frost v. Oregon Short Line & U. N. R. Co.* (1895) 60 Fed. Rep. 936; *Baltimore & O. R. Co. v. Camp* (1895) 31 U. S. App. 213, 65 Fed. Rep. 952, 13 C. C. A. 233.

Compare subd. X. of the note in 43 L. R. A. 303.

So, also, though in some respects the engineer and fireman of a special engine are fellow servants of a section hand, yet, in giving him warning of the use of the track by a special train, they discharge a nonassignable personal or positive duty of the railroad company in its corporate capacity. *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675. The court said: "It has been well said that it would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions or loss of life. *Lewis v. Selfert* (1887) 116 Pa. 647. Having prepared and promulgated its schedule, it must adhere to it, and if it makes a change or violates such schedule, it is its positive duty to notify all who may be affected thereby of such change. When, in contravention of its schedule, it sends a 'wild engine' over its track unexpectedly, it is in duty bound to warn all its employees who are rightfully on and using the track about its business, whether in charge of engine, train, or hand-car, of the change in the schedule, and if it intrusts this duty to others, by bell, whistle, or otherwise, it makes such others its vice principals to that extent, and if they fail to discharge this duty the company must answer for their negligence unless it be shown that the injured person contributed thereto. For instance, if the company had failed to notify Foreman Alley, by bell, whistle, or otherwise, of the presence of a special train or obstruction on the track, and he had been injured thereby, he could recover, unless the defendant showed that he was under express instructions to be on the lookout for such special trains, and, as a matter of precaution, to flag around curves and through cuts. In such case he would fail, not because of being a fellow servant with the engineer, but from contributing to his negligence. The company must protect its employees from all dangers created by itself or its authorized agents or agencies which such employees cannot themselves foresee, or, by the use of ordinary prudence, avoid. For it must furnish them a safe place to work. To send 'wild engines' and trains without any manner of warning or precaution over tracks already rightfully occupied by other employees is negligence in the highest degree criminal, in utter disregard of human life or limb, and worthy of the severest penalties the law can possibly inflict; and it is made less criminal by the degree of precaution taken to give the necessary warning, and only becomes excusable when the measures adopted are sufficient to protect such employees from threatened danger, provided they are free from fault themselves."

(See, however, cases cited in X. c, *supra*.)

The same principle is applicable where the duty of warning is voluntarily undertaken by a person not in the master's employ. Here, the fact that another person performs a duty incumbent on a railroad company to warn a servant of another employer while working upon it that trains are approaching will not absolve the company from liability if the warning was not heard, and the servant is consequently injured. *Speed v. Atlantic & P. R. Co.* (1879) 71 Mo. 303. The court pointed out that, under the 44 L. R. A.

circumstances, the relation between the railway company and the contractor stood several of the usual tests which are applied in determining whether one person is the servant of another. The company's superintendent had the right to direct the manner in which the work should be done. The contractor's services were due to the company alone. The subordinate employees of the contractor were selected by the company and were liable to discharge by the company. Moreover, the defendant being a railway company, the case was controlled by another principle also. The contractor "was transacting a part of the business of the company, a common carrier, not as a lessee of the road and rolling stock, or either, but simply in loading and unloading freight which the company transported as a common carrier." As a common carrier, it was observed "the law imposes certain obligations and liabilities upon the defendant, of which it is extremely doubtful whether it can relieve itself while it continues to be a common carrier, by any agreement with a third person. The doctrine might well apply that, where the law imposes a liability upon a company, in which it vests a franchise with exclusive privileges, it cannot escape responsibility by delegating to others the power to transact a portion of the business in which it is engaged, if the business to be transacted by the employee be but a part of the general business in which the company is engaged. If the company should lease the entire road, or an entire portion of the road, to another company, it would cease to be liable as a common carrier, as to the whole or such portion; but it cannot parcel out its business to agents, and be a common carrier, without the liabilities of a common carrier."

A corollary of the doctrine that the duty of instruction is absolute is that, in cases where the injured employee is an infant or inexperienced, the rule as to fellow servants "only holds good when it appears that such employee has been properly instructed by his employer as to the dangers of his employment, or has acquired knowledge of such dangers from other sources." *Jones v. Florence Min. Co.* (1886) 66 Wis. 268, 57 Am. Rep. 269.

Hence, the mere fact that a defect in a machine is due to the fault of a coemployee will not absolve a master from the duty of instructing a servant, where the danger resulting from the defect is one which is not within his comprehension. *Bjbljan v. Woonsocket Rubber Co.* (1895) 164 Mass. 214.

The practical operation of the doctrine that the duty of instruction and warning is non-assignable is considerably modified by the principle that the master is not bound to supervise personally the details of his business. It would be out of place to discuss at any length in this connection the results which follow from the application of this principle, and we shall content ourselves with citing the few cases in which it touches upon the subject of the present note.

A master is not liable for the negligence of a fellow servant of the injured servant in failing to give a warning signal as it was his duty to do. *Hermann v. Port Blakely Mill Co.* (1896) 71 Fed. Rep. 853.

A railroad company is not liable for injuries caused by the negligence of a fireman in omitting to sound a bell or whistle for the purpose of notifying an employee of the approach of a moving engine. *Greenwald v. Marquette, N. & O. R. Co.* (1882) 49 Mich. 197.

Contrast *Turner v. Norfolk & W. R. Co.* (1895) 40 W. Va. 675, *supra*.

Where a servant undertakes the work of putting damaged cars on a certain track in a yard,

the receipt of insufficient notice as to the precise defect in some particular car which he has to handle is to be treated as the neglect of a fellow servant, and the risk must fall within the ordinary rule, inasmuch as it is an incident of the service which was entered upon, that broken cars might be put in the wrong place in the yard, and insufficient notice of the defects in them might be given. Such an omission of notice relates to matters of detail, and is one which cannot be given in advance. It is therefore not like an omission to give instructions to an inexperienced hand as to the general danger to which his work will expose him. *Yeaton v. Boston & L. R. Corp.* (1883) 135 Mass. 418.

An employer owning a coal dock, the structures and machinery upon which are undergoing repairs and rebuilding made necessary by a storm, is not guilty of negligence in failing to warn a new and inexperienced employee at work upon a chute, of the presence in such chute of the slack of a cable attached to the machinery of the dock, and of the danger of its suddenly lifting by the starting of the machinery, where the machinery is not in regular operation, and such lifting of the cable is not one of the incidents of such operation, regularly or occasionally occurring, but arises from the engineer's adjusting the cable upon the drums and leaving it for a time lying in the chute, and plaintiff's position is safe until the starting of the engine, and the employer has no notice of the presence of the cable in the chute, and could not reasonably anticipate it,—especially where such employee is not ordered to take a position over the chute. *Porter v. Silver Creek & M. Coal Co.* (1893) 84 Wis. 418. (Two judges dissented on the ground that the master was bound to know that the machinery might start at any moment and imperil plaintiff.)

Where a servant is injured in obeying a mere foreman not having the station of a vice principal, who, without sufficient instruction, had ordered him to perform a specially dangerous service, not within the scope of his employment, the fault is that of a fellow servant, not of the master. *Crown v. Orr* (1893) 140 N. Y. 450.

See, however, *Union P. R. Co. v. Fort* (1873) 17 Wall. 553, 21 L. ed. 739. C. B. L.

George L'HOTE

v.

City of NEW ORLEANS *et al.*, Appts.

(.....La. Ann.....)

*The city of New Orleans has the power to assign the limits beyond which houses of prostitution shall not be permitted. An ordinance of that character merely asserts the municipal functions to secure public order, decency, and morals, and violates none of the guarantees of the rights of person and property contained in the Federal and state Constitutions. City Charter, Act No. 45 of 1896, § 15; the similar provision in previous charters; *Black, Const. Law*, p. 301; 1 Dill. Mun. Corp. § 310.

(November 21, 1898.)

A PPEAL by defendants from a judgment of the Civil District Court for the Parish

*Headnote by MILLER, J.

NOTE.—As to power of a city over houses of ill fame, see also *People v. Hanrahan* (Mich.) 4 L. R. A. 751, and note. 44 L. R. A.

of Orleans enjoining the enforcement of an ordinance changing the limits within which houses of prostitution are permitted. *Reversed.*

The facts are stated in the opinion.

Messrs. James J. McLoughlin and Samuel L. Gilmore for appellants.

Messrs. E. Howard McCaleb, E. Howard McCaleb, Jr., and Rene C. Metoyer for appellee and intervener.

Miller, J., delivered the opinion of the court:

The defendants appeal from the judgment maintaining the injunction restraining the enforcement of the ordinance of the common council changing the limits beyond which lewd women are prohibited from residing. From an early period it has been the policy of the councils of the city to assign limits for houses of prostitution, by prohibiting, under prescribed penalties, the location of such houses beyond the designated limits. The ordinance earliest in date on this subject to which our attention has been directed was passed in 1857. There were changes in the limits in subsequent years, and the last ordinance which gave rise to the present controversy prescribed the south side of Custom House street, to the North side of St. Louis, and from Basin to the lower side of Robertson street, as the limits beyond which houses of prostitution were prohibited. This, as we understand it, extended the permitted limits of previous ordinances so as to include St. Louis street, from which such houses had been excluded by the ordinance passed shortly preceding that the city is now seeking to enforce. This last ordinance restricts the limit assigned to these houses by the previous ordinances by substituting "between Basin and Robertson streets" for the more enlarged space comprised between the river in front and the rear of the city, designated by earlier ordinances, although St. Louis street is embraced in the last ordinance, not in the ordinance immediately preceding the last enactment. It is claimed that St. Louis street never was within the space assigned for these houses. We derive a different impression but whether or not included in the earlier ordinances can exert no appreciable influence on our decision.

The plaintiff, a property owner, and a resident on Tremé street, intersecting St. Louis street, and half a square from St. Louis street, alleges, in his petition for the injunction, the close proximity of his dwelling to that portion of St. Louis street brought within the area in which houses of prostitution are to be allowed by the ordinance he proposes to enjoin; that his locality has been, and is, free from such houses; that their introduction is calculated to render his property unfit for his family dwelling, and greatly depreciates its value; that the ordinance excludes a large portion of the area in which houses of prostitution were previously permitted, at the same time enlarging the limits so as to embrace St. Louis street; that the city, by the previous ordin-

ances designating the limits and excluding St. Louis street, had exhausted the legislative power in respect to the subject; and the petition charges that the ordinance is oppressive, unjust, and violative of the protection to persons and property accorded by the Constitution of the United States and of the state. There is an intervention by a religious corporation owning and maintaining a church near to St. Louis street, between Robertson street; and another intervention, by another property owner in the same neighborhood. The allegations in the petitions of intervention present the subject in a different phase, and allege the injury to property within the designated area, arising from confining houses of prostitution as proposed by the ordinance. Thus, the theory of the plaintiff's petition is that the city has no power to change the limits of houses of prostitution; the position of the interveners is, there should be no limits for such houses. The city and the officials sought to be restrained by the injunction except to the jurisdiction of the civil district court, on the ground that the injunction sought is directed against the enforcement of a penal statute, that the petition discloses no cause of action, and on other grounds unnecessary to notice. The judgment maintained the injunction, and this appeal followed.

It is clear that the civil district court has no jurisdiction to restrain prosecutions for crime confided by the law to the criminal courts. No prevention of such prosecutions is attempted. The plaintiff seeks the injunction for the protection of his rights of property, menaced, as he conceives, by an illegal ordinance. The right of the citizen to that protection is too clear to permit dispute, and, in our view, the petition contains all that is essential to secure relief at our hands, if the allegations in the petition are supported. 1 High, Inj. § 68. The regulation of houses of prostitution would seem to be so closely connected with public order and decency, the policy announced by the ordinance has been so long exerted in all large cities of our country, and the power has had such frequent recognition in the charters of this city, that it would seem the power itself cannot be successfully controverted. City Charter 1870, § 12; Id. 1892, § 8; Id. 1896, § 15. We have, however, given careful attention to the argument that urges objection to all such legislation, and which directs attention to the grounds of opposition deemed specially applicable to the ordinance, the execution of which is sought to be arrested. That there are limitations to the power asserted by this ordinance may be conceded. It does not, however, readily occur to the mind that confining houses of this character within certain limits, by the appropriate ordinance, is violative of any of the constitutional guaranties invoked in this discussion before us. The ordinance neither sanctions nor undertakes to punish vice. The power to punish vice, not in the form of an offense, denied by the argument and enforced by the authorities we find in the briefs, is, in our view, entirely

distinct from the function the ordinance asserts as belonging to municipal government, by the express terms of the city charter. It is urged, too, the ordinance is a license for vice, and hence illegal. Tiedeman, Pol. Power, p. 291. Undoubtedly, the court should refuse its aid to any ordinance if of the character asserted by the argument. The vice, the subject of this ordinance, beyond the reach of penal statutes, is simply subjected by this ordinance to that restraint demanded by the public interest. The unfortunate class dealt with by the ordinance must live. They are not denied shelter, but assigned that portion of the city beyond which they are not permitted to establish their houses. Thus viewed, the ordinance cannot be deemed open to the objections that it either punishes or grants a license to vice beyond the competency of the council.

Again, it is urged that the ordinance is oppressive, unreasonable, and hence not to be enforced, because it seeks to confine the depraved women in too narrow limits. We find the testimony of this tendency in the record. If the ordinance is lawful, this question of space is, in our opinion, confided to the council, and not for the courts. At any rate, we find no basis in the record to authorize the conclusion that the judgment of the council on this question is erroneous. There is the general proposition asserted by the argument that the correct policy is to diffuse the houses throughout the city, although the anticipated presence of the houses within half a square of the plaintiff's residence, and though on a different street, prompted this suit and vigorous opposition of the plaintiff. We cannot accept the view of public policy announced by the argument for the plaintiff, and, on that ground, set aside the action of the council.

The argument is advanced that houses once used for immoral uses, the subject of the ordinance, can never regain a reputable character; that the primary ordinance of this character gave the neighborhood it designated, and to the property within its limits, an ineffaceable stigma, depreciating for all time the value of the property; and hence it is argued that this first concession of private right for the public good is enough,—that is, the first exercise of power by the council is exhaustive of its power over the subject. The character of the houses within the limits first assigned is fixed forever. It is hence contended the limits cannot be changed, least of all extended, involving, as it would, a fresh and unnecessary sacrifice of private right. The effect of the argument, while conceding the function of municipal government to assign limits for such houses, is to affirm that this important municipal function, once exerted, can never be again exercised. The limits, we are told, must remain as originally fixed, irrespective of all those changes and public needs apt to arise, and to demand modifications of limits assigned years previously, for uses admitting of no suppression, but which can be restricted as to locality. It seems to us, if the functions asserted by the ordinance can be once

exerted as the argument concedes, the more reasonable conclusion is that the function may again be called into exercise, to meet the changed conditions time has called into existence, and which appeal for appropriate action to the municipal authorities. We cannot therefore assent to the proposition that, because limits for these houses were assigned perhaps more than three quarters of a century ago, therefore the council cannot furnish in 1896 the legislation demanded by the public interest.

There remains the argument addressed to us, varied in form, but maintaining the general proposition that the ordinance operates to deprive the citizen of his property; that is, to depreciate its value,—the same as deprivation in legal effect. We can readily appreciate there might be an arbitrary exercise of this power that would warrant an appeal to the courts. Thus, to extend these limits so as to embrace, without any apparent reason, if reason could exist, portions of the city always devoted to private residences, schools, churches, and other lawful uses, might well be deemed oppressive and an abuse of the power of municipal government; but, as we understand this ordinance, in its main features it is restrictive,—that is, confines these houses within narrower bounds. True, it takes in St. Louis street, or, as we believe, one side of the street excluded by the ordinance immediately preceding that now sought to be enforced. If it be true that St. Louis street—that is, both sides of it—was always without the area in which these houses were permitted, it is none the less true that St. Louis street has always been in close proximity to the space allotted to houses of prostitution. An extension of these limits, so as to take in that street, or rather that portion of it always alongside of the area for these houses, and at the same time greatly diminishing that area as previously delineated, does not strike us as arbitrary, or as calling for any substantial sacrifice of private rights beyond that re-

quired by antecedent ordinances. To whatever extent, however, the right of private property may be deemed affected by this last ordinance, it must be borne in mind that it is their great power of government given to preserve the morals, health, and lives of the community that requires the surrender of right by the citizen supposed to be exacted by this ordinance. To that police power all must yield obedience. As put in the text-books, and enforced by all decisions: Every citizen holds his property subject to the proper exercise of the police power, exerted either by the legislature or by the subordinate political corporations. It is settled that police laws and regulations, though they may disturb the enjoyment of individual rights, are not unconstitutional. They do not expropriate property for public use. If the individual sustains injury, it is deemed *damnum absque injuria*; or in the theory of the law, the injury to the owner is deemed compensated by the public benefit the regulation is designed to subserve. 1 Dill. Mun. Corp. § 93. It is our conclusion, on every aspect of the case, that the ordinance is the exercise of lawful power, and no ground exists to enjoin the execution of that the ordinance proposes. Id. § 310; Black, Const. Law, p. 301; Dyarrris, Stat. p. 455.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court in favor of plaintiff be *reversed*, and the injunction obtained by plaintiff issued be dissolved, his suit be dismissed, and that the judgment of the lower court dismissing the interventions, and dissolving the injunction granted on the prayer of one of them, be affirmed, and that plaintiff pay costs.

Nicholls, Ch. J., concurs in the judgment, but declines to sign it, for reasons orally assigned from the bench. **Blanchard**, J., concurs in the judgment, also, for reasons also assigned from the bench.

Rehearing denied January 9, 1899.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Franklin BARRICKMAN

v.

MARION OIL COMPANY, *Plff. in Err.*

(.....W. Va.....)

*1. A person or corporation engaged in furnishing natural gas to stoves, heaters, pipes, etc., for purposes of domestic light, heat, and fuel in a dwelling house, is bound to exercise such care, skill, and diligence in all its operations as is called for by

*Headnotes by MCWHORTER, J.

NOTE.—The above case seems to be a novel one as respects the liability for fire caused by illly regulated pressure of gas used for fuel.

As to the general subject of negligence in the escape and explosion of gas, see *Ohio Gas Fuel Co. v. Andrews* (Ohio) 29 L. R. A. 337, and 44 L. R. A.

the delicacy, difficulty, and dangerousness of the nature of the business, that injury to others may not be caused thereby; that is to say, if the delicacy, difficulty, and danger are extraordinarily great, extraordinary skill and diligence are required.

*2. If the defendant, so furnishing such gas, negligently and carelessly suffer and permit a greater amount of pressure of said gas to be furnished than is reasonably proper for said purpose, by reason whereof the house or building being so furnished is consumed or injured by fire, resulting from such negligence, the defendant is liable in damages for such loss.

note; also *Schmeer v. Gas Light Co.* (N. Y.) 30 L. R. A. 653; *Consolidated Gas Co. v. Crocker* (Md.) 31 L. R. A. 785; *Consumers' Gas Trust Co. v. Perrego* (Ind.) 32 L. R. A. 146; and *Pine Bluff Water & L. Co. v. Schneider* (Ark.) 33 L. R. A. 366

2. If such defendant suffer and permit its regulators or other appliances to be and remain for an unreasonable time in such condition that they do not control the amount and pressure of gas so furnished, so that more than a safe and proper amount of gas is so furnished, the defendant is guilty of negligence, and liable in damages for injuries proximately caused by such negligence.
4. If such injury is the natural consequence of such negligence, and such as might have been foreseen and reasonably anticipated as the result of such negligence, then such negligence must be regarded as the proximate or direct cause of the injury, in the absence of intervening negligence.
5. The mere fact that a building so furnished with gas was set on fire from the gas is not sufficient to justify the inference that an increased pressure of gas caused the fire.
6. In the trial of an action against a corporation so furnishing natural gas to a dwelling house, for damages causing the destruction of such house by fire by negligently permitting too great a pressure of gas, it is not competent to prove by a witness the bare fact of what pressure the gauge of another gas company usually indicated.

(December 14, 1898.)

ERROR to the Circuit Court for Monongalia County to review a judgment in favor of plaintiff in an action brought to recover damages for the loss of a house alleged to have been burned through defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. A. B. Fleming and U. N. Arnett, Jr., for plaintiff in error:

The person who uses natural gas, and seeks to recover damages by reason of the explosion thereof, "must show that he is free from fault."

Lebanon Light, Heat & P. Co. v. Leap (Ind.) 29 L. R. A. 342, note, which refers to *Bartlett v. Boston Gaslight Co.* 122 Mass. 209.

The negligence of the tenant is imputed to the owner.

Simpson v. Hand, 6 Whart. 311, 36 Am. Dec. 231.

The tenant having control of the property, it is his duty to take care of it and prevent damage from such causes.

McGahan v. Indianapolis Natural Gas Co. (Ind.) 29 L. R. A. 357; *Bartlett v. Boston Gaslight Co.* 117 Mass. 533, 19 Am. Rep. 421.

If the appellant was negligent in the care of its line and in not controlling the flow of gas, still the tenant's leaving the house unoccupied all day with the gas burning, knowing that the pressure of the gas varied, was negligence on his part, and such negligence being the intervening cause should have prevented a recovery.

Gerity v. Haley, 29 W. Va. 98; *Hesser v. Grafton*, 33 W. Va. 548; *Snoddy v. Huntington*, 37 W. Va. 111; *Eastburn v. Norfolk & W. R. Co.* 34 W. Va. 681; *Cooley, Torts*, p. 673.

Testimony as to the condition of the gas and the gas pressure in other houses was not 44 L. R. A.

only irrelevant, but it was calculated to prejudice the jury.

Lebanon Light, Heat, & P. Co. v. Leap (Ind.) 29 L. R. A. 342, note referring to the case of *Emerson v. Lowell Gaslight Co.* 3 Allen, 410; *Hunt v. Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697.

It does not appear that at any other time the pressure of gas was so great as upon that occasion, according to the testimony of said witnesses. If this be the case no rule of diligence or care would make appellant liable.

Hutchinson v. Boston Gaslight Co. 122 Mass. 219.

Messrs. Cox & Baker, for defendant in error:

The demurrer was properly overruled.

Snyder v. Wheeling Electrical Co. 43 W. Va. 661, 39 L. R. A. 499; 1 Hogg, Pleading & Forms, § 140; *Berns v. Gascon Gas Coal Co.* 27 W. Va. 285; *Davis v. Guarnieri*, 45 Ohio St. 470; *Ware v. Gay*, 11 Pick. 106; *McCauley v. Davidson*, 10 Minn. 418.

A gas company is bound to exercise such care, skill, and diligence in all its operations and in the transaction of all its business as is called for by the delicacy and difficulty of the nature of its business.

8 Am. & Eng. Enc. Law, p. 1273; *Ohisholm v. Atlanta Gaslight Co.* 57 Ga. 28; *Holly v. Boston Gaslight Co.* 8 Gray, 123, 69 Am. Dec. 223; *Emerson v. Lowell Gaslight Co.* 3 Allen, 410; *Butcher v. Providence Gas Co.* 12 R. I. 149, 34 Am. Rep. 626; *Dillon v. Washington Gaslight Co.* 1 MacArth. 626; *Ohio Gas Fuel Co. v. Andrews* (Ohio) 29 L. R. A. 337, note; *Holden v. Liverpool New Gas & Coke Co.* 3 C. B. 15; *Brown v. New York Gaslight Co.* Anthon, N. P. 356; *Blenkiron v. Great Central Gas Consumers Co.* 2 Fost. & F. 437; *Oil City Gas Co. v. Robinson*, 99 Pa. 1; *Koelsch v. Philadelphia Co.* 152 Pa. 355, 18 L. R. A. 759; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; *Strawbridge v. Philadelphia*, 13 Phila. 173; *Smith v. Boston Gaslight Co.* 129 Mass. 318; *Mose v. Hastings & St. L. Gas Co.* 4 Fost. & F. 324; *Kibele v. Philadelphia*, 105 Pa. 41.

Contributory negligence on the part of the plaintiff, which of itself defeats his recovery, must be the proximate cause of the injury, and the burden of proof of contributory negligence rests with the defendant.

Snyder v. Pittsburgh, C. & St. L. R. Co. 11 W. Va. 14; *Blaine v. Chesapeake & O. R. Co.* 9 W. Va. 252; *Sheff v. Huntington*, 16 W. Va. 307; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *Tompkins v. Kanawha Board*, 21 W. Va. 224; *Johnson v. Baltimore & O. R. Co.* 25 W. Va. 571; *Dooney v. Chesapeake & O. R. Co.* 28 W. Va. 732.

McWhorter, J., delivered the opinion of the court:

Franklin Barrickman brought his action of trespass on the case in the circuit court of Monongalia county against the Marion Oil Company, claiming damages for the destruction of a dwelling house, owned by him, by fire, occasioned by the negligence of the defendant in furnishing natural gas at said house for domestic purposes. On the 18th of

February, 1896, defendant appeared, and demurred to the declaration, and to each count, in which plaintiff joined and of which the court took time to consider. On the 24th of the same month the court overruled the demurrer, and the defendant pleaded to the general issue. Plaintiff filed an amended declaration, when defendant again demurred to plaintiff's whole declaration, and to each count, which demurrers were overruled by the court, and defendant entered its plea of not guilty to both the declaration and the amended declaration. A jury was duly impaneled, the case tried, and on the 20th of February, 1897, the jury rendered a verdict for plaintiff, and assessed his damages at \$1,000. Defendant moved the court to set aside the verdict, and grant it a new trial, because the verdict was contrary to the law and the evidence, for permitting improper evidence to go to the jury, for rejecting proper and material evidence offered by defendant, because the court gave several improper instructions on behalf of the plaintiff, and rejected and refused to give proper instructions offered by defendant, and in not giving instructions asked for by defendant in the form as prepared by defendant, and in modifying and making changes therein and additions thereto, and in giving them in such changed and modified form; which motion to set aside the verdict and grant a new trial was overruled and denied, and defendant excepted, and the court entered a judgment on said verdict against the defendant. Defendant took nine several bills of exception, which were severally signed, sealed, and made a part of the record. The defendant applied for and obtained a writ of error, assigning as error the overruling of the demurrers to the declaration and the amended declaration, and to each count; the permitting of improper evidence on behalf of plaintiff to go to the jury, as set out in bills of exception 5, 6, 7, 8, and 9; in giving plaintiff's instructions, and each of them, and in refusing defendant's instructions 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, and each of them; and in refusing to give defendant's instruction No. 8 in the form prepared and requested by defendant, and in amending the same by making addition thereto by the court, and in giving same to the jury in the form as shown by bill of exception No. 4. It is claimed that the demurrer to the declaration and to each count should have been sustained. There are three counts, two in the original and one in the amended declaration; and it is claimed by appellant that these counts are inconsistent (especially the one in the amended declaration) with those contained in the original declaration. In the latter (the original) it is averred that the dwelling house destroyed was the property of the plaintiff, and makes no mention of the fact that it was occupied, or in possession of a tenant or agent. In the amended declaration it is averred to be the property of and owned by plaintiff, while it is in the possession of one Milton Rinehart, as the lessee thereof, and from the plaintiff. It is no less the property of plaintiff, being in the possession of plaintiff by his tenant, than if the possession was held

by him in person, and the third count, or amended declaration, is simply to show the manner of the possession of the owner of the property, and is an eminently proper count. It is insisted that because it is averred, in substance, in all the counts, that it was the duty of defendant to control and regulate the quantity and pressure of gas in such manner that only such quantity and pressure as was necessary for fuel and domestic heat for said dwelling house should be furnished, the demurrers should have been sustained that the degree of diligence set forth in each count is greater than is required by law. Appellant says that, "if it can be claimed that because natural gas is a very dangerous substance, etc., and that, under certain circumstances, more than ordinary care can be required of a person or company furnishing it, such a rule would not apply in this case, as it is shown the appellant only had what is known as a 'high-pressure line' for its own use, and that the appellee and a few other householders in a small village were allowed to connect therewith for their own accommodation by means of their own gas line, called a 'service line,' and which was as much a 'gas line' as was the appellant's main." This may all be well said in the course of the trial on the merits of the case, but not on demurrer. It nowhere appears in the declaration that defendant had only what is known as a "high-pressure line" for its own use, and a few householders connected with it for their own accommodation. The theory of the declaration is that defendant was in possession of certain wells producing natural gas, and was engaged in the business of furnishing gas through its pipe lines to consumers for fuel and domestic heating purposes for consideration, and it is averred that it was so furnishing such gas to the said dwelling house, the property of said plaintiff, under contract, for valuable consideration, and, being so engaged, it was the duty of defendant to properly control and regulate the quantity and pressure of the said natural gas so far as same was necessary for fuel and domestic heat, which should be so furnished by it to and for said dwelling house; and then it is averred that on the day, etc., and at the county of Monongalia, the defendant wrongfully, negligently, and unlawfully caused, suffered, and permitted the said natural gas to run, flow, and pass out of and from the said wells producing natural gas, and out of and from the said lines of pipe, machinery, and apparatus of which the defendant was possessed, in and into and through the said burners, heaters, stoves, grates, pipes, lines of pipe of plaintiff (which were averred to be in good repair, and fit for the purposes for which they were used), in so great and large quantities, and with so great a pressure, that the said burners, heaters, etc., of plaintiff were then and there forced open, broken, thrown apart, and burst, and by reason thereof the said great and large quantities of gas did escape and pass out of said pipes, burners, etc., in and into the said dwelling house, and was ignited, burned, and exploded by the fires then and

there lawfully kept, and being in the burners, heaters, etc., by which means the said house was burned and destroyed. "The object of the declaration is to set forth the facts which constitute the cause of action so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and the court, who is to pronounce judgment." *Hogg Pleading & Forms*, § 140; *Berns v. Gaston Gas Coal Co.* 27 W. Va. 285; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499. The declaration in the case at bar is sufficient, and the court did not err in overruling the demurrers.

The second assignment is that the court erred in permitting the evidence mentioned in appellant's bills of exception numbered 5, 6, 7, 8, and 9, and in each of them, to go to the jury. That contained in bill No. 5 relates to certain questions asked witness Mrs. Berry, who lived some 300 or 400 yards from the house that was destroyed, and that was furnished with gas from the same pipe line. Witness was asked what the gas pressure was that day, at her home, about the time of the fire, and shortly before. She stated that it was very high; that she burned it in the cooking stove in the kitchen. "How high was it, and what did you do at your house, Mrs. Berry?" Answer: "Well, when I went out, the stove was red hot, and the wall was burning behind the stove." She was asked to describe to the jury how the gas was acting in the kitchen stove, and what it was doing. Answer: "Why the gas—The stove was red hot, and it was burnt behind the stove when I went out." She also said: "I first threw water on the fire, I guess." Also certain testimony of E. O. Wiedman, who was supplied with gas at his blacksmith shop, from the same line, and 200 or 250 yards from the Barrickman house that was burned, where he was asked: "How was the pressure at your house that day at the time, or shortly before, the fire?" Answer: "The gas, I think, was stronger than usual. Also the same bill sets forth certain questions asked of witness Mrs. Rosa Sutton, who lived about 100 yards from the Barrickman house, and was furnished gas from the same main, who was asked to state what the condition of the gas pressure was about the time, or shortly before, the house was burned. Answer: "It was very high. Was over the stove at work, and it was so high that it shook the stove-lids, and I got out of the way of it. I turned it off, and then went to the other fires, and could not get it regulated, and I turned it off from the house. When I heard of the fire, I turned it off from the house." Plaintiff's counsel also propounded the four following questions to the same witness, and received the following answers, as set out in said bill No. 5:

Q. Where did you go from the dwelling?

A. To the store.

Q. How was it there?

A. Just the same as in the house.

Q. What was the condition of the gaslights in the store?

A. Well, so high they blew out.

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Q. When you went to the stove in the kitchen, how was the gas acting?

A. I said that I was trying to regulate it in the stove, and went to the sitting room, and could not regulate it there, and came back to the stove, and turned it off from the grate.

Also witness Charles Hall, minister of the Methodist Protestant Church, who lived about 100 yards from the house that burned,—two houses between them. Witness's house was supplied with natural gas from the same main which furnished the Barrickman house, and he was asked: "What was the condition of the gas, and where were you?" Answer: "I was sick that morning, lying on a cot in the room where one of my fires was. I kept two fires, one in the stove and sitting room. My brother was with me. He was reading by the fire. Noticed the fire come on. I thought he didn't notice it, as he was reading, and I spoke to him, and directed the fire to be turned lower. The pressure seemed higher than usual."

Also, in the same bill, witness Jacob Barrickman, who lived 125 or 150 yards from the house that burned, and was supplied with gas from the same main line, and got home about half past 11 o'clock, day of fire, was asked:

Now, Mr. Barrickman, when you came home, what was the pressure in your house?

A. Well, I guess, when I came home, it seemed to be higher than usual.

Q. I will get you to state to the jury what the pressure and condition of the gas was about the time the fire broke out in the Barrickman house, and shortly before.

A. Well, I guess about 11, or between 11 and 12 o'clock, it came on very strong, high pressure, stronger than it usually came on in the store building there.

This testimony so excepted to refers to the condition of the gas as to the force and pressure at the time of the fire; no regulator on the main pipe intervening between the house burned and houses occupied or referred to by the witnesses. Appellant cites the case of *Emerson v. Lowell Gaslight Co.* 3 Allen, 410, to sustain its position. That case is not applicable. It was for damages sustained by sickness introduced and suffered in a certain building by inhaling the gas that escaped into the house, but evidence that the inmates of another house were made sick in consequence of inhaling the gas that escaped into their house from the same defect in defendant's pipes was held inadmissible. "The evidence should be limited to the effect of the gas upon those who have in common, and under similar circumstances, inhaled it." *Hunt v. Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697. The condition and pressure of the gas in the neighboring houses at the time of the fire, there being no intervening regulator or hindrance to the force of the gas between the burned house and the other houses men-

tioned, would clearly indicate what it was at the house of plaintiff, and I see no valid objection to the answering of the questions.

Bill of exceptions No. 6 relates to the testimony of plaintiff, which refers to what took place between plaintiff and Charles J. Meeks, an employee of defendant, who had been asked by plaintiff to go to the house, and see if the fixtures were safe; complaint having been made about a leak of gas. Witness was asked and answered questions as follows:

Q. What was done in reference to the leak?

A. He called my attention to the leak, and says, "It is not safe,"—the way Charlie spoke to me; and, says I, "Charlie, if it is not safe, I want you to take the gas out of the house until you know it is safe." I told him to shut the gas out of our house until he knewed it was safe.

Q. State whether or not it was repaired after that.

A. It was repaired after that.

Q. State whether or not Meeks approved of it after it was repaired.

A. He did.

Appellant insists that it owed no duty to appellee in reference to service line and gas fittings in the house and about the store, and that anything that Meeks did towards repairing them was done for and as the employee of appellee, or for his accommodation, and neither his acts nor declarations would bind appellant. Meeks testified that he was not the agent of defendant; that he was an employee, a laborer. It is true, he did so much of skilled work for defendant as to connect the service pipes with the main line, which was his only duty connected therewith; but, as alleged in the declaration, plaintiff was the owner of and put in the pipes, burners, etc., in his house, by himself, or his tenant, and it was his duty to keep the same in good order and repair. Meeks was only the agent of defendant in the line of his duties in its employ, and could not be called to the service of another without the consent of defendant, and it was improper to admit as testimony before the jury what Meeks told plaintiff in relation to the condition and repairs of the fixtures of plaintiff in his house and on his premises.

Bill of exceptions No. 7 relates to the evidence of E. O. Wiedman, who was asked what the gauge at the regulator showed the pressure to be at the time of the fire, the house still burning, but nearly burned down, answered, "The hand was on the other side of the pin," and witness was asked "whether that gauge registered more than 180 pounds, or whether that was all it could register." He answered, "There was only 180 pounds marked on it." Witness had stated that once in a while for probably six months back he had gone to the register, and generally looked at what it stood at, and the best that he could remember, outside of the one time he had mentioned, he had seen it as low as 15 pounds and as high as 40 or 50; and was asked and answered the following questions:

Q. From that time on up to the fire, when

you examined the gauge, about what would the pressure stand at?

A. Well, I have saw it as low, I guess.

Q. Usually about what, ordinarily? You have seen it as low as that and as high as that. About what was it usually?

A. I suppose midway between, I reckon.

To which exceptions were taken. Also the following questions and answers propounded to and given by witness Reuben Laytan (included in same bill of exceptions):

Q. Whether or not you examined it on that day, and what it registered?

A. I went over and looked at it, after the fire was all over.

Q. How shortly afterwards?

A. It might have been two hours.

Q. Mr. Laytan, was part of the house still burning?

A. Yes, sir; there was fire there yet when I went there.

Q. Mr. Laytan, how did that gauge register?

A. 80 pounds, when I went there.

This examination of witnesses was on the matter of the flow of the gas, and referred to the register of defendant at its regulator; and, while it was a little after the fire,—an hour or two,—it was corroboration of witnesses who had testified to the fact of an extraordinary flow of gas at and immediately before the time of the fire; and I think the testimony was competent, as well as that tending to show what the flow had been for some time before.

Bill of exceptions No. 8 relates to testimony of witnesses J. M. Gregg and Samuel McGara. Gregg, an employee of the Union Improvement Company, engaged in furnishing natural gas for fuel, light, and heating in the vicinity of Morgantown, had been employed in the office about four years, and was asked, "I will get you to state to the jury what that pressure is customarily," and, by the court, "What pressure is usually contained in gas lines that furnish gas for domestic use?" Answer: "I can only speak from the gauge in one office. All the examinations there I made of that gauge show from a half to a pound; sometimes a little lower than a half a pound, in cold weather." Witness McGara was asked and answered the following questions, to which exceptions were taken, as shown in said bill No. 8:

Q. I will get you to state to the jury what pressure is used by you, or is necessary to operate an oil well,—what pressure without fire and without steam.

A. Well, 30 pounds pressure is enough to pump a well.

Q. Mr. McGara, from your experience in the gas business, I will get you to state whether or not, in your judgment, 30, or 40, or 50, or 60, or 80, or 180 pounds of gas on the service line to dwelling house—say $\frac{3}{4}$ inch pipes—is dangerous.

A. I would not let that go into a house.

These two witnesses were examined as experts. Gregg had been employed as book-

keeper in a gas office, and as stated by himself, could only speak from the gauge in this office. Said he was not an expert; did not claim to know what pressure would be dangerous. It is not competent to prove, in this case, the bare fact of what the gauge of some other gas company might show, unless accompanied by scientific explanations or expert testimony showing its relevancy; hence the evidence of Gregg should not have been admitted. Witness Samuel McGara had large experience, and could be considered an expert in the use of gas, as well as the handling and controlling of it, and his testimony, excepted to, taken in connection with the rest of his testimony, is not exceptionable, and it was properly admitted.

The ninth bill of exceptions relates to the introduction by plaintiff of a receipted gas bill made by defendant against E. O. Wiedman, dated January 1, 1896, for "the use of gas as per contract to February 1st, 1896, \$3." This, I presume, was introduced to prove the fact that defendant was furnishing gas for consideration. This bill was made quite nine months after the injury complained of, and I fail to see the relevancy of it, even if it were a transaction between defendant and plaintiff, instead of a stranger. Its admission was an error; yet, I think, harmless.

At the request of appellee, the court gave to the jury the following instructions, numbered 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, and 14: "(1) The jury is instructed that a corporation or person furnishing natural gas to the stoves, heaters, burners, pipes, lines of pipe, machinery, or apparatus of another, to be used for the purpose of domestic heat and fuel in a dwelling house, is bound to exercise such care, skill, and diligence in all its operations as is called for by the delicacy, difficulty, and dangerousness of the nature of its business, in order that injury may not be occasioned to others; that is to say, if the danger, delicacy, and difficulty is extraordinarily great, extraordinary skill and diligence is required. (2) The jury is instructed that it was the duty of the defendant, as it is of all incorporated companies which are invested for their own profit and advantage with the great and important privilege of supplying a community with natural gas for private habitations, to be used as fuel and domestic heating, to exercise such care, diligence, and skill in the conduct of its business as is proportioned to the danger or risk to the property of others. (3) The jury is instructed that if they believe from the evidence that at the time of the alleged injury and burning of the plaintiff's dwelling, mentioned in the declaration, the defendant, for a valuable consideration, was furnishing natural gas to the stoves, grates, burners, heaters, pipes, lines of pipe, machinery, or apparatus used for the purpose of fuel and domestic heat in and about said dwelling, and that the defendant negligently and carelessly suffered and permitted a greater amount of pressure of said gas to be furnished than is proper for said purpose, and that by reason thereof the plaintiff's

said dwelling house was consumed by fire, then the jury must find for the plaintiff, and assess his damages occasioned by such burning. (4) The jury is instructed that if they believe from the evidence that natural gas is a very dangerous, volatile, and explosive substance, then the person or corporation who furnishes it for valuable consideration to the stoves, heaters, burners, pipes, lines of pipe, machinery or apparatus of another, for the purpose of fuel for domestic heat, must use such care, skill, attention, and diligence in order that no greater amount or pressure thereof shall be so furnished than is proper to be furnished, and in order to prevent injury to the person or property of others, as is proportioned to the danger of such substance." "(6) If the jury believe from the evidence that natural gas is an extremely dangerous substance, and that the defendant, at the time of the burning alleged in the declaration, was furnishing, for a valuable consideration, such gas to the heaters, burners, stoves, grates, pipes, lines of pipe, machinery, or apparatus of the plaintiff, for the purpose of using such gas as fuel for domestic heat in and about the dwelling house mentioned in the declaration at the time of such burning, then it was the duty of the defendant under the law to use such care, diligence, and skill, both in providing proper machinery, regulators, and apparatus, work, labor, and attention, in order to control such gas, and the amount of pressure furnished to such dwelling house, as is in due proportion to the nature of the substance used. (7) If the jury believe from the evidence that the defendant, at the time of the alleged burning of the dwelling house of the plaintiff, mentioned in the declaration, was, for a valuable consideration, furnishing natural gas to said dwelling house or to the machinery and apparatus used in and about said dwelling house, for the purpose of burning natural gas for domestic heat and fuel, as mentioned in the declaration, and that the said defendant at the time of such burning negligently failed to provide all such appliances, regulators, and machinery as were reasonably necessary to control the amount and pressure of the gas so furnished, then such failure is negligence on the part of the defendant, and it is liable for such damage to the property of another as was the direct result of such negligence. (8) The jury is instructed that if it believes from the evidence that at the time of the burning of the dwelling house of the plaintiff, alleged in the declaration, the defendant, for a valuable consideration, was furnishing to and for the machinery and apparatus in and about said dwelling house, for the purpose of domestic heat and fuel, a substance known as 'natural gas,' and that at the time of such burning the defendant permitted and suffered its regulator or regulators to be in such condition that it or they did not control the amount and pressure of the gas so furnished, and that it had permitted and suffered its regulators to remain in such condition for at least three or four months prior to the time of said burning, and that more than a safe and proper amount of gas was so furnished, then the defendant is

guilty of negligence, and it is liable to the plaintiff for any damages occasioned to him directly caused by such negligence. . . .

(10) The jury is instructed that if they believe from the evidence that the defendant was guilty of the negligence or carelessness, charged in the declaration, and that the injury complained of was the natural consequence of such negligence or carelessness, and such as might have been foreseen and reasonably anticipated as the result of such negligence or carelessness, then such carelessness or negligence should be regarded by the jury as the proximate or direct cause of the injury. (11) The jury is instructed that the burden of proving contributory negligence rests with the defendant, but the jury may look to all the evidence offered by both parties to determine the question of contributory negligence. (12) The jury is instructed that remote negligence on the part of the plaintiff or those occupying the house in the declaration mentioned at the time of the alleged burning will not prevent the plaintiff from recovering for an injury for the destruction of his property immediately caused by the negligence of the defendant. (13) The jury is instructed that the negligence on the part of the plaintiff, in order to defeat of itself his recovery, must be a proximate cause of the injury. (14) The jury is instructed that the negligence of the plaintiff, Barrickman, or his tenant, Rinehart, in this case, which precludes a recovery, is where, in the presence of a seen danger, he omits to do what prudence requires to be done under the circumstances for the protection of his property, or does some act inconsistent with its preservation. Where the danger is not seen, but merely anticipated, or dependent upon future events, such as the future continuance of the defendant's negligence, plaintiff is not bound to guard against it by refraining from his usual course, being otherwise a prudent one, in the management of his property and business." To which appellant excepted by bill of exceptions No. 2. The argument against the giving of most of these instructions is the same as that used on the demurrer. Appellant insists that under the averments of the declaration, as well as the instructions, too high a degree of care and diligence is required of appellant in the handling of the gas; that there is a proper rule for each case as it arises; and it is insisted that in this case it is that of ordinary care and diligence.

In *Berns v. Gaston Gas Coal Co.* 27 W. Va. 285 (Syl. point 7), it is held that "negligence" and "ordinary care" are correlative terms. What constitutes ordinary care depends on the circumstances of each particular case. It is such care as a person of ordinary prudence would exercise under the circumstances." What are the circumstances of this particular case? Appellant was engaged in the business of transporting and furnishing to consumers an article of trade and traffic of the most delicate, explosive, and inflammable nature, and very dangerous, and the care and diligence of appellant must be commensurate with the danger incident to the handling of the commodity. Appellant cites *Bartlett v.* 44 L. R. A.

Boston Gaslight Co. 122 Mass. 209, to show that appellee's instructions 12, 13, and 14 especially were bad, where it was said: "The jury, in the main part of the charge, had been told that the burden of proof was on the plaintiff to show affirmatively 'that the injury was occasioned by the negligence of the servants of the defendant company; and that in no material degree did the negligence of the tenant of the plaintiff contribute to that injury.' 'The question is, Was either of these parties negligent or not? If either, which?'"

The plaintiff must satisfy you upon the whole evidence, by a fair preponderance of the evidence, that he was in the exercise of such care as a prudent man might reasonably be expected to exercise under the circumstances, and that the explosion was caused by the negligence of the defendant." The company is liable in damages "if the plaintiff's tenant was in the exercise of due care." Instruction 12 was not proper to be given, because it was not applicable. In the very nature of the case at bar, as disclosed by the record, plaintiff's negligence, if guilty of any, was not remote, but proximate; and the instruction was misleading. No. 13 is the law in that case, as laid down by this court in *Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 14 (Syl. point 7), discussed by the court on page 37. The nature of that case differs very materially in many respects from the case at bar, and I can scarcely see how it can be made to apply here, unless there should be added to it, "unless the danger was such as no prudent man ought to risk." With these qualifying words it might have been given. Appellee's instructions Nos. 3, 7, and 8 should not have been given because they "present a certain hypothesis [the negligence of defendant], and make the case turn wholly on it, disregarding another hypothesis [contributory negligence] fairly arising on the evidence." *Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470 (Syl. point 9); *McKelvey v. Chesapeake & O. R. Co.* 35 W. Va. 500 (Syl. point 3). Instruction No. 10 is subject to very much the same criticism, and should not have been given without adding to it, "in the absence of intervening negligence," or something to the same effect. The other instructions of appellee were properly given.

Appellant asked the instructions Nos. 1 to 13, inclusive, which (leaving out No. 8) are referred to in bill of exceptions No. 3, and are as follows: "(1) The plaintiff, in order to recover in this suit, must satisfy the jury by a preponderance of testimony that the defendant was guilty of negligence, and that such negligence caused the injury. (2) The mere fact that the house of the plaintiff was set on fire is not sufficient to justify the inference that an increased pressure of gas caused the fire. (3) If the jury believe from the evidence that the plaintiff and his tenant Milton Rinehart, or either of them, had knowledge some time prior to the burning of the plaintiff's house that the pressure of gas in the defendant's lines was uneven and variable,—greater at some times than at others,—and if, by reason of such uneven and varia-

ble pressure, it was dangerous to use the gas from said line for lighting and heating the dwelling house owned by the plaintiff and occupied by Milton Rinehart, then the plaintiff was guilty of negligence in permitting the same to be used therein; and if the jury believe that the fire which destroyed said house was caused by an uneven and variable pressure of gas, he cannot recover damages against the defendant for the injuries sustained. (4) If the jury believe from the evidence that the plaintiff and his tenant, Milton Rinehart, or either of them, had knowledge, prior to the burning of said house, that the pressure of gas in defendant's lines was variable and uneven, and that the tenant left the gas burning in said house during his absence and the absence of his family therefrom, on the day and at the time of the so leaving of the gas burning during his and his family's absence from the house, this was negligence on the part of the tenant, which negligence of the tenant is to be imputed to the plaintiff, and the plaintiff cannot recover in this action. (5) If the jury believe from the evidence that at the time of the fire which destroyed plaintiff's house there was an unusual pressure of gas, as described in the declaration, and that said gas, with unusual force, came into the pipe and appliances and to the burners, valves, and fittings on the plaintiff's premises and thus increased the quantity of gas where the same was to be consumed, yet the plaintiff cannot recover if the jury further believe from the evidence that the pipe, valves, fittings, and appliances placed on the plaintiff's premises, for the purpose of conducting said gas from the defendant's line to said house were not in good order and repair, and were at the time of the fire unsafe for the use and consumption of said gas, and that by reason thereof the said gas escaped, or the quantity thereof being burned was increased, and caused the destruction of said house. (6) If the jury believe from the evidence that the plaintiff's tenant, Milton Rinehart, was guilty of negligence in the placing or maintaining on said leased premises the pipe, valves, fittings, and appliances which made the connection to conduct said gas from defendant's main into the house on said leased premises in an unsafe condition, and in not keeping and maintaining said pipe, valves, fittings, and appliances in good order and repair, and in proper and safe condition for the use and consumption of the gas, and that by reason of which unsafe condition of said pipe, valves, fittings, and appliances said house was set on fire, and destroyed, by means of an explosion of said gas, or by means of increased heat or the escape of gas, occasioned, in whole or in part, by such unsafe and defective pipe, valves, fittings, and appliances, the negligence of the tenant, Milton Rinehart, should prevent the plaintiff from recovering in this action, and the jury should find for the defendant. (7) If the jury believes from the evidence that, at the time of the fire which destroyed the plaintiff's house, Milton Rinehart, the plaintiff's tenant, was guilty of negligence in not keeping and maintaining pipes, valves, fixtures, and ap-

pliances placed on the premises of the said plaintiff for the purpose of conducting the said gas from the defendant's main into the said dwelling house on said premises in good order and repair, and if the said negligence of the said tenant, in whole or in part, caused or occasioned the injury complained of and described in the declaration in this cause, the plaintiff cannot recover, and the jury should find for the defendant. . . . (9)

If the jury believe from the evidence that the house of the plaintiff, described in the declaration, was by the defendant furnished and supplied with gas on the application of Milton Rinehart, the plaintiff's tenant, and that such gas was conducted from the defendant's main or gas line to said house by means of pipe, valves, fittings, and appliances laid and furnished by said tenant, with the consent of the plaintiff, and that pursuant to a promise made by said tenant that he, said tenant, would keep and maintain said pipe, valves, fittings, and appliances necessary and proper for the safe use and consumption of said gas in good order and repair, and that the fire which consumed the plaintiff's house was caused by an explosion of the gas in said house, or by any other means resulting from the escape or leakage of said gas, or the negligent manner of taking care of or using the same after leaving the defendant's main, the plaintiff cannot recover, and the jury should find for the defendant. (10) If the jury believes from the evidence that the injury complained of by the plaintiff in his declaration resulted from a cause which neither the plaintiff nor defendant knew of, and of which the defendant could not, by the exercise of ordinary care and prudence, have foreseen or known, the injury would be the result of accident, and for which the defendant would not be responsible, and the jury should find for the defendant. (11)

Only ordinary care and prudence were required of the defendant in the conduct of its business and in the management of the gas line described in the declaration, and, if the jury believes from the evidence that the defendant exercised ordinary care and prudence in the delivering of its gas through the pipe line into the service line of the plaintiff or his tenant leading to the house which was destroyed, then the plaintiff cannot recover for the injury complained of. (12) If the jury believes from the evidence that the defendant had upon its gas line from which it delivered gas to the plaintiff for use in his house, gas regulators in good order and sufficient to control the pressure and quantity of gas, and that the plaintiff used ordinary care in having its gas line and said regulators inspected and kept in good working order and safe condition, and that said regulators were so inspected within an hour or less of the time of the accident complained of in the declaration, and found to be in good order, and working properly, and the gas properly regulated and controlled thereby, and that from some unknown cause said regulators, or one of them, after said inspection, and before said fire, became temporarily and suddenly obstructed

in some unknown way, which caused them, or either of them, to cease to work, or regulate said gas, and by reason of which the quantity and pressure of gas was enormously and suddenly increased to a high pressure, which occasioned the injury complained of in the declaration, the defendant is not responsible for such accident, and the plaintiff cannot recover in this action. (13) The jury is instructed that in this case negligence is the ground of the plaintiff's action, and that it therefore rests upon the plaintiff to trace the fault of his injury to the defendant, by proving negligence upon the part of the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if from these circumstances so proved by the plaintiff, and from all the evidence, including the evidence of the defendant, it appears that the fault of the injury was mutual, or, in other words, that the negligence is fairly imputable to the plaintiff or his tenant, the plaintiff cannot recover."

Appellant's instructions Nos. 1 and 2 were given. As to Nos. 3 and 4, in my view of the case they are too sweeping. It is a fact known to all who have any knowledge of natural gas that the pressure is uneven and variable, greater at some times than at others, which facts are also abundantly shown in the evidence in this case; and by reason of such variable pressure it is more or less dangerous to use it; and, if instruction No. 3 is proper to be given, contributory negligence would have to be presumed in every case of this character. I think it simply tends to confuse and mislead the jury; and, if No. 4 is proper, then in no instance could a consumer leave his house with the gas turned on to any extent without being guilty of contributory negligence in case of destruction of his property from the gas. However, a majority of the court holds No. 3 to be good, and that the same should have been given, and that No. 4 was properly rejected. As to instructions Nos. 5, 6, 7, and 9, there was evidence tending to prove that the fixtures of plaintiff, especially those connecting the gas with the stove where the fire originated, were not well put in, as shown by the evidence of Robert and Charles Barlickman, who did the work; that it was probably not a good job, or well done, and that Dr. Rinehart, the tenant, had notice thereof; and also tending to show that such fixtures were not in good order and repair, and were not safe. In view of the evidence in the case, said last-named instructions were improperly rejected. Appellant's instructions 10, 11, and 12 are drawn upon appellant's theory of "ordinary care" only being incumbent upon it, and were properly rejected as presented, and should not have been given unless "ordinary care" was so qualified in said instructions to be "such care as is required by the dangerous character of natural gas." Instruction No. 13 is the law as laid down by Cooley on Torts (p. 803,* 673). He says: "The plaintiff must show the circumstances under which the injury occurred, and if, from these circumstances, it appears

that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by showing them, disproved his right to recover;" and adds: "There is a legal presumption against negligence, upon which he is at liberty to rely, thus casting the burden of showing contributory negligence upon the defendant." The instruction is in consonance with plaintiff's instruction No. 11 "that the burden of proving contributory negligence rests with the defendant, but the jury may look to all the evidence offered by both parties to determine the question of contributory negligence"; and should have been given. *Gerity v. Haley*, 29 W. Va. 98, and *Carrioco v. West Virginia C. & P. R. Co.* 39 W. Va. 86, 24 L. R. A. 50 (Syl. point 7).

Instruction No. 8, which is made the subject of bill of exceptions No. 4, is as follows: "(8) If the jury believe from the evidence that the house of the plaintiff described in the declaration was by the defendant furnished and supplied with gas upon the application of the plaintiff's tenant, Milton Rinehart, and that such gas was conducted from the defendant's main or gas line to the said house by means of pipe, valves, fittings, and appliances laid and furnished by the said tenant with the consent of the plaintiff, and that such gas was furnished upon the promise of the said tenant that he would keep and maintain said pipe, valves, fittings, and appliances in good order and repair, the jury is instructed that it was the duty of the plaintiff, or his tenant, Milton Rinehart, to see that the pipe, valves, fittings, and appliances and fixtures on the premises of the plaintiff, described in the declaration, and which conducted the gas from the defendant's gas line to the premises of the plaintiff, were kept in good order and repair, and in proper and safe condition for the use and consumption of gas on the premises and in the house of the plaintiff; and if the jury believes from the evidence that such pipes, valves, fittings, and appliances which made the connections necessary to conduct said gas from the defendant's gas line to said premises were not, at the time of the burning of the plaintiff's house, in good order and repair and safe condition for the consumption of such gas, and that the fire which destroyed the plaintiff's house was caused from gas, and that such fire was caused by escape or leakage of such gas, or the negligent manner of taking care of or using the same after leaving the defendant's main or gas line, the plaintiff cannot recover, even if the defendant was negligent as claimed by the plaintiff in his declaration." For the same reasons given above for granting instructions 5, 6, 7, and 9, this No. 8 should have been given as presented, and without the modification by the court as given.

For the reasons herein given, *there is error in the judgment complained of, and the same is reversed* and annulled, the verdict of the jury set aside, and the case remanded to the circuit court for a new trial to be had therein

Mary A. STEWART

v.

NORTHERN ASSURANCE COMPANY of
London, *Plff. in Err.*

(..... W. Va.....)

- *1. While the judgment of a competent court of any state that has jurisdiction over the person or subject-matter is conclusive upon the merits of the controversy in every state, a court of another state has not the power, without service of process or voluntary appearance, to render a judgment on a contract that is absolutely void, under the statutes of the state where it is made.
- *2. If such a void contract is sued on by a foreign attachment in a foreign jurisdiction, the garnishee must make defense to the action, or notify, if practicable, his absent creditor of the pendency of the attachment proceedings, that such creditor may make such defense; otherwise, a judgment rendered by default will not protect the garnishee when sued by his creditor.

(Brannon, P., dissents.)

(December 17, 1898.)

ERROR to the Circuit Court for Hancock County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Erskine & Allison, for plaintiff in error:

A judgment in an attachment proceeding, if the defendant has appeared to the merits, or has been served with process, will be *in personam* as well as *in rem*.

1 Barton, Law Pr. 971.

Where there is a seizure of the defendant's property at the commencement of the action, or in garnishment, what is equivalent to seizure at that time, namely service of process on the garnishee, accompanied in both cases by publication or other form of substituted service against the nonresident defendant, such process is due process of law in attachment suits, and a judgment so rendered will divest the defendant of his title to such property, and will protect the garnishee from the danger of double payment.

Reno, Nonresidents, § 241; *Campbell v. Home Ins. Co.* 1 S. C. N. S. 158; *Morgan v. Verille*, 74 Pa. 52; *Morrison v. New Bedford Inst. for Sav.* 7 Gray, 269; *Wheeler v. Aldrich*, 13 Gray, 51; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Miller v. United States*, 11 Wall. 268, 20 L. ed. 135; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 502, 36 L. R. A. 640; *Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co.* 95 Va. 515, 40 L. R. A. 237.

*Headnotes by MCWHORTER, J.

NOTE.—As to protection of nonresident creditor against garnishment, see note to *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 777, also *Louisville & N. B. Co. v. Nash* (Ala.) 41 L. R. A.

See also 48 L. R. A. 452.

The judgment of a justice comes within the term "judicial proceeding."

Black, Judgm. §§ 935, 936.

The invalidity of the contract between Mrs. Stewart and Porter & Company did not deprive the Ohio justice of jurisdiction to pass on any question that was before him in that case. Both the proceeding and the judgment were *in rem*.

Waples, Attachment & Garnishment, 513; *Cooper v. Reynolds*, 10 Wall. 318, 19 L. ed. 932; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

The fact that Mary A. Stewart was a married woman residing and contracting in a state where the laws at the time held her personal contract void would, if it had been pleaded in the Ohio court, have been a complete defense to the action of Porter & Company.

There is no evidence that the garnishee knew that she was a married woman, and the law did not require it to be concerned with any fact not affecting the jurisdiction of the court.

Black, Judgm. § 595; *Earl v. Matheney*, 60 Ind. 202; *Drake, Attachment*, 7th ed. §§ 87b, 87c, 88a, 89, 89a, 89b.

The Northern Assurance Company is entitled to protection because the judgment was by a court which had jurisdiction over it, and over its indebtedness, which both parties admit was valid.

Black, Judgm. § 888.

Had this been a personal judgment rendered in Ohio against a married woman on a contract made in Ohio and while she was by the law of that state incompetent to make it, the judgment would not be declared a nullity merely on account of such incapacity to make the contract.

Callen v. Illison, 13 Ohio St. 446, 82 Am. Dec. 448; *McCurdy v. Baughman*, 43 Ohio St. 78.

The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action.

Sheldon v. Newton, 3 Ohio St. 490; *United States v. Arredondo*, 6 Pet. 709, 8 L. ed. 554; *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283; *Cornett v. Williams*, 20 Wall. 226, 22 L. ed. 254; *Thompson v. Tolmie*, 2 Pet. 157, 7 L. ed. 381; *Cooper v. Reynolds*, 10 Wall. 308, 13 L. ed. 931.

No provision of law in one state as to contracts made in such state, or as to the capacity of persons residing therein to contract, determines the jurisdiction of any court of another state—its right to hear and determine any matter.

The claim that the fact that a debt has its situs where it was contracted, and where the debtor resides, will bar a jurisdiction by attachment in another state where a debtor of that creditor may be found, will not be sustained in West Virginia.

Sterens v. Brown, 20 W. Va. 458; *Mahan-*

41 L. R. A. 331, and cases cited in footnote; and *Swedish American Nat. Bank v. Bleecker* (Minn.) 42 L. R. A. 283.

oy v. Kephart, 15 W. Va. 622; *Illinois O. R. Co. v. Smith*, 19 L. R. A. 577, note, 70 Miss. 344.

Mr. John R. Donehoo, for defendant in error:

A contract made in West Virginia, by a married woman domiciled there, in 1891, is void.

White v. Foote Lumber & Mfg. Co. 29 W. Va. 385.

Inquiry may be made collaterally into the question of jurisdiction.

Bowler v. Huston, 30 Gratt, 266, 32 Am. Rep. 673; *Virginia Bd. of Public Works v. Columbia College*, 17 Wall. 521, 21 L. ed. 687; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Knowles v. Logansport Gas-light & Coke Co.* 19 Wall. 58, 22 L. ed. 70.

As to our own home judgments, our courts are perfectly free to go into examination of the basis of such judgments, and, if they are found not to stand on jurisdiction, will set them aside as void.

White v. Foote Lumber & Mfg. Co. 29 W. Va. 385; *Dickel v. Smith*, 38 W. Va. 635.

Nor are our West Virginia courts a whit less free to inquire into the jurisdiction of the court of a sister state.

Gilchrist v. West Virginia Oil & Oil Land Co. 21 W. Va. 115, 45 Am. Rep. 555; *Crumlish v. Central Improv. Co.* 38 W. Va. 390, 23 L. R. A. 120; 6 Rob. Pr. new, 437; *Gray v. Stuart*, 33 Gratt. 351; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; 1 Black, Judgm. § 275; *Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 340.

Assuming that Justice Hauser's court had jurisdiction of the person of Mrs. Stewart, and of the res attached, had it jurisdiction to render the judgment it did? Both parties to the contract—Porter & Company and Mrs. Stewart, a married woman—resided in West Virginia, and it was there that the contract was both made and to be performed. The *lex loci contractus* governs as to the interpretation and validity of the contract.

Stevens v. Brown, 20 W. Va. 450; *Crumlish v. Central Improv. Co.* 38 W. Va. 390, 23 L. R. A. 120; *Wick v. Dawson*, 42 W. Va. 43.

The law of domicil denounces the judgment as void.

Armstrong v. Best, 112 N. C. 59, 25 L. R. A. 188; *Evans v. Beaver*, 50 Ohio St. 190.

"The situs of a debt is the domicil of the creditor," is the doctrine as tersely stated.

Reno, Nonresidents, § 166; *Kirtland v. Hotchkiss*, 100 U. S. 401, 25 L. ed. 558; *Wharton, Conf. L.* §§ 359-371; *Wilkins v. Ellett*, 9 Wall. 740, 19 L. ed. 586; *Renier v. Huribut*, 81 Wis. 24, 14 L. R. A. 562; *Missouri P. R. Co. v. Sharitt*, 8 L. R. A. 385, 43 Kan. 375; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Taylor v. Life Asso. of America*, 13 Fed. Rep. 493; *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 23 L. R. A. 210.

The moment a state attempts to lay its hands upon the rights of those whose domicil and affairs are beyond its boundaries, its acts are null.

Black, Constitutional Prohibition, § 120; *Drake, Attachm.* § 474; *Douglass v. Phenix* 44 L. R. A.

Ins. Co. 138 N. Y. 209, 20 L. R. A. 122; *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849.

The court will not protect the garnishee if from any cause the judgment against the defendant is void.

Drake, Attachm. § 691.

McWhorter, J., delivered the opinion of the court:

Mary A. Stewart, a married woman, was the owner of an hotel and furniture in New Cumberland, Hancock county, which was insured by the Northern Assurance Company of London, England, which had its central or principal office in the United States, at Cincinnati, Ohio. A loss occurred by fire, which was duly adjusted at \$1,700; and before the money was paid to the assured, Porter & Company, a corporation doing business at New Cumberland, brought an action before Louis Hauser, a justice of the peace, at Cincinnati, Ohio, on a store account against Mary A. Stewart, and sued out an attachment against the property of said Stewart, and cited the said assurance company to answer as garnishee, as the debtor of said Stewart. In obedience to the summons duly served on it, the company appeared and answered, admitting its indebtedness to Stewart, when the justice heard the case, rendered judgment against the defendant, and issued an order against the garnishee, requiring it to pay \$251.07, the amount of Porter & Company's judgment, which it did on the 16th of June, 1892. On the 27th of July, 1892, Mary A. Stewart brought her action against said assurance company in the circuit court of Hancock county, upon her policy of insurance, to recover the said sum of \$1,700. The defendant appeared, and filed a special plea in writing, setting up the payment made by it under the said proceedings in Cincinnati of \$251.07, and paid into court the residue of the \$1,700, with its interest; to the filing of which special plea plaintiff, by counsel, objected, which objection was by the court overruled, and the plea allowed to be filed, and leave was granted to plaintiff to file a special replication thereto by the 1st of April, 1893. To the special plea of defendant plaintiff tendered her special replication, in writing, averring that at the time the contract mentioned in said special plea, and upon which the alleged judgment of Porter & Company was recovered, was made, plaintiff was, and still is, a married woman, under coverture, domiciled and resident in the state of West Virginia, and then and ever since and there living with and not separate from her husband, William Stewart, and the said contract was made in the state of West Virginia, while she was so under coverture, domiciled, resident, and living with her husband as aforesaid, and this she was ready to verify, wherefore she prayed judgment, etc., to the filing of which special replication the defendant objected, which objection the court overruled, and permitted the same to be filed, to which ruling of the court defendant excepted. On the 15th day of May, 1897, the case being called, and neither party requiring a jury, by consent the

matters arising on the issue were submitted to the court in lieu of a jury; and the court, having considered the evidence adduced and the arguments of counsel, rendered judgment for the plaintiff for the said sum of \$251.07 and costs of the action. The defendant moved to set aside the finding and judgment, and grant it a new trial, on the ground that the same is contrary to the law and evidence, which motion the court overruled, and the defendant excepted. The bill of exceptions shows that the proceedings before Justice Hauser were regular and the transcript thereof properly attested, certified, and proved, and it was agreed by the parties that the transcript should not be copied into the record, and that, as proved, it established and proved every allegation of fact contained in defendant's special plea as to the proceedings in said action and the judgment by Justice Hauser against defendant as garnishee, and the payment by it, in obedience to the order of said justice, on June 16, 1892, of \$251.07. It was also agreed that it was proved that defendant, at the time it was proceeded against as garnishee, had complied with the laws of the state of Ohio with respect to foreign insurance companies doing business in that state, and was subject to be proceeded against in the courts of said state as provided by the laws thereof applicable to foreign insurance companies doing business therein, and which evidence was by the court not copied into the record. It was also agreed that the plaintiff proved by witnesses all the matters of fact alleged in her special replication. The facts and allegations both of the special plea of defendant and plaintiff's special replication thereto were admitted by both parties to be proved at the trial, all of which is set forth in the bill of exceptions. Defendant applied for, and obtained, a writ of error, making the following assignments: First, because the circuit court should have rejected the special replication of the plaintiff to the defendant's special plea, or should have sustained the demurrer to said replication; second, because the court erred in giving effect to said replication, and in treating the facts therein set up as affecting the jurisdiction of Justice Hauser to render the judgment pleaded in the defendant's special plea; third, the court erred in overruling defendant's motion for a new trial.

Appellant's counsel, in their brief, say: "The fact that Mary A. Stewart was a married woman, residing and contracting in a state where the laws at the time held her personal contract void, would, if it had been pleaded in the Ohio court, have been a complete defense to the action of Porter & Company, because the courts everywhere, in the exercise of their undoubted jurisdiction, give force and effect to the *lex loci contractus*." They further say: "There is no evidence that the garnishee knew that she was a married woman, and the law did not require it to be concerned with any fact not affecting the jurisdiction of the court,"—and cite Black, Judgm. § 595, in support of their proposition. Their position is correct to the extent said section goes, but, by their proposition that the law does not require the gar-

nishee to be concerned with any fact not affecting the jurisdiction of the court, they assert that the garnishee owes no duty to its own creditor in the premises, which is untenable. In *Penney v. Neff*, 95 U. S. 714, 727, 24 L. ed. 565, 570, Justice Field, in delivering the opinion of the court, says: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken when property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." It is presumed that, when property in the possession of an agent is seized on legal process, the fact is known to the agent; and in case of garnishment of funds in the hands of a debtor or of the defendant who is a nonresident, and not served with process, it is clearly the duty of such garnishee, if practicable, to notify his creditor of the proceedings, that he may make such defense therein as his rights and interests may require. Appellant's special plea alleges that the process was served on it on May 2, 1892, requiring it to make answer on the 5th day of the same month, which answer it filed on said last-mentioned day, when, "it appearing that the summons has not and cannot be duly served on the defendant in this county, this cause is continued to June 15, 1892, at nine o'clock A. M., for publication of notice," which is the entry made by the justice as alleged in the special plea; that notice was duly published, and, at the time mentioned, Porter & Co. appeared, and proved their claim, and judgment was rendered against the defendant, who failed to appear, and also an order was issued on the garnishee to pay the said judgment and costs, which order was delivered to the constable; and that in obedience thereto on the 16th of June, 1892, the garnishee paid same. In its special plea, defendant wholly failed to allege that it had notified, or attempted in any way to notify, the plaintiff, its creditor, of such proceeding. For want of such allegation, the plea was not sufficient in law, and the objection thereto should have been sustained. In *Morgan v. Neville*, 74 Pa. 52 (Syl. point 3), it is held that "a garnishee in foreign attachment, to protect himself, must give notice to his own creditor," and this is manifestly right. *Pierce v. Chicago & N. W. R. Co.* 36 Wis. 283 (Syl. point 1); also 8 Am. & Eng. Enc. Law, p. 1234, and cases there cited; *Martin v. Central Vermont R. Co.* 50 Hun, 347.

It is admitted by appellant that if plaintiff had appeared and pleaded the statute of her state as it then existed, in the action before Justice Hauser, the claim of Porter & Company must have been defeated; and yet with the full knowledge of the proceedings against her, and that she had no notice thereof, and could not be served with process, it

stood by, and meekly paid out her money, in obedience to the justice's order, without even attempting, so far as the record shows, to notify her of the jeopardy of her property in its hands, all of which "smacks" strongly of collusion. Appellant cites *Virginia F. & M. Ins. Co. v. New York Carousal Mfg. Co.* 95 Va. 515, 40 L. R. A. 237, in support of its special plea, the court there holding that "it is a settled rule, founded upon obvious principles of natural justice, that a garnishee cannot be lawfully compelled to pay the same indebtedness twice. Nothing can be more clearly just than that a person who has been compelled by a court of competent jurisdiction to pay a debt should not be compelled to pay it over again. Consequently, where he is in such a situation that, if charged as garnishee, this would be the result, he will not be charged, unless his situation is due to his own fault or neglect." In that case it is shown that the garnishee was guiltless of any fraud or collusion. It took all the necessary steps to prevent a recovery in a suit pending in a North Carolina court for the same debt, pleading the garnishment in the Virginia court, but to no avail. The North Carolina court refused the plea, and rendered judgment, and issued execution, and collected the money. When it pleaded the North Carolina judgment, execution, and payment in answer to the garnishment in the Virginia court, that court rejected the plea, and rendered judgment, which was properly reversed by the supreme court.

Appellee insists that Justice Hauser was without jurisdiction in the case, because of the facts set up in her special replication, and that the judgment rendered by said justice is void, and not entitled to the "full faith and credit" provision contained in § 1, art. 4, U. S. Const. The appellee cites the case of *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673, where it is claimed the question is thoroughly discussed; but it cannot be said to cover the question raised in the case at bar. That was an action to enforce a personal judgment rendered by a New York court against Bowler, wherein there had been neither service of process nor appearance in person or by attorney. So, there was nothing upon which to found a judgment, and the record was an absolute nullity, and no question was raised of a judgment *in rem*, or involving a garnishee or substituted service in the case; and yet, under the statutes of New York, the judgment was a valid personal judgment as far as Bowler's interest was concerned in the firm with which he was surety. In *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931, in discussing the question of jurisdiction, Justice Miller says: "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers or in authority specially conferred. . . . While the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which

are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. . . . So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court." Under the statutes of the state of Ohio, Justice Hauser had general jurisdiction, within the limitations and restrictions contained in such statutes, in all cases of the nature of this proceeding before him based on legal and valid contracts and transactions.

While a judgment of a competent court of any state that has jurisdiction over the person and subject-matter is conclusive upon the merits of the controversy in every state, I question the power of the court of another state, without service of process or voluntary appearance, to render a judgment on a contract that is absolutely void under the laws of the state where it is made, and upon which contract a judgment rendered by a court of such last-mentioned state is void, even upon process duly served. In *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648, it was held that "Congress did not intend by the act of 1790 to declare that a judgment rendered in one state against the person of a citizen of another, who had not been served with process or voluntarily made defense, should have such faith and credit in every other state as it had in the courts of the state in which it was rendered." That case was based on the statute of New York which provided that when joint debtors were sued, and one was brought into court on process, if judgment should pass for plaintiff he should have judgment and execution, not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it should not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court.

It could never have been contemplated by the framers of the Constitution of the United States to include among judgments entitled to "full faith and credit," under § 1, art. 4, a judgment obtained upon a contract absolutely void under the laws of the state where it was made, and upon substituted process. It may be said, then: Where is the protection afforded the garnishee in such case? On the other hand, what protection has the defendant, the creditor of the garnishee, in such a proceeding? The garnishee has better facilities for protecting his interests than the defendant. He is served with process. He knows of the proceeding. He can readily advise the defendant, his creditor, thereof, and make his defense sure, if any there be; while without such notification the defendant remains in profound ignorance of the proceeding until his property is taken from him, may be on a valid, just claim or demand, possibly by the connivance of the plaintiff and the garnishee, on a void or illegal claim.

In *White v. Foote Lumber & Mfg. Co.* 29 W. Va. 385 (Syl.), it is held that "a judgment rendered by a court of common law against a married woman, either in her own name or in the name of a company under which she does business, upon a contract made during her coverture, is absolutely void; and an execution or suggestion sued out upon such judgment is invalid and ineffectual for any purpose," and "such judgment may be assailed collaterally in proceedings upon a suggestion thereon."

I fail to see any error in the judgment, and the same is affirmed.

Note by McWhorter, J.:

Since the foregoing opinion was handed down, I find the case of *Louiseville & N. R. Co. v. Nash* (Ala.) 23 So. 825 (41 L. R. A. 331), decided in June, 1898, the syllabus of which is as follows: "(1) The courts of one state have no jurisdiction to attach and condemn a debt, due to and payable to a nonresident where he resides, by service of process on his debtor as garnishee, in the absence of personal service on the creditor within the state of the forum, or his voluntary appearance."

"(2) The payment by the garnishee of a judgment rendered for a debt against a nonresident without personal service within the state of the forum, or voluntary appearance, constitutes no defense to a subsequent suit by the judgment debtor against the garnishee."

"(3) The constitutional provision that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state' does not apply to a judgment against a nonresident debtor, in the absence of personal service upon him within the state of the forum, or a voluntary appearance."

Brannon, P., dissenting:

This case is important in principle, and, regarding the decision in it as plainly erroneous and contrary to the right of the defendant under the Constitution of the United States, I must dissent.

My position is: The justice in Ohio had jurisdiction and authority under the law of Ohio to render the judgment against the garnishee. This is not denied. This judgment had the effect there to protect the defendant against a suit by Mrs. Stewart to make him pay the money again. Having this force in Ohio, it must have the same force in every state, under the United States Constitution, providing that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," and the act of Congress under it that judgments in a court of one state "shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." We do not go behind the Ohio judgment to see on what contract in favor of the creditor it was rendered, whether good or bad, void or not, because the only question is: Had the court jurisdiction, and did it give judgment protecting the garnishee there? 1 Greenl. Ev. § 548. "It is a question of constitutional obligation, not of state policy, whether our courts will enforce a judgment of another state court of competent jurisdiction, having

jurisdiction in the case. When a judgment or decree of the court of another state is sought to be enforced in a court in this state, the court in this state may inquire into the jurisdiction of the court which rendered the judgment or decree; and if it appears that such court had no jurisdiction the judgment or decree is void, but if it had jurisdiction, the judgment or decree is valid and binding in this state." *Stewart v. Stewart*, 27 W. Va. 167. "The first question to be determined in regard to a judgment of another state, after jurisdictional inquiries have been satisfactorily answered, is, What is its effect in the state whence it was taken? The effect which it has there is precisely the effect which must be accorded to it in every other state. It must not be given any greater effect than it had in the state wherein it was rendered. If the judgment appear on its face to be harsh and erroneous, it must be received and enforced, irrespective of its harshness. The pleas which might be made to it at home, and those only, can be made to it in any other part of the Union." 2 Freeman, Judgm. § 575. The law is that it is not the domicile of the owner of the debt garnished that tests the place of jurisdiction for garnishment, but the question whether the court had control over the garnished debtor within its territory. *Mooney v. Buford & G. Mfg. Co.* 34 U. S. App. 582, 72 Fed. Rep. 32, 18 C. C. A. 421; *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118.

Mrs. Stewart could sue the company in Ohio, and therefore it could be garnished there. "Foreign corporations are subject to the process of garnishment in all cases in which an original action may be commenced against them in the courts of this state to recover the debt in respect to which the garnishment process is served. . . . A foreign corporation doing business within the state may generally be made a garnishee in that state when by the laws of the state, service of process may be properly made upon it therein; when, according to the jurisdictional rule, the debt is payable within the state, or the corporation has within its control property belonging to the principal defendant." 2 Shinn, Attachm. § 493. "When, however, there is seizure of the defendant's property at the commencement of the action, or, in garnishment, what is equivalent to seizure at that time, namely, service of process upon the garnishee, accompanied in both cases by publication or other form of substituted service against the nonresident defendant, it is well settled that such process is due process of law in attachment suits, and that a judgment so rendered will divest the defendant of his title to such property, and will protect the garnishee from the danger of double payment." *Reno, Nonresidents*, § 241. See *Molyneux v. Seymour*, 30 Ga. 440, 76 Am. Dec. 671. 2 Black, Judgm. § 852, says: "The judgment of a foreign court of competent jurisdiction, in a proceeding in the nature of a garnishment, is binding and conclusive, and affords a complete protection to the garnishee, and the money paid under it cannot be recovered back by the original owner of the debt in

any action in another country." Garnishment is a proceeding *in rem*, binding everywhere (2 Shinn, *Attachm.* § 486; 30 Ga. 440, 76 Am. Dec. 671; 1 Greenl. Ev. § 543); at least so far as the property garnished and its owner are concerned. "The liability of property belonging to nonresidents to be attached and sold under legal process is determined by the law of the state in which the property is actually situated, and from whose courts the process issues, and is not determined by the law of the state in which the owner resides. Hence, in case of conflict between the laws of these two states, the law of the former governs." Reno, *Non-residents*, § 148. "Where, however, the garnishee is a resident of the state, the fact that the principal debtor is a nonresident will not affect the validity of the garnishment proceedings, because attachments are permitted against nonresident debtors. And the fact that the principal defendant is served by publication only has no effect upon the jurisdiction of the court, when the property or debt is within the power of the court; that is to say, where the property is within the jurisdiction of the court or the debt is payable therein." 2 Shinn, *Attachm.* p. 861. But the opinion by Judge McWhorter says that the contract of a married woman was void in West Virginia when this one was made. That is no matter. The question is the force of the Ohio judgment in Ohio. Ohio Rev. Stat. §§ 4996, 5319, authorize judgments on married women's contracts. Thus, the judgment is not void there. The position of Judge McWhorter is answered by many authorities. Our own court, in *Black v. Smith*, 13 W. Va. 780, held: "When a court of law in the state of Maryland, having jurisdiction of the subject and person of the citizen, renders judgment in a cause therein pending, against such citizen for money, the validity of such judgment rendered by such court cannot be questioned in the courts of this state; nor will the courts of this state look into the transaction upon which the Maryland judgment is founded in order to ascertain if that judgment ought not to have been rendered by the court." Johnson, P., in *Stewart v. Stewart*, 27 W. Va. 173, said: "But it is not on the ground that such suits have been maintained in many states that we would enforce a decree for such cause in our own courts, nor would we sustain it because it agreed with our policy, nor refuse to enforce it here because it is hostile to our policy. The reason why we would enforce a decree, rendered by a court of competent jurisdiction in another state is the fact that the Constitution of the United States requires us to do so. For the wisest purposes, the states, when they formed and adopted the Constitution of the United States, provided, in § 1 of article 4: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.' If this clause had not been inserted in the Constitution and rigidly enforced by the judiciary in all the states, our relations as states to each other would have been anything but harmonious. Citizens, by passing

from one state to another, could escape the effect of their contracts and obligations. It is not a question of state policy whether we will or will not give effect to the judgments of courts of competent jurisdiction of other states. It is a question whether we will in good faith live up to the constitutional obligations which we have assumed. In *Gilchrist v. West Virginia Oil & Oil Land Co.* 21 W. Va. 115, 45 Am. Rep. 555, we decided that where a judgment rendered in another state is sought to be enforced in a court in this state, our courts may inquire into the jurisdiction of the court which rendered it, and if it appear that the court which rendered the judgment had no jurisdiction, the judgment or decree is void; but, if it had jurisdiction, it is valid and binding in this state; that, in deciding what effect a judgment rendered in another state is to have in this, it must be regarded as well settled that it must have the same effect here as it had in the state where it was rendered. It is not an open question whether we will enforce the judgments and decrees of another state rendered by courts of competent jurisdiction having jurisdiction to render such judgment or decree. The general rule is as we have stated it. If there are any exceptions, I have not been able to find them. I do not say there can be none. If the court of common pleas of Columbiana county had jurisdiction to pronounce the decree rendered there, and sought to be enforced here, we must give full faith and credit to it, and enforce it here." 2 Black, *Judgm.* § 888, reads: "As to whether the personal disability of the defendant at the time the judgment was rendered against him is a good defense to an action on such judgment in another state, the question depends upon the status of the judgment in the state of its rendition. Its validity must be tested by the laws of that state. If the coverture, infancy, or insanity is regarded, in the state where the judgment is rendered, as making the judgment absolutely void, that invalidity may undoubtedly be shown against it in any other jurisdiction. If, on the other hand, the rendition of a judgment against such a person is regarded, in the state where it is given, as a mere irregularity or error in fact, having no greater effect than to make the judgment voidable on a proper direct proceeding for that purpose, then it will not be a good defense to an action on the judgment in another state. This rule is illustrated by a case ruled in Iowa. . . . The defendant answered that the judgment was void because rendered while he was a minor. . . . The chief justice said: 'If there was an error in fact in permitting defendant to appear by attorney when a minor, it was an irregularity, and as such no more affected the validity of the judgment than if it had been an error in law. In either case the error, whether of law or fact, does not render a judgment void; but a party may have his remedy in the state where the judgment was rendered, either in the same or in an appellate tribunal. The defense cannot prevail here; for, until set aside, the judgment would have full force and effect in Ohio, and

is entitled to the same here. The error does not go to the jurisdiction of the court." And the theory that the debt of the married woman is void will not sustain this decision. It is void, it is true, in West Virginia, in a court of law, and only there; for it is a valid debt in equity, binding her separate estate. The money garnished for it was separate estate, and bound for this debt under our own law. A court of equity would, in this state, make it liable therefor. A justice in Ohio exercises law and equity jurisdiction, and his judgment binds that estate for this debt as a decree in equity would here. Do not think that I assert that the personal judgment against Mrs. Stewart in Ohio binds her. I mean that it binds her as to the debt, so as to protect the garnishee from second payment. I do not mean that it would further bind her.

I would much prefer that the court should give, as the reason for its decision, the reason given in *Pierce v. Chicago & N. W. R. Co.* 36 Wis. 288, and *Morgan v. Neville*, 74 Pa. 52,—that garnishee, to be protected, must notify his creditor,—than to place the decision on the untenable ground it does; though, with Thompson, Homesteads & Exemptions, § 864, I do not think notice necessary, as I have not found it suggested in other cases. Publication, as dictated by the law of Ohio, is legal warning. Nor did the company have to plead that by the law of West Virginia the contract was void. No evidence shows that it knew she was a married woman. In its widespread business, why require it to inquire? If the state seize the debt in its hands, shall it go further? Shall not Mrs. Stewart bow to the majesty of the republic, which makes that seizure valid? Shall she assume to question the power of the republic, though she suffer from it, if she could suffer in paying a just debt for groceries, making her life and the lives of those dear to her to subsist? Id. §§ 864, 866, shows this to be an unreasonable requirement. Nebraska and Wisconsin require that a garnishee shall plead that the debtor has a right to the garnished debt as an exemption, but other authorities deny it. *Moore v. Chicago, R. I. & P. R. Co.* 43 Iowa, 385; *Jones v. Tracy*, 75 Pa. 417; *Conley v. Chilcote*, 25 Ohio St. 320; *Baltimore & O. R. Co. v. May*, 25 Ohio St. 347. I hold that this state, through this court, should give to the defendant the protection which the Constitution of the republic designed to give to all citizens alike. No mere sympathy should defeat this high behest of the highest municipal law.

NOTE BY DEBT. J.: The assurance company doing business in the state of West Virginia must be presumed to know the laws thereof, and, having insured the separate property of Mary A. Stewart, a married woman, must be presumed, after the custom of insurance companies, to know that she was a married woman, and what were all her rights and liabilities with regard to said property under the laws of said state, and therefore must be presumed to have known that her separate property was not subject to her husband's control, nor liable for the payment of his debts: and, being under his

coverture, she was entitled to be supported by him, and that any simple contract debt made in relation to such support was void as to her, and binding on her husband alone, and could not in any wise affect her separate property, as the laws of West Virginia then stood. Porter & Company being residents of the state of West Virginia, must also be presumed to be fully cognizant of these matters, and that their alleged claim was no debt against Mrs. Stewart, but binding on her husband alone. Knowing this they seek a remote foreign tribunal, and upon a false and fraudulent affidavit, for they knew they had no debt which was enforceable against the separate estate of Mrs. Stewart; they invoke its aid to secretly seize and wrongfully appropriate her property, without her knowledge. She is given no notice of these proceedings, as such would be fatal to them, but publication is made in a local paper, which she has no chance of seeing; and thus her separate property is fraudulently seized and appropriated without her knowledge, and her debtor, the garnishee, presumably with full knowledge of her rights and the fraudulent purpose of the plaintiffs, Porter & Company, and with its agencies in the state of West Virginia, makes no effort to defend the action, as it had the right to do, or to notify her thereof, that she might interpose her defense. Why did the garnishee thus remain silent? There can be but one answer, and that is that it was colluding with Porter & Company to unlawfully apply Mrs. Stewart's separate estate on a debt for which it was not liable, and thus perpetrate a fraud upon her without her knowledge. The justice was not to blame in the matter, for he was imposed upon by the fraudulent conduct of the plaintiff, aided and abetted by the silence of the garnishee. The "Constitution and majesty of the great republic" was never intended to be a cover for such fraudulent practices, and permit persons, by collusion, to wrongfully appropriate the property of another by deceit and stealth. This judgment against the garnishee, under the circumstances, should be regarded as though procured by itself. *Smith v. Dickson*, 58 Iowa, 444. The suppression of the truth oftentimes operates to perpetrate a fraud as completely as the utterance of a falsehood, and no one should be permitted to take advantage of a wrong in which he participates. The garnishee had the plaintiff's separate property, and it was in duty bound to defend it from the wrongful appropriation of others to debts to which it was exempt, or notify her of such wrongful attempt. Having failed to do either, it is no more than right that it should bear a loss incurred, to say the least, by its own indifference. Of two innocent parties, the one whose negligence occasioned the loss should bear the burden thereof. I concur in Judge McWhorter's opinion, for the foregoing reasons.

Amos STEELSMITH, *Appt.*,

v.

James GARTLAN.

(.....W. Va.....)

*1. A lease for the purpose of operating for oil and gas for the period of five years, and so much longer as oil or gas

*Headnotes by DEBT. J.

NOTE.—As to forfeiture of oil and gas lease, see also *Evans v. Consumers' Gas Trust Co.* (Ind.) 31 L. R. A. 673, and *note*.

is found in paying quantitles, on no other consideration than prospective oil royalty and gas rental, vests no present title in the lessee except the mere right of exploration; but the title thereto, both as to the period of five years and the time thereafter, remains inchoate and contingent on the finding, under the explorations provided for in such lease, oil and gas in paying quantitles.

2. The completion of a nonproductive well, though at great expense, vests no title in the lessee.
3. Such lease must be construed as a whole, and, if there is no provision therein contained requiring the boring of another well after the first unsuccessful attempt is completed and abandoned, the lease becomes invalid and of no binding force as to any of its provisions.

(April 16, 1898.)

A PPEAL by plaintiff from a decree of the Circuit Court for Ritchie County in favor of defendant in a proceeding brought to cancel a certain lease as a cloud on plaintiff's title under a lease of oil land. *Reversed.*

The facts are stated in the opinion.

Mr. V. B. Archer, for appellant:

Gartlan under the terms of his lease of February 11, 1895, only took the privilege of exploring for oil on the 122 acres of land. He had no interest in either the surface or minerals.

Venture Oil Co. v. Fretts, 152 Pa. 451; *Funk v. Haldeman*, 53 Pa. 229; *Thompson's Appeal*, 101 Pa. 225; *Rynd v. Rynd Farm Oil Co.* 63 Pa. 397; *Duffield v. Hue*, 120 Pa. 94; *Brown v. Beecher*, 120 Pa. 590; *Duke v. Hague*, 107 Pa. 57; *Horne v. Den, Leeds*, 25 N. J. L. 106; *Sharswood & B. Lead. Cas. Real Prop.* p. 30; *State v. South Penn Oil Co.* 42 W. Va. 101.

The consideration for an oil lease is developments for oil, not payment of monthly rentals which are only in the nature of penalties for not developing.

Hukill v. Guffey, 37 W. Va. 448; *Bettman v. Harness*, 42 W. Va. 433, 36 L. R. A. 566; *Eaton v. Allegany Gas Co.* 122 N. Y. 416.

The abandonment of an oil lease is complete when work of development is abandoned.

Eaton v. Allegany Gas Co. 122 N. Y. 422. Gartlan, lessee, never completed a well on the tract of 122 acres of land.

Guffy v. Hukill, 34 W. Va. 49, 8 L. R. A. 759.

The intention of lessee can have no influence so far as controlling the effect of abandonment of actual developments.

Mitchell v. Carder, 21 W. Va. 277.

Gartlan's abandonment of the work of development operated as a surrender of the lease of February 11, 1895.

12 Am. & Eng. Enc. Law, p. 758i.

Equitable rights may be lost by abandonment.

Picket v. Dowdall, 2 Wash. (Va.) 106.

The forfeiture clause in an oil lease is in the interest of the lessor, who has the option to forfeit the lease.

Guffy v. Hukill, 34 W. Va. 49, 8 L. R. A. 759; *Schaupp v. Hukill*, 34 W. Va. 375; 44 L. R. A.

Thomas v. Hukill, 34 W. Va. 385; *Hukill v. Myers*, 36 W. Va. 339; *Hukill v. Guffey*, 37 W. Va. 425; *Craig v. Hukill*, 37 W. Va. 520; *Crawford v. Ritchey*, 43 W. Va. 252; *Brown v. Vandergrift*, 80 Pa. 142; *Munroe v. Armstrong*, 96 Pa. 307; *Galey Bros. v. Kellerman*, 123 Pa. 491; *Wills v. Manufacturers' Natural Gas Co.* 130 Pa. 222, 5 L. R. A. 603; *Thompson v. Christie*, 138 Pa. 230, 11 L. R. A. 236; *Kennedy v. Crawford*, 138 Pa. 561; *Springer v. Citizens' Natural Gas Co.* 145 Pa. 430; *Ogden v. Hairy*, 145 Pa. 640; *Jones v. Western Pennsylvania Natural Gas Co.* 146 Pa. 204; *Phillips v. Vandergrift*, 146 Pa. 357; *Heintz v. Shortt*, 149 Pa. 286; *Glasgow v. Chartiers Oil Co.* 152 Pa. 48; *Wolf v. Guffey*, 161 Pa. 270; *Mathews v. People's Natural Gas Co.* 179 Pa. 165; *Bartley v. Phillips*, 179 Pa. 175.

The drilling of one well upon the tract of 122 acres of land by Gartlan, which well was not productive, was not such a performance of the contract as entitled him to the full five years, the term mentioned in the lease.

Barnhart v. Lockwood, 152 Pa. 82; *Venture Oil Co. v. Fretts*, 152 Pa. 451; *McNish v. Stone*, 152 Pa. 457, note; *Hooks v. Forst*, 165 Pa. 238; *Bartley v. Phillips*, 165 Pa. 325, 179 Pa. 175; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297; *Craig v. Hukill*, 37 W. Va. 520; *Crawford v. Ritchey*, 43 W. Va. 252.

There is an implied condition in every lease of land for oil, that the lessee will continue developments necessary for the common advantage of the parties.

Kleppner v. Lemon, 176 Pa. 502; *McKnight v. Manufacturer's Natural Gas Co.* 146 Pa. 185.

A mining lease may be lost by forfeiture.

Barringer & Adams, Mines & Mining, 300, 301, citing numerous cases at pp. 301-305.

The lessee may covenant for a forfeiture on his part, and if he does he incurs no liability for rent or breach of the covenants of the lease, other than the forfeiture of the lease.

Glasgow v. Chartiers Oil Co. 152 Pa. 49.

The court of equity will cancel an abandoned lease as a cloud on title.

Crawford v. Ritchey, 43 W. Va. 252; *Hukill v. Guffey*, 37 W. Va. 425; *Hukill v. Myers*, 36 W. Va. 339.

An oil-lease agreement which contains no covenants which bind the lessee, but only covenants authorizing him by payment of money, or making developments, to keep the lease alive, is an option, and not an oil lease proper.

Glasgow v. Chartiers Oil Co. 152 Pa. 49.

To enable Gartlan to hold the lease of February 11, 1895, he must bring himself within the rules governing specific performance of contracts.

Hissam v. Parrish, 41 W. Va. 686; *Clay v. Deskins*, 36 W. Va. 350; *Harrison v. Harrison*, 36 W. Va. 557; *Henking v. Anderson*, 34 W. Va. 709; *Dyer v. Duffy*, 39 W. Va. 149, 24 L. R. A. 339; *Litt v. Goosling*, 21 L. R. A. 127, note, 93 Ky. 185.

After May 1, 1895, there was no consideration for further continuing the lease of

February 11, 1895, in force, and consequently the agreement became void.

Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 34 L. R. A. 62; *Evans v. Consumers' Gas Trust Co. (Ind.)* 31 L. R. A. 673.

Steelsmith first found oil. He obtained the lease after Gartlan's abandonment was complete, and his equity is merged into legal title to the oil under the 122-acre tract.

Guffy v. Hukill, 34 W. Va. 49, 8 L. R. A. 759; *Schaupp v. Hukill*, 34 W. Va. 375; *Barrett v. McAllister*, 33 W. Va. 738; *Ross v. Parks*, 93 Ala. 153, 11 L. R. A. 149.

Messrs. Van Winkle & Ambler, for appellee:

Gartlan's lease was valid. It was dated February 11, 1895, and ran for five years and as long as oil and gas were found in paying quantities. It was liable to forfeiture, if a well was not completed in one month, or rental paid. The rental was paid until a well was completed on April 15.

Thus, everything named in the lease was fully complied with; and on the face of the deed he had a term of five years for further drilling.

Guffy v. Hukill, 34 W. Va. 49, 8 L. R. A. 759.

As the lessee makes the expenditure, he has the right to determine and control operations.

It is an implied condition of every lease of land for the production of oil therefrom, that, when the existence of oil in paying quantities is made apparent, the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee. In determining when and where such wells shall be located, regard must be had to the operations on adjoining lands, and to the well-known fact that a well will drain territory of much larger extent when the sand rock in which the oil or gas is found is of coarse and loose texture, than when it is of fine grain and compact together.

Whatever ordinary knowledge and care would dictate as the proper thing to be done for the interests of both lessor and lessee under any given circumstances is that which the law requires to be done as an implied stipulation of the contract.

Kleppner v. Lemon, 176 Pa. 502.

It is not unusual in undeveloped territory to require a well to be commenced in one year and completed in eighteen months, and the court is not very strict as to the time, even then.

Fleming Oil & Gas Co. v. South Penn Oil Co. 37 W. Va. 645.

Oil in place is part of the land, and is real estate.

Williamson v. Jones, 39 W. Va. 231, 25 L. R. A. 222.

An oil lease, even before the lessee has entered into possession, confers a right to mine the oil, which a court of equity will protect.

Bettman v. Harness, 42 W. Va. 433, 36 L. R. A. 566.

And upon which a court of law will give judgment.

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Guffy v. Hukill, 34 W. Va. 49, 8 L. R. A. 759.

The deed of Mrs. McGregor to Gartlan is not a mere license.

Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 34 L. R. A. 62; *Wettengel v. Gormley*, 160 Pa. 559; *Williamson v. Jones*, 39 W. Va. 231, 25 L. R. A. 222.

The grant of oil in place would be a conveyance of a part of the corpus of the real estate, and a sale of the substance.

Williamson v. Jones, 39 W. Va. 231, 25 L. R. A. 222.

The grounds of Gartlan's equity are inherent in the nature of the case.

He had a right of great value that had been paid for, call this right what you will.

Watson v. Coast, 35 W. Va. 480.

A license or lease paid for will be protected by injunction.

Brown v. Spilman, 155 U. S. 665, 39 L. ed. 304; *Tufts v. Copen*, 37 W. Va. 623; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 621.

In a field where oil is being taken so close to the leased tract as to drain it, the lessee must be prompt to protect his lines; but in a new territory after the lessee has sunk one well, he is not bound to go forward with other wells, not knowing where to locate them. He may suspend and await developments, and such suspension is not abandonment.

Baumgardner v. Browning, 12 Ohio C. C. 73.

Leases must be construed according to their terms.

Venture Oil Co. v. Fretta, 152 Pa. 451; *Barnhart v. Lockwood*, 152 Pa. 82; *Crawford v. Ritchey*, 43 W. Va. 252; *Cowan v. Radford Iron Co.* 83 Va. 547.

The burden is on him who claims that Gartlan had abandoned, to prove, not only acts of an abandonment, but that he intended to surrender and abandon. Abandonment is relinquishment without intention of resuming.

Mitchell v. Carder, 21 W. Va. 277; *Chancey v. Smith*, 25 W. Va. 407, 52 Am. Rep. 217; 15 Am. & Eng. Enc. Law, pp. 546-549.

Gartlan was back and ready to work when Steelsmith intervened. If he had abandoned, this would save his rights.

Utah Min. & Mfg. Co. v. Dickert & H. Sulphur Co. 6 Utah, 183, 5 L. R. A. 259; *Bartley v. Phillips*, 179 Pa. 175.

Steelsmith was entitled to no relief. Having taken this lease with knowledge of our rights, he took in bad faith, and came not with clean hands.

Thorn v. Phares, 35 W. Va. 772; *Craig v. Hukill*, 37 W. Va. 520; *Lively v. Winton*, 30 W. Va. 554; *Straughan v. Hallwood*, 30 W. Va. 274; *Bill v. Schilling*, 39 W. Va. 123; *Seborn v. Beckwith*, 50 W. Va. 775; *Christian v. Vance*, 41 W. Va. 754; *Bird v. Stout*, 40 W. Va. 43.

Gartlan was entitled to relief upon his cross-bill answer.

Lively v. Winton, 30 W. Va. 554; *West Virginia Oil & Oil Land Co. v. Vinal*, 14 W. Va. 638; *Beach*, Modern Eq. Jur. § 426;

Kanawha Lodge v. Sicann, 37 W. Va. 176; *Kilbreth v. Root*, 33 W. Va. 600; *Leonard v. Smith*, 34 W. Va. 442; *Goff v. Price*, 42 W. Va. 384.

Gartlan was the owner of such oil as he could take within the terms of his lease, less the royalty of one eighth.

Bettman v. Harness, 42 W. Va. 433, 36 L. R. A. 566.

These wells bored by Steelsmith reached that oil. The exclusive right to bore was in Gartlan.

The lessor granted the oil right to Gartlan, and he is entitled to the possession of the property for oil purposes. The wells must go to him, under the doctrine of permanent improvements.

Hall v. Hall, 30 W. Va. 784; *Cain v. Coe*, 29 W. Va. 258; *Dawson v. Grow*, 29 W. Va. 337.

The law ought not to indemnify a trespasser who goes upon lands in violation of the exclusive rights of another and keeps him out of possession while the substance is being taken away.

Williamson v. Jones, 43 W. Va. 562, 38 L. R. A. 694; *Walnut v. Wude*, 103 U. S. 693, 26 L. ed. 526; *Jessup v. United States*, 106 U. S. 147, 27 L. ed. 85; *E. B. Bolles Woodenware Co. v. United States*, 106 U. S. 432, 27 L. ed. 230; *Benson Min. & Smelting Co. v. Alta Min. & Smelting Co.* 145 U. S. 428, 36 L. ed. 762.

On rehearing.

An accepted option is a contract mutually binding.

Barrett v. McAllister, 33 W. Va. 738; *Dye v. Duffy*, 39 W. Va. 148, 24 L. R. A. 339.

The effect of the option is to interpolate a provision not dreamed of by either party, and never before intimated by any court: "This lease shall be void if the first well is unproductive."

After Gartlan had paid rentals and had put down his well, there could not be an optional feature.

A party cannot be bound by an implied promise when he has made an express promise as to the same subject.

Hawkins v. United States, 96 U. S. 639, 24 L. ed. 607; *Coleman v. Parran*, 43 W. Va. 737; *Roddard v. Emery*, 128 Pa. 436.

The remedy for breach of an implied covenant is not by way of forfeiture of the lease, in whole or in part, but by an action for damages caused by such breach.

Harris v. Ohio Oil Co. 57 Ohio St. 118.

The implied covenant for active drilling cannot arise, except in a developed oil-producing field.

Kleppner v. Lemon, 170 Pa. 502.

A lease has been held complied with when a well was drilled in a neighborhood, and not on the leased premises at all.

Fleming Oil Co. v. South Penn Oil Co. 37 W. Va. 646.

The pittance of rental, however small, will preserve the lessee's right, even when not paid strictly on time.

Huskill v. Myers, 36 W. Va. 639; *Guffy v. Huskill*, 34 W. Va. 49, 8 L. R. A. 759. 44 L. R. A.

The one great thing to be done is the specific act of boring.

Huskill v. Guffey, 37 W. Va. 448.

An oil lease is a grant of land, and of real estate.

Wilson v. Youst, 43 W. Va. 826, 39 L. R. A. 292; *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, 34 L. R. A. 62; *Williamson v. Jones*, 39 W. Va. 231, 25 L. R. A. 222, note; *Wettengel v. Gormley*, 160 Pa. 559.

Dent, J., delivered the opinion of the court:

On the 30th day of August, 1889, Knotts and Garber obtained a lease for oil purposes covering the land in controversy in this suit, without other consideration than one eighth of the oil produced and \$200 per annum for each paying gas well, with the stipulation that the lessees should complete a well within one year from the date of the lease; and the failure to do so rendered the lease null and void unless the lessees should pay 25 cents per acre from and after the time above specified for the completion of said well, when such payment should operate to extend the time for five years. This lease David McGregor considered forfeited, and refused to accept the rent therefor, or continue the same in force. If the conditions had been performed by payment of rent accepted by the lessor, it would have expired the 30th of August, 1895, no well having been drilled by Knotts and Garber. On the 10th day of February, 1895, Matilda McGregor, as devisee and executor of David McGregor, then deceased, executed the following lease to James Gartlan, to wit:

An agreement, made the 11th day of February, A. D. 1895, between Matilda McGregor, of the district of Grant, county of Ritchie, and state of West Virginia, lessor, and James Gartlan, of Pittsburgh, Pennsylvania, lessee, witnesseth: That the lessor, in consideration of \$1, the receipt of which is hereby acknowledged, and of other valuable considerations, do hereby demise and grant unto the lessee, his heirs or assigns, all the oil and gas in and under the following described tract of land, and also the said tract of land, for the purpose and with the exclusive right of operating thereof for said gas and oil, together with the right of way, the right to lay pipes over and use water from said premises, and also the right to remove at any time all property placed thereon by the lessee, which tract of land is situated in the district of Grant, county of Ritchie, and state of West Virginia, and is bounded and described as follows, to wit: North by lands of Andrew Douglass and B. & O. Railroad, east by lands of Andrew Douglass and Jacob Hatfield, south by lands of A. M. Douglass and others, west by lands of Andy Hall and others, containing 122 acres, more or less; to have and to hold the same unto the lessee, his heirs and assigns, for the term and period of five years from the date hereof, and so much longer as oil or gas is found in paying quantities thereon, yielding and paying to the lessor the one-

eighth ($\frac{1}{8}$) part of all the oil produced and saved from the premises, delivered free of expense into tanks or pipe lines to the lessor's credit; and, should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of \$200 per year for such well so long as the gas therefrom is sold, lessor to have gas for domestic use on the premises free, she making her own connections. Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portion of the farm, and to pay all damages to growing crops by reason of operations. No well to be drilled on this lease within 500 feet of the buildings as now located, without the consent of both parties. In case no well shall be completed on the above-described premises within one month from the date hereof, this lease shall become null and void, and without any further effect whatever, unless the lessee shall pay for further delay at the rate of \$50 per month in advance thereafter until a well shall be completed. Such payment may be made in hand or by deposit to the lessor's credit in Second National Bank of Parkersburg. If above-mentioned well produces 20 barrels of oil per day for the first thirty days after completion, the lessee agrees to drill two more wells on the above-mentioned premises within a year from the completion of the above-mentioned well, provided that the second well drilled produces 20 barrels of oil per day for the first thirty days after completion. If second well does not produce 20 barrels per day for first thirty days after completion, then it shall be optional with the lessee to drill the third well. All wells shall be served with the best known means to produce the greatest quantity of oil. A failure to comply with any of the conditions of this lease shall render the same null and void, and of no effect. It is agreed further that second party shall have the right at any time to surrender this lease to first party for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms shall cease and determine, and the lease become absolutely null and void. It is understood that all the terms and conditions between the parties hereto shall extend and apply to their respective heirs, executors, administrators, and assigns. In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

Matilda McGregor. [Seal.]

Matilda McGregor, Executrix. [Seal.]

_____. [Seal.]

James Gartlan. [Seal.]

Sealed and delivered in presence of _____

Gartlan, with the assistance of others, put down a test hole about 1,800 feet by April following, but, finding neither gas nor oil in paying quantities, removed the derrick and tools, pulled the casing, and plugged the hole, and left the premises. At the same time he surrendered a number of other leases.
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but through his agent, Parks, asked permission of Mrs. McGregor to retain the lease under consideration for a short time. During the time the test was made the lessee paid Mrs. McGregor three monthly payments of \$50 each, as stipulated, because of delay in completion of the first well. He then discontinued such payments, and entirely abandoned and ceased further operations for oil and gas on the premises. Mrs. McGregor, according to her testimony, before he stopped operations insisted that he should go deeper, and make a more thorough test, even being willing to part with a further portion of her interest in the result, if successful, if he would consent to do so. But, claiming that he had made a full test, he refused her request. Gartlan had taken a man by the name of Hays in with him. On the 17th of September, 1896, Mrs. McGregor wrote them the following letter:

Cairo, W. Va., Sept. 17, 1896.

Mess. Hays and Gartlan—Gentlemen:

As you have abandoned the lease given you by me on our farm, and shown by your actions that you did not intend to operate it any further, I would ask you kindly to send it to me with a release deed, as I am now ready to lease again. Please give this your earliest attention, and oblige,

M. McGregor.

Getting no reply from this she wrote another letter to a Mr. Parks, who had acted as agent for Gartlan, to wit:

Cairo, W. Va., Sept. 28, 1896.

Mr. Parks—Sir:

I wrote a letter some time ago to Mr. Gartlan and your uncle, asking them kindly to send me the lease that they have been holding on my place. You know you only asked me to hold it for a short time, and now I think I have waited a sufficient time for them to make up their minds on what they intended to do; and they have shown, by abandoning the lease, that they did not intend to operate it, so I think they ought to send me the lease at once, so I could be making something out of it, as life is too short for me to let that amount of land lie idle, and not be making even the taxes off it. Now, please take this in consideration, and act on this at once, as you know I mean business. And I understand you have Mr. Gartlan's place in the Co. now. I don't know what position Gartlan holds in the Co. at this time. Now, do please give this your attention at once, as I am going to lease. I am going to get something out of it or nothing, as the case may be. That remains to be seen. I may get a 19½ barrel well next time and may be another dry hole. I can't tell. Now, you understand me. I am going to lease at once if I don't hear from you by return mail.

Yours, in haste, your friend,

M. McGregor.

To this she also received no reply, when she wrote a third letter, as follows, to wit:

Cairo, W. Va., Oct. 3, 1896.

Mr. Parks—Sir:

I wrote you on the 28th Sept., asking for the lease that your Co. holds on my farm; asked you to answer me by return mail, and I think you have had sufficient time to write, and now I am going to write you again, and now I want an answer by wire, as I have no time to wait for mails. Well Mr. Gartlan was here since, and left again without doing anything. He still wants me to wait and see the Wilson and Church wells come in before he does anything, so that will develop the other two sides of the lease. I told him I was not willing to wait any longer; if he was going to do anything, now was the time to do it, while the excitement is up. I can lease now, and to a good advantage; but, if either of those wells should come in dry, it will give another black eye, and I could not lease it at all. So I think he is injuring me in holding this lease from me, and not going to work on it at once, and protecting the lines. If he is not willing to take a risk on it, I am not either. I told him if they wanted to hold it any longer they would have to pay me the back rental. I could have leased it long ago, and been getting more from it than the back rental is worth; but I feel conscientious in the matter, and did not feel disposed to give them any trouble over it, as you know I could by putting a lease on top of theirs. It might cause a lawsuit, at least, and that would cost them more than the rental, so you see I want to treat them fairly, and do what is right by them, if they will let me do so; but, if they will not, then the only thing left for me to do is to look out for myself and the interest of this estate which I represent. Mr. Gartlan promised me he would see your uncle just as soon as he reached Pittsburg, and wire me what he was willing to do in the matter. Now, I will wait a sufficient time for his telegram, and also for yours, and, if I fail to get one, then I am going to lease at once. I have a good offer, and I am going to take it now while the excitement is up. I am offered more bonus than all the back rental comes to and the one-fourth of the oil if there is any, and, if there is none, I will have the bonus anyway. Now you see my offer is a good one, and they can't blame me for taking it. And now for your lease, or the rental at once, as there is no time to wait, and you know I mean just what I say. So please let me hear from you at once by wire, as the parties are waiting, and are willing to take it at their own risk. Please see your uncle at once, and wire me his conclusion. We have a telegram office here at Cairo.

Yours, in haste,
M. McGregor.

Then, getting no satisfaction from the parties, either in the way of rentals or a new lease, on the 22d of October, 1896, she executed a new lease to Amos Steelsmith, the plaintiff and appellant in this case. In the 44 L. R. A.

meantime the parties claiming under the Gartlan lease moved some timbers on the land, as though in preparation for again boring, which Mrs. McGregor had cast off. Steelsmith, under his lease, proceeded forthwith to put down two wells, both coming in producers, when, before going to further expense, he filed his bill to cancel the Gartlan lease as a cloud on his title. The Gartlan lessees filed an answer in the nature of a cross bill, claiming the cancellation of Steelsmith's lease and the oil wells and their production, which was sustained by the court and the relief sought granted. Knotts and Garber, also, to a supplemental and amended bill filed by Steelsmith, filed an answer in the nature of a cross bill, praying for affirmative relief, which was denied, and the bills were dismissed. Steelsmith appeals.

The question of importance presented to the court is as to whether the Gartlan lease was at an end at the time the Steelsmith lease was executed. The Gartlan lease is, with slight variance, in the usual form of such leases, and amounts to nothing more than the privilege of searching for oil and gas, and, if they be found in paying quantities, then vests an oil and gas tenancy in the lessee for the period of five years, or until exhaustion. Mrs. McGregor entered into the lease for the sole consideration of the prospective rents and royalties she would enjoy if the lessee, in diligent search therefor, should find oil and gas in paying quantities. If such lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party, and voidable, if not void, at the pleasure of either. *Cowan v. Radford Iron Co.* 33 Va. 547; *Petroleum Co. v. Coal, Coke & Mfg. Co.* 89 Tenn. 381. The only provision in the lease binding the lessee to prosecute operation thereunder with diligence is as follows: "In case no well shall be completed . . . within one month from the date hereof, this lease shall become null and void, and without any further effect whatever, unless the lessee shall pay for further delay at the rate of \$50 per month in advance thereafter until a well shall be completed. . . . If above-mentioned well produces twenty barrels of oil per day for the first thirty days after completion, the lessee agrees to drill two more wells on the above-mentioned premises within a year from the completion of the above-mentioned well, provided that the second well drilled produces twenty barrels of oil per day for the first thirty days after completion." There is no provision made for any further operations or payment of rent in case the first well, when completed, is nonproductive. But the contract is at an end as to both parties as soon as such first well is abandoned as unsuccessful. "A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate and for purposes of exploration only, until oil is found. If it is not found no estate vests in the lessee, and

his title, whatever it is, ends when the unsuccessful search is abandoned." *Venture Oil Co. v. Fretts*, 152 Pa. 451; *Plummer v. Hillside Coal & Iron Co.* 160 Pa. 483; *Crawford v. Ritchey*, 43 W. Va. 252. This unsuccessful search and abandonment in this case applies to the first well, the only one the lessee stipulated to put down unless gas and oil were found in paying quantities. He could not, as he himself maintains, be compelled to put down another well; and, he not being bound, the lessor was not bound either, for the only consideration left to her was the prospective oil royalties and gas rentals, which the lessee was in position to entirely defeat. Contracts unperformed optional as to one of the parties are optional as to both. Nor can there be a different conclusion if it is held that the lease, being for the purpose of operating for oil and gas, is subject to the implied precedent condition, according to the decisions of some of the states, notably North Carolina, that the lessee shall diligently prosecute the search and operation, for in such case the forfeiture would follow in a much less time than eighteen months under the general clause, to wit: "A failure to comply with any of the conditions of this lease shall render the same null and void and of no effect," which necessarily applies to implied as well as express conditions. *Conrad v. Morehead*, 59 N. C. 31; *Maxwell v. Todd*, 112 N. C. 677; *Hawkins v. Pepper*, 117 N. C. 407. In the case of *Munroe v. Armstrong*, 96 Pa. 307, it was held that a cessation of active operations for thirty days forfeited a lease for oil purposes. The court says, on page 310: "An oil lease yields nothing to the landowner when not worked, and is an encumbrance on his land, tying his hands against selling or leasing to others; but when idle, it costs the lessee nothing, and is valuable, or may prove valuable, if he can hold it awaiting developments in its vicinity. If a well be productive, it is the interest of both lessor and lessee that it be continuously operated till its exhaustion, but, if dry, it is of no value. Holding on to a lease after ceasing search is often for purposes of speculation, the thing which a prudent landowner guards against. Forfeiture for nondevelopment or delay is essential to private and public interests in relation to the use and alienation of property." In this case the condition was express, but the same rule applies with equal force to implied conditions. However, as before shown, the lessee having abandoned the only obligatory search provided for in his lease, it died on his hands without surrender, forfeiture, or intentional abandonment on his part, for he was without authority to make further explorations without the consent of and arrangement as to conditions with the lessor; in other words, without a new lease or extension of the old. Such leases are construed most strictly against the lessee and favorable to the lessor. *Bettman v. Harness*, 42 W. Va. 433, 36 L. R. A. 566. When a lease provides the mode, manner, and character of search to be made, implications in regard thereto are excluded

thereby as repugnant. And the demise for the purpose of operating for oil and gas for the period of five years is dependent on the discovery of oil and gas in the search provided for, and, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise. The lessee's title being inchoate and contingent, both as to the five-years' limit and time thereafter, on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a nonproductive well. This gave him no new or more extensive rights than he enjoyed before, but in fact destroyed all his rights under the lease. As is said in *Williamson v. Jones*, 43 W. Va. 562, 38 L. R. A. 694. "As an abortive well neither enhances the value, nor yields anything to the true owner, he ought not to be charged with its costs thereof." The lessee would charge the expense of this abortive well as though it were a part of the consideration for this lease, when it was plainly evident that no such thing was ever had in contemplation by the parties, but this is a mere desperate afterthought to furnish a nonexistent money consideration for the continuance of the lease. A dry hole, plugged up and abandoned, while expensive to the lessee, is no advantage, but an encumbrance, to the lessor. Then why should she pay for it by a nonoperating and indefinite extension of the lease, to await the will and pleasure of the lessee, who claims the option to operate, abandon, surrender, or forfeit at his pleasure, while numerous others are clamoring for the privilege of diligent operation, and offering a large bonus therefor? Such a holding would be unconscionable, and contrary to both right and justice. Mrs. McGregor's letters are given at length, to show how fully she understood her rights, and yet how willing, out of tender womanly sympathy, she was, in consideration of her lessee's fruitless expenditures, for which she was in no wise responsible, to give her lessee the first option of a new lease. This she was not required to do, and it was wholly gratuitous on her part, but she did not surrender or lose any of her rights thereby. The reason that the lessee gives for the abandonment of the well and the removal and sale of his tools and machinery, being that he was endeavoring to escape the process of the courts of this state to avoid unjust litigation, is not a legal or justifiable excuse. In the case of *Cryan v. Riddelsperger*, 7 Pa. Co. Ct. 473, an excuse that the lessee was unable to put down a well on account of the extremely cold weather was held insufficient to prevent a forfeiture, and yet it was much more reasonable than the one given by the lessee in the present case. No excuse, though ever so good, could relieve from the operation of a contract which was at an end by virtue of its own terms. The time the Garber and Knotts lease had to run, in any event, expired before the Steelsmith lease was executed, and hence they have no rights against the latter lease and cannot attack it in any manner for any reason.

For the foregoing reasons *the decree complained of is reversed*, the lease known as the "Gartlan lease," bearing date the 11th day of February, 1895, is canceled, and an-

nulled, and the injunction originally awarded in this case is made perpetual.

Rehearing denied.

CALIFORNIA SUPREME COURT (Department 2).

Catherine SLEVIN, *Resp't.*,
v.

BOARD OF POLICE PENSION FUND
COMMISSIONERS of the City and County
of San Francisco, *Appt.*

(.....Cal.....)

Death caused by accident is not from natural causes, within the meaning of act March 4, 1889, § 7, providing an insurance fund for families of policemen who die from natural causes.

(December 22, 1898.)

A PPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff in a mandamus proceeding to compel defendant to audit and allow a claim of plaintiff as widow of a member of the police force upon the police insurance fund. *Reversed.*

The facts are stated in the opinion.

Messrs. Harry T. Creswell and William I. Brobeck, for appellant:

Slevin not being a member of the police department at the time of his death, his widow is not entitled to any insurance under the provisions of the act.

This act of 1889 repealed by implication those provisions of the act of 1878 relating to the relief fund, and had the effect of merging the fund created by the act of 1878, with the fund created by the act of 1889.

Pennie v. Reis, 80 Cal. 267, 132 U. S. 471, 33 L. ed. 429.

Slevin did not die from natural causes.

Walther v. Mutual L. Ins. Co. 65 Cal. 417; *Sutherland*, Stat. Constr. § 247.

The appellants are not subject to the control of the courts through the writ of mandamus.

Jacobs v. San Francisco City & County Supers. 100 Cal. 123.

Mr. W. W. Foote for respondent.

Temple, J., delivered the opinion of the court:

The superior court, by its judgment, awarded to plaintiff a writ of mandate to compel the defendant to audit and allow the claim of respondent, as the widow of Patrick Slevin, for \$1,000, as insurance upon the life of said Patrick Slevin. It is contended that the findings do not support the judgment. By the findings it is shown that Slevin became a member of the police department April 1, 1868, and served until September 23, 1889, when, at his own request, he was retired upon a pension under an act of the legislature passed March 4, 1889. The act provides that

a member of the department, after twenty years' service, and he has reached the age of sixty years, and his services in the police department shall have ceased, may be retired on a pension. It is found that Patrick Slevin died on the sixth day of March, 1895, and "that said death was the result of injuries received in a railroad accident two days previous thereto." Section 7 of the act under which the claim is made reads as follows: "Whenever any member of the police department of such county, city and county, city or town shall, after ten years of service, die from natural causes, then his widow or children, or, if there be no widow or children, then his mother or unmarried sisters, shall be entitled to the sum of \$1,000 from such fund."

It is contended that Slevin did not die from natural causes, and therefore, under the terms of the act, his widow is not entitled to the insurance. What is meant by the phrase "shall die from natural causes"? It is not an uncommon colloquial expression, and I think uniformly means that the person who died from natural causes was not killed. To say that one died from natural causes is to say that he was not killed; that is, he did not die through external violence or through human agency. I do not think any persons who are proficient in the use of the English language would understand the expression differently. If, in response to the question, "Was he killed?" the reply was, "He died from natural causes," we would be at no loss for the meaning of the reply. So, if the statement were made in a military report that a certain number died from natural causes, the meaning would be clear. Nor are we without authority. In *Bouvier's Dictionary* (Rawles's Revision, *verb. Death*) it is said: "Natural death is the cessation of life. It is also used to denote a death which occurs by the unassisted operation of natural causes, as distinguished from a violent death, or one caused or accelerated by the interference of human agency." *Black's Law Dictionary* (phrase *Natural death*); "Death resulting from disease, or from natural forces, without the concurrence of man's agency, as distinguished from 'violent' death." See also, *Webster's Dictionary*, *verb. Natural*. But it is said that the usual and ordinary meaning of the words leads to absurd results, and the limitation is unreasonable. I confess it is difficult to understand why this particular limitation was imposed; but to give the language its ordinary meaning does not lead to absurd results, and I do not see how, without doing violence to the language, any other meaning than that well established by usage can be given it.

An attempt might be made to make this

NOTE.—The decision in the above case seems to be entirely of first impression.
44 L. R. A.

provision in § 7 the complement of § 6, which provides for a pension to the widow of the officer who loses his life while in the performance of his duty as an officer. This is undoubtedly a provision provided for the case of a violent death. But one provision cannot be the complement of the other, for there is an additional requirement in § 7,—the officer must have served ten years.

Nor can it be held to provide against the case of suicide. There is nothing in the law to indicate such intention, and it is absurd to say that one who dies from wounds in-

flicted by an assassin dies from natural causes, while, if the same fatal injuries had been inflicted by himself, his death would not have resulted from natural causes. Although unable to understand the reasons which induced the legislature to dispose of the funds in this mode, I see no way to avoid the conclusion that such is the law.

The judgment is reversed.

We concur: **McFarland, J.; Henshaw, J.**

DELAWARE COURT OF ERRORS AND APPEALS.

NATIONAL BANK OF WILMINGTON AND BRANDYWINE

v.

Irving FURTICK,
Liverpool & London & Globe Insurance Company, Garnishee.

(.....Del.....)

1. The service on a foreign insurance company as garnishee is governed by 18 Laws, chap. 681, providing for garnishment of a corporation by service upon the president, treasurer, cashier, or paying clerk, and not by 16 Laws, chap. 140, providing for the appointment by a foreign insurance company of a person or agent upon whom service of process may be made.
2. A demand against a foreign insurance company has no situs for the purpose of garnishment in a state where it has an agency, when the demand is due to a nonresident for a loss of property insured in another state in which the loss was payable.

(Cullen, J., dissents.)

(March 17, 1897.)

RESERVATION by the Superior Court for Newcastle County for the opinion of the Court of Errors and Appeals of the question of the vacation of an attachment which had been levied by plaintiff upon a claim of defendant against the garnishee. *Attachment vacated.*

Irving Furtick was and is a citizen of the state of South Carolina, and he effected insurance upon a stock of merchandise and a store building situated in that state through an agency located there with the Liverpool & London & Globe Insurance Company, a corporation of Great Britain having its principal office for the United States in the city of New York. On December 6, 1894, a loss occurred for which the insurance company acknowledged a liability. Plaintiff is a Delaware corporation having a demand against Furtick. It sued out a writ of foreign attachment in the state of Delaware against him, which was laid in the hands of Ferdinand L. Gilpin, agent for the Liverpool &

London & Globe Insurance Company, who was appointed under the provisions of 16 Laws, chap. 140, requiring the appointment of resident agents before foreign insurance companies could do business in the state. He appeared and pleaded *nulla bona*. Subsequently a rule was granted to show cause why the attachment should not be vacated, and the question raised by this rule was reserved for the opinion of the court of errors and appeals. It further appeared in the case that Furtick had assigned his claim against the insurance company to Allen J. Green.

Mr. John Biggs for plaintiff.

Mr. William S. Hilles, for defendant:

Service of process of attachment must be made in strict conformity with the provisions of the law relating to attachments, which requires that corporations doing business in the state "shall be summoned as garnishee, for which purpose service of summons upon the president, treasurer, cashier, or paying clerk shall be sufficient."

14 Del. Laws, chap. 90, Passed April 23, 1871, Amended April 29, 1889, 18 Del. Laws, chap. 681.

As Mr. Gilpin was neither the "president," "treasurer," "cashier," or "paying clerk" of the garnishee, the attachment could not be served upon the company through him.

Drake, Attachm. § 470; 6 Thomp. Corp. § 8021; Shinn, Attachm. § 607a, and cases.

A general statute will not amend or repeal by implication a special act.

Sutherland, Stat. Constr. §§ 157-159, 286.

The whole proceeding of commencing actions by attachment, though founded on the custom of London, is, in Delaware, unquestionably of statutory existence, and the course of procedure must be governed by that statute.

Pennsylvania Steel Co. v. New Jersey Southern R. Co. 4 Houst. (Del.) 572; *Holland v. Leslie*, 2 Harr. (Del.) 306.

In such cases the power or right originates with the statute, and exists only to the extent plainly granted.

Sutherland, Stat. Constr. § 325.

NOTE.—On the question, Who may be served with process in suit against a foreign corporation? Including the matter of service on state officers, see *note to Foster v. Charles Betcher* 44 L. R. A.

Lumber Co. (S. D.) 23 L. R. A. 490; also *Lubrano v. Imperial Council, O. of U. F. (R. I.)* 38 L. R. A. 547.

The Liverpool & London & Globe Insurance Company, a corporation existing under the laws of Great Britain, is not liable to be summoned as garnishee in Delaware in respect to a debt payable through the agency of the said company in South Carolina, and not payable in the state of Delaware.

Under the custom of London one could not be charged as garnishee unless he resided within the jurisdiction of the lord mayor's court.

Turbill's Case, 1 Saund. 67, note a; *Tamm v. Williams*, 2 Chitty, 438; *Crosby v. Hetherington*, 4 Mann. & G. 933; *Day v. Paupierre*, 13 Q. B. 802.

A nonresident may not be summoned as a garnishee, especially where the property itself is not within the jurisdiction.

Tingley v. Bateman, 10 Mass. 343; *Nye v. Liscombe*, 21 Pick. 263; *Ray v. Underwood*, 3 Pick. 302; *Hart v. Anthony*, 15 Pick. 445; *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630; *Jones v. Winchester*, 6 N. H. 497; *Laurence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Sawyer v. Thompson*, 24 N. H. 510; *Baxter v. Vincent*, 6 Vt. 614; *Toule v. Wilder*, 57 Vt. 622; *Cronin v. Foster*, 13 R. 1. 196; *Green v. Farmers' & C. Bank*, 25 Conn. 452; *Bates v. New Orleans, J. & G. N. R. Co.* 4 Abb. Pr. 72; *Willett v. Equitable Ins. Co.* 10 Abb. Pr. 193; *Bush v. Nance*, 61 Miss. 237; *Green's Bank v. Wickham*, 23 Mo. App. 633; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747; *Miller v. Hoove*, 2 Cranch, C. C. 622; *Drake, Attachm.* § 474.

Proceedings by attachment are proceedings *in rem*, and the *res* must be within the jurisdiction of the court in order that the court may attach it.

Rorer, Interstate Law, p. 174; *Drake, Attachm.* §§ 452, 453; *Waples, Attachm.* 227.

Apart from any consent expressed or implied, a corporation may only be sued in the state of its creation.

Rorer, Interstate Law, pp. 32-35; 2 *Morawetz, Priv. Corp.* §§ 900, 971; 6 *Thomp. Corp.* §§ 7980-7991.

A corporation cannot, against the consent of a foreign state, transact its business within the limits of such foreign state, and any government may impose conditions upon a foreign corporation doing business within its jurisdiction in relation to such business.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451.

The restrictions and conditions placed upon a corporation doing business in a foreign jurisdiction may be imposed only in respect to the business done in such foreign jurisdiction.

St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222; *Newby v. VonOppen*, L. R. 7 Q. B. 295.

The state of Delaware therefore had no right to require the maintenance here by the Liverpool & London & Globe Insurance Company of an agent for any other purpose than as a safeguard to the citizens of this state and others in connection with the business of such corporation done in the state of Delaware, or at most with a citizen of this state. 44 L. R. A.

St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222; *National Condensed Milk Co. v. Brandenburgh*, 40 N. J. L. 111; *Parke v. Commonwealth Ins. Co.* 44 Pa. 422; *Morawetz, Priv. Corp.* § 980; 6 *Thomp. Corp.* § 7997.

The situs of a debt for the purpose of attachment is the place where a debt is payable.

6 *Thomp. Corp.* § 8073; *Shinn, Attachm.* §§ 490, 626; *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118.

A foreign corporation is not liable to be summoned as a garnishee in respect to a debt payable or property situated without the jurisdiction of the state.

Story, Confli. L. §§ 532, 592a; *Waples, Attachm.* 246, 249; *Drake, Attachm.* § 478; *Rorer, Interstate Law*, pp. 175, 176; 6 *Thomp. Corp.* § 8069; *Shinn, Attachm.* §§ 490, 491, 492; *Gold v. Housatonic R. Co.* 1 Gray, 424; *Danforth v. Penny*, 3 Met. 564; *Larkin v. Wilson*, 106 Mass. 120; *Myer v. Liverpool, L. & G. Ins. Co.* 40 Md. 595; *Gibbs v. Queen Ins. Co.* 63 N. Y. 114, 20 Am. Rep. 513; *Plimpton v. Bigelow*, 93 N. Y. 592; *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118; *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 168; *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524; *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. 655, 65 Am. Dec. 254; *Smith v. Boston C. & M. R. Co.* 33 N. H. 337.

Garnishment rests wholly on judicial process. It can borrow no aid from the acts of the garnishee, and the fact that Mr. Gilpin at the election of the plaintiff pleaded *nulla bona* cannot give the court any jurisdiction over the cause there having been no appearance by attorney and the corporation not being in court other than by the answer of Mr. Gilpin.

Drake, Attachm. 451b; *Raymond v. Rockland Co.* 40 Conn. 401; *McDonald v. Moore*, 65 Iowa, 171; *Rindge v. Green*, 52 Vt. 204; *Gates v. Tusten*, 89 Mo. 14; *Shinn, Attachm.* §§ 491, 610, 646.

Marvel, J., delivered the opinion of the court:

It was contended by counsel for the garnishee in this case that the attachment should be vacated for two reasons: (1) Because of want of service upon the statutory officer; (2) because the debt, under the facts, was not the subject of attachment in the state of Delaware. We will first consider whether there was such a service upon the garnishee as to give the court jurisdiction. The garnishee is a foreign corporation and it is unquestioned law that the service must be in accordance with the provisions of the statutes of this state. The sufficiency of the service, therefore, depends upon the requirements of the statutes. What these requirements are, as applicable to the case before us, depends upon which statute controls,—the general insurance law regulating the transaction of business in this state by foreign fire insurance companies or the attachment statute providing for the summoning of corporations as garnishees. The insurance law, passed March 24, 1879, 16 Del. Laws, chap. 347, § 7, and amended for the

last time March 17, 1881, 16 Del. Laws, chap. 140, provides, "that before insurance companies shall be permitted to transact business in this state they shall file with the insurance commissioner a certificate of the name and residence of some person or agent, within this state, upon whom service of process may be made, and all processes against said company, issued out of the courts of this state may then and thereafter be served upon such person or agent so designated." At the time of the passage of this law, and the last amendment thereto the act relating to attachments authorized the summoning of corporations as garnishees in attachment proceedings only in the case of "corporations chartered by act of the general assembly" of this state (14 Del. Laws, chap. 90). It was not until April 25, 1889, that the legislature amended this statute, generally known as the "Attachment Act," and subjected all corporations "doing business in this state to the provisions of the laws in relation to garnishees" (18 Del. Laws, chap. 681); and this statute provided that "service of the summons upon the president, treasurer, cashier, or paying clerk, as provided in other attachment cases, shall be sufficient to render said officers and the corporation subject to all the liabilities provided by the said law." Thus it is seen that prior to March 31, 1871, corporations were not subject to the attachment laws of this state, and that by the act of that date only certain corporations "chartered by act of the general assembly" of the state were made liable to be summoned as garnishees in attachment proceedings. Foreign corporations were not included. The insurance law of March 17, 1881, did not extend the attachment law nor authorize the issuing of attachment process against foreign corporations, but only provided that, before foreign insurance companies should be permitted to do business in this state they must appoint an agent upon whom all processes against them issued out of the courts of the state might be served. It provides only for service of process already authorized by law, and attachment against foreign corporations was not then expressly recognized as such a process. It was not until eight years after the passage of this act that the attachment laws were amended, and for the first time "made foreign corporations doing business in this state" subject to be summoned as garnishees in attachment proceedings, and under this act process could be served only on the "president, treasurer, cashier, or paying clerk of such corporation."

It is true, as contended by the counsel for the plaintiff, that the attachment statute is a remedial statute, and that, as a general rule, when the object of a statute is remedial it is to be construed liberally. But it is equally true that when the remedy is sought to be obtained by summary proceeding, and under a statute which is in derogation of the common law, a statute is to be strictly construed and must be exactly followed by those who act under or in pursuance of it. "A proceeding in attachment, as authorized by the statutes of the several

states, is always viewed as a violent proceeding, wherein the plaintiff, at the inception of his suit, seizes the property of the defendant without waiting to establish his claim before the judicial tribunals of the land, and the statute authorizing it has invariably received a strict construction." Black, Interpretation of Laws, 315. This rule of construction has become so general in this country that in some of the states statutes have been enacted directing that the attachment laws shall be liberally construed. As before stated, the attachment statutes of this state expressly provide upon whom service must be made to give the court power to appropriate, to the satisfaction of the plaintiff's demand, the effects or credits of the debtor in the hands of the garnishee; for it is by the service of the writ that the court gets control of the property. To acquire jurisdiction and secure such control the terms of the statute must be strictly followed. The power originates with the statute, and exists only to the extent plainly granted. This has been recognized to be the law in this state. In *Pennsylvania Steel Co. v. New Jersey Southern R. Co.* 4 Houst. (Del.) 572, and in *Frankel v. Satterfield*, 9 Houst. (Del.) 209, the court (per Grubb, J.) said: "In this state the institution of a suit by foreign attachment process is a statutory proceeding, which must be pursued conformably with the statutory provisions authorizing it." We are therefore of the opinion that service of process upon corporations, when such corporations are to be summoned as garnishees, must be made upon one of the officers designated in the statute relating to attachments. Ferdinand L. Gilpin, under the facts of this case, was not such an officer, being neither the president, treasurer, cashier, nor paying clerk, and the attempt to serve the writ upon the Liverpool & London & Globe Insurance Company through him was ineffectual to bind the corporation, and it should be discharged. If the garnishee should be discharged, no other property being attached, there was nothing to give the court jurisdiction, and the attachment should be vacated.

The second reason assigned why the attachment should be vacated was that, even if it could be granted that service was had upon the statutory officer, the debt, under the facts of this case, was not the subject of attachment. To reach a satisfactory solution of this proposition will require an examination into the nature of attachments and garnishment, and the law fixing the situs of the *res* when the *res* is a debt or other chose in action. In doing this we will confine ourselves to the consideration of the attachment and garnishment proceedings against non-residents alone. In *Wells v. Jones*, 2 Houst. (Del.) 370, Houston, J., said: In this state a suit by foreign attachment is, in its original character, in the nature of an *ex parte* proceeding *in rem* to judgment of condemnation against the property bound by the foreign attachment; for, while it continues such there is no appearance of the defendant, no defense whatever pleaded, no issue joined, and no trial had. This was followed in

Frankel v. Satterfield, 9 Houst. (Del.) 201, where the court (per Grubb, J.) said: "Under our statutory provisions it is plain that, if no property has been attached by the writ, there can be no attachment to dissolve, no security given, no appearance by the defendant, no action *in personam*, and, consequently, no want of jurisdiction, no judgment *in personam*. Nor can there be a judgment *in rem*, for a like reason." These views are not new. They have been frequently expressed with more or less distinctness in opinions of eminent judges, and have been carried into adjudications in numerous cases. The Supreme Court of the United States, in *Cooper v. Reynolds*, 10 Wall. 318, 19 L. ed. 932, in the case of absence of personal service on the defendant within the jurisdiction, said: "The court in such a suit cannot proceed, unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proved in court. Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property,—or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this, the court can proceed no further; with it, the court can proceed to subject the property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form, under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court the power of the court over the *res* is established." And in the subsequent and well-considered case of *Pennoyer v. Neff*, 95 U. S. 723, 24 L. ed. 569, Mr. Justice Field said: "It is in virtue of the state's jurisdiction over the property of the nonresident situated within its limits that its tribunals can inquire into that nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the nonresident had no property in the state, there is nothing upon which the tribunals can adjudicate." *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670; *Wilson v. Seligman*, 144 U. S. 44, 36 L. ed. 339; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896; *Goldrey v. Morning News*, 156 U. S. 518, 39 L. ed. 517; *Rorer*, *Interstate Law*, p. 174; *Drake*, *Attachm.* §§ 52, 54, 453, 478; *Waples*, *Attachm.* 227, 244, 249; *Story*, *Conf. L.* §§ 532, 592a. Garnishment, as in this case, is a form of attachment. It is an attachment by means of which money or property of a debtor, in the hands of third parties, which cannot be levied upon, may be subjected to the payment of the debtor's claim. To subject the property or credit to attachment, and thus confer jurisdiction, it must be within the jurisdiction, so that the court

may obtain legal control of the *res*; otherwise, it could make no legal disposition of it, because it is an axiomatic principle of law that the courts cannot change rights of property situate without the state. *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849.

These principles governing attachment and garnishment proceedings against nonresidents are founded upon reason, and established by the adjudicated cases of the highest courts, and recognized by nearly all text writers. It being essential, then, that, in the absence of personal service within the jurisdiction, an actual seizure of or levy on property of the absent defendant within the jurisdiction should be had, and until this is done the jurisdiction is not established, the question of the situs of the property or *res* is one of paramount importance. This inquiry could present no difficulty in respect to real estate, and little or none in regard to tangible personal property having an actual situs; but, for the purpose of jurisdiction, the situs of a debt or chose in action is a question upon which there has been some diversity of opinion. There is, of course, no actual or visible, but only constructive, situs. Does the debt follow the creditor and his domicile, or the debtor and his domicile? The legal title and right are clearly in the creditor, and, by analogy to the principle that constructive possession is with the rightful owner, we should expect that the chose in action, particularly a debt, follows the person of the creditor for the purpose of attachment, as well as for many other purposes. And such seems to us to be the law, especially where there is no stipulation to the contrary. *Central Trust Co. v. Chattanooga, R. & O. R. Co.* 68 Fed. Rep. 685; *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118; *Everett v. Connecticut Mut. L. Ins. Co.* 4 Colo. App. 509; *Atchison, T. & S. F. R. Co. v. Maggard*, 6 Colo. App. 85; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Missouri P. R. Co. v. Sharritt*, 43 Kan. 375, 8 L. R. A. 385; *Renier v. Hurlbut*, 81 Wis. 24, 14 L. R. A. 562; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538. This was laid down in the case of *State Tax on Foreign-held Bonds*, 15 Wall. 300, where Mr. Justice Field says: "Debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtor is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due." The same rule has been held to apply for discharge under insolvent laws. *Reno*, *Nonresidents*, § 271; *Main v. Messner*, 17 Or. 78. The principle seems well established in cases of attachment for the purpose of giving jurisdiction, especially when the debt is payable at the domicile of the creditor. In *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L.

R. A. 118, the facts were that the insurance company, a corporation formed under the laws of the state of New York, was indebted to Douglass, a citizen of New York, the insured, on account of a loss. The insurance company had an agent in Massachusetts, appointed under the laws of that state, upon whom process might be served, and was engaged in carrying on business in that state. Alley and other creditors of Douglass brought suit in Massachusetts, jointly against the insurance company and Douglass, and the attachment or trustee process was served on the legal agent, and levied on the debt. This was set off as a defense to the suit on the policy by the insurance company, and the question was whether the Massachusetts court (that suit having been first instituted) had jurisdiction, and it was held that it had not. The court (Andrews, Ch. J.) said: "We are of opinion that the attempt to execute an attachment in Massachusetts upon the debts owing to the plaintiff by the insurance company by serving upon the agent of the corporation there, and without having acquired jurisdiction of the plaintiff, must fail, for the reason that the debtor, the insurance company, was in no just or legal sense a resident of Massachusetts, and had no domicile there, and was not the agent of the plaintiff, and that in contemplation of law the company and the debt were, at the time of the issuing of the attachment, in the state of New York, and not in the state of Massachusetts." In *Everett v. Connecticut Mut. L. Ins. Co.* the facts were: Everett was a citizen of Colorado. Mrs. Walker was a nonresident, though formerly a resident of Colorado, and was indebted to Everett on a promissory note executed by her jointly with her husband. The insurance company was a Connecticut corporation, and had, under a written designation of authority, appointed the superintendent of insurance of the state of Colorado for the purposes of the service of process as a condition precedent to its right to do business in the state. The insurance company admitted an indebtedness to Mrs. Walker on account of the death of her husband, and forwarded to her the money through their agent in Denver. So far as it is disclosed by the record, there was no other tangible property in the state capable of seizure. Everett commenced suit, but was unable to obtain service on the principal defendant. In aid of his suit he procured a writ of attachment to issue, and attempted to effectuate it by the service of the process of garnishment on the superintendent of insurance as the agent of the company. Judgment was entered so that upon the record it would appear there had been a recovery against the principal defendant. The insurance company asked to be discharged, on the invalidity of the judgment, and that they were not legally charged by the service of garnishment on the superintendent of insurance. The court (per Bissell, P. J.) said: "We do not find any satisfactory authority which holds that, where both the debtor and the creditor are outside of the state, a suit may be commenced by attachment, and the debt seized. To escape the force of the doc-

trine of *Pennoyer v. Neff*, 95 U. S. 714, 21 L. ed. 565, and obtain a judgment against one without the limits of the sovereignty, an attachment must issue and be levied on the property of the nonresident person. To the extent of the property seized, judgment may go against the absent person, and he will be held to have had notice through the seizure of the *res*, and be bound by the judgment. The cases go this far. It is not easy to perceive how a case is brought within the scope of this exception when the only levy is that made by the service of the garnishment process upon the agent of the nonresident debtor. Nothing is seized, nothing is taken, nothing is within the jurisdiction of the court, and a person out of the state is sought to be brought into court where the service of a writ is upon another, who is likewise absent. The circle never ends. . . . It is as impossible by judicial construction as by legislative enactment to declare that property out of the state, having a domicile with the debtor or the creditor, is within the limits of the sovereignty for the purposes of a levy." In the case of *Central Trust Co. v. Chattanooga R. & C. R. Co.* in the United States circuit court for the eastern district of Tennessee, the facts, in brief, were: A citizen of Tennessee sought to attach by garnishment proceedings the wages of employees of the railroad company, which was incorporated and organized under the laws of Georgia, with its line of railway extending a short distance into the state of Tennessee. The laborers whose wages were sought to be attached were employed and paid in the state of Georgia. The garnishment was served upon the receiver, who was a citizen of Georgia, but who was appointed by the courts both in Georgia and in Tennessee with power to operate the railroad, and he answered, showing wages due the nonresident. No personal service was had on the nonresident defendant. The court said: "Where both garnishee and the principal debtor are nonresidents of this state, and the debt, such as wages due, is payable in the state of their residence, there is no property within the state, and the courts of the state and the courts of the United States for such state are without jurisdiction to proceed by attachment, and a judgment based on such an attachment is an absolute nullity. And this rule applies fully to the case of wages due by a corporation of another state to its employee, a resident of such other state, under contract of employment there made, and is not affected by the fact that a foreign railway corporation, without being incorporated in this state, extends its railroad into the state, and is subject to suit by process on its local agents." In *Atchison, T. & S. F. R. Co. v. Maggard* the plaintiff was a resident of Colorado. The defendant was a resident of Kansas, and an employee of the garnishee railroad company, a corporation created by the state of Kansas, but operating a part of its line in Colorado when the wages of its employee for work performed in Kansas, and payable there, was attached. The court (per Reed, J.) said: "As between the plaintiff and defendant, the debt, beyond question, followed the domicile

of the plaintiff—that was its situs; but the indebtedness of the garnishee to the defendant did not follow the plaintiff. Its situs was by contract fixed where the services were performed, and the payment to be made, and if such claim or indebtedness is property, in contemplation of the statute, the situs of such property was in Kansas, and not in Colorado. Care must be taken not to confound the indebtedness due from the defendant to the plaintiff with that due the defendant from the garnishee. They have no relation to each other whatever.” The court in this case review the Federal and state decisions, and show that a large majority of the states have followed the principle that, for purposes of jurisdiction in attachment proceedings, the situs of a debt is at the domicile of the creditor, unless otherwise stipulated.

An exception to this rule appears to be where the garnishee is a resident of the state where the proceedings are instituted, and is under the exclusive jurisdiction of that state, and as a consequence under its power to determine for itself the rights and obligations arising from his contracts, and the mode of enforcing them; and possibly another exception is where a foreign corporation is doing business in a state and the debt arose in respect to such business, and where the corporation submits or subjects itself to the law of the state in the same manner and to the same extent in respect to such business as it would be bound to were it a corporation created by the state. We avoid expressing an opinion upon these cases. The proceeding here is not based upon any cause of action that originated in this state, nor to enforce any contract or agreement entered into with any of its citizens or in reference to any subject-matter within the state. It is a case of a nonresident defendant and a nonresident garnishee. True, the garnishee is a corporation doing business in this state, but the debt due the defendant arose from its contract for insurance made through its agency in South Carolina, with the defendant, a citizen of that state, and concerning property situated there, and was payable there under the custom of the company; and it was payable there in accordance with the principle of law that, in the absence of a place fixed by the contract, a debt is payable at the domicile of the creditor (*Central Trust Co. v. Chattanooga R. & C. R. Co.*) and is not such a credit or property within this state as will confer jurisdiction in this proceeding, even if service had been made upon the statutory officer. To take any other view would be to hold that it existed, had its situs, and was liable to attachment in every state in this Union where the defendant happened to have an officer upon whom process could be served, as a condition precedent to its being permitted to do business in such state. That this is true is shown by the fact that an attempt was made to attach this very same debt by a creditor in the state of New York. Upon motion, the court there vacated the attachment upon the grounds we have just stated. We believe this view to be based upon reason and supported by authority, and 44 L. R. A.

to be the only doctrine consistent with proper protection to citizens of other states. If it is not the situs of the defendant that gives jurisdiction, as is held in *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468, and if it could be granted that service was had upon the statutory officer, we would still hold that the attachment in the case should be dissolved. The statute provides that, before foreign insurance companies shall be permitted to do business in this state, they must appoint an agent upon whom process may be served. The condition has relation to the permission given. The presumption is that only such jurisdiction is claimed as is necessary to deal with litigation arising out of the business that is done under this permission. “Statutes by which the jurisdiction is assumed should be construed strictly, and should not, unless their language is explicit, be held to confer jurisdiction beyond that which is required to enable the courts to take cognizance of matters arising out of the business done within the state, or else to protect and enforce the rights of the residents of their own state against foreign corporations.” Judge Wheeler, in a case decided in Vermont in 1874 (*Sawyer v. North American L. Ins. Co.* 46 Vt. 697), expressed very strongly the opinion that a statute providing for the appointment of an agent on whom a process might be served ought not to be construed as intended to permit a nonresident to sue a foreign corporation for a cause of action arising outside of the state. He said that, even assuming that the agent in that case had been appointed in obedience to the statute, the question still remained what cases the statute was intended to reach. A statute is to be construed with reference to the old law, the mischief, and the remedy. When this statute was passed, the old law permitted the agents of any insurance company, foreign as well as domestic, to make contracts of insurance within the state under which causes of action would accrue to our own people within the jurisdiction of the state courts. The mischief was that the jurisdiction of the state courts over these causes of action would be unavailing except upon voluntary appearance, for want of power in the courts to compel appearance. The remedy provided was the requiring of any foreign insurance company making such contract to keep an agent in this state on whom service could be made. This would be a full remedy for all that mischief, without requiring such companies to keep an agent here on whom any process for any purpose could be served. There could be no advantage obtained for the people of the state by providing means to give the courts of the state jurisdiction over causes of action that occurred out of the state in favor of persons not citizens of the state against a corporation existing out of the state; and it is not to be presumed that the legislature intended to accomplish that purpose unless that is the necessary result of the enactment. It is more reasonable to suppose that the intention was to provide a method for obtaining jurisdiction over a defendant to a cause of action the courts had jurisdiction of before,

than that it was to provide means for obtaining jurisdiction of a cause of action where none was had before, and of the parties also, by the compulsory appointment of an agent. 12 Harv. Law Rev. 1. The statute is not so explicit as to be clearly intended to require a foreign insurance company to submit to suits in this state having no relation to the business done within the state, nor with one of her citizens, or to suits brought by persons that are citizens of the state where the corporation was organized, or of some other foreign state. For this reason, the attachment would have to be dismissed in this case.

The contention of the plaintiff's attorney that no hardship could follow by permitting the judgment, as a foreign jurisdiction would be bound to give full faith and credit to it, does not seem to be in accordance with the rulings of the adjudicated cases. We find that judgments rendered upon such facts as in the present case have been in many jurisdictions held void, and no bar to a suit to recover the same debt in the courts of another state having unquestioned jurisdiction over it. *Renier v. Hurlbut*, 81 Wis. 24, 14 L. R. A. 562; *Missouri P. R. Co. v. Sharitt*, 43 Kan. 375, 8 L. R. A. 385. And, by courts assuming jurisdiction in similar cases, parties have been made to pay the same debt twice, through no fault or negligence of their own. *Alabama G. S. R. Co. v. Chumley*, 92 Ala. 317; *Green v. Farmers' & C. Bank*, 25 Conn. 452; *Smith v. Boston, C. & M. R. Co.* 33 N. H. 337; *Pierce v. Chicago & N. W. R. Co.* 36 Wis. 283; *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 433; *McCarty v. The City of New Bedford*, 4 Fed. Rep. 818; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538. The rulings of the courts in these cases were based upon the reason that the previous judgments were rendered without the court's having jurisdiction of the person or subject-matter, and upon the now well-settled principle of law that when the courts are without jurisdiction the proceedings are an illegitimate assumption of power, and no faith and credit or force and effect will be given them in any other jurisdiction. Such judgments cannot be sustained under the provisions of the Constitution requiring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of other states," and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, "they shall have such faith and credit given to them in every court within the United States, as they have by law, or usage in the courts of the states from which they are, 44 L. R. A.

or shall be taken." Said Justice Field in *Pennoy v. Neff*: "In the earlier cases it was supposed that the act gave to all judgments the same effect in other states which they have by law in the state where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject-matter." *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Frankel v. Satterfield*, 9 Houst. (Del.) 201. Such judgment "can be taken advantage of at any time and in any court, where it is offered as a conclusive adjudication between the parties, . . . when collaterally drawn in question may be disregarded and treated as a nullity, and need not be adjudged to be such by a formal and direct proceeding for its vacation or reversal." *Frankel v. Satterfield*, 9 Houst. (Del.) 201. The contention that the garnishee cannot thus attack the judgment is not supported by any well-considered case. In a suit by attachment the court must acquire jurisdiction and proceed to enter a judgment before it can pronounce any judgment against a party summoned as garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. By it no rights would be divested, and the garnishee would not be protected in the payment of a judgment under such circumstances. It would be regarded, as shown by the authorities above cited, as a voluntary, and not a compulsory, payment, and the defendant might compel him to pay a second time. Black, Judgm. § 260. In attachment proceedings, therefore, like the one we are now considering, it is the duty of the garnishee, and a duty he must perform at his peril, to see that the court has jurisdiction. *Drake, Attachm.* §§ 691. 693; *Shinn, Attachm.* §§ 660, 707, 708.

It is therefore considered by the court that upon the facts of this case, as set forth in the record filed with the statement of the question reserved, *the attachment should be vacated*; and it is ordered that the opinion of this court be certified to the court below, and the record remanded.

Cullen, J., dissented, but delivered no opinion.

IDAHO SUPREME COURT.

PEOPLE of the State of Idaho, *ex rel.* ATTORNEY GENERAL, *Respts.*,
v.

ALTURAS COUNTY, Existing now under the Name of Blaine County, *et al.*, *Appts.*

(.....Idaho.....)

- *1. The state, having, through each of its co-ordinate branches of government, repeatedly recognized Blaine county as a county and legal subdivision of the state, is estopped, after the lapse of nearly four years, from questioning the regularity of the passage of the act creating the county.
2. The legislature, by an act approved March 5, 1895, established the county of Blaine. The legislature thereafter, in four different acts, recognized the existence of Blaine county as a legal subdivision of the state. The supreme court of the state held the act creating Blaine county to be valid. Its existence was repeatedly recognized by the executive department. The people residing within the territory embraced within Blaine county repeatedly recognized the existence of the county, held general elections therein, participated in by the electors generally, elected county and precinct officers, levied and collected taxes, assumed debts of its predecessors, funded a large indebtedness, brought suits as a county against other counties, and recovered large sums, and exercised all the powers and functions of a county government for a period of nearly four years. Held, that, under such circumstances, the court would decline to examine into the manner of the passage of the act creating the county.

(January 14, 1899.)

APPEAL by defendants from a judgment of the District Court for Bannock County in plaintiffs' favor in a quo warranto proceeding to exclude Blaine County from the exercise of municipal powers within the boundaries fixed by the act creating such county. *Reversed.*

The facts are stated in the opinion.

Messrs. Kingsbury & Parsons, for appellants:

Long acquiescence and universal recognition of a municipal corporation are a bar to any inquiry as to any irregularity in its original formation.

As soon as Blaine county was created suits were brought to test the constitutionality of the act of its creation. Four such suits have been previously heard and determined in this court.

Wright v. Kelly (Idaho) 43 Pac. 565; *Bellevue Water Co. v. Stockslager* (Idaho) 43 Pac. 568; *Blaine County v. Lincoln County* (Idaho) 52 Pac. 165; *Blaine County v. Heard* (Idaho) 45 Pac. 890.

When the point was fully argued and considered, its decision is not without authority,

*Headnotes by QUARLES, J.

NOTE.—For estoppel as to validity of claim of city to jurisdiction over certain territory, see *State, West, v. Des Moines* (Iowa) 81 L. R. A. 186.

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although it might have been a technical dictum.

State, Nourse, v. Clarke, 3 Nev. 573; *Clark v. Thomas*, 4 Heisk. 419; *Alexander v. Worthington*, 5 Md. 489; *Michael v. Morey*, 26 Md. 261, 90 Am. Dec. 106; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451; *San Francisco v. Spring Valley Waterworks*, 53 Cal. 608; *Gwinn v. Hamilton*, 75 Cal. 266; *Table Mountain Tunnel Co. v. Stranahan*, 21 Cal. 551.

The attorney general cannot at this date ignore the decisions of this court and the former acts of an attorney general of Idaho.

The decision of that court which is the final interpreter of a Constitution passing upon the constitutionality of a particular statute is binding and conclusive upon all other courts until reversed.

3 Am. & Eng. Enc. Law, pp. 676, 678; 2 Black, Judgm. § 614.

The state of Idaho is estopped from denying the *de jure* existence of Blaine county.

Where a county has a *de facto* existence, recognition and long acquiescence in the existence of the county estop the state from denying its *de jure* existence.

Bingham County v. Bannock County, (Idaho) 51 Pac. 769; *Ruine County v. Lincoln County* (Idaho) 52 Pac. 165; *Blaine County v. Smith* (Idaho) 48 Pac. 286; *Osborn v. Ravenscraft* (Idaho) 51 Pac. 618; *Ravenscraft v. Blaine County Comrs.* (Idaho) 47 Pac. 943; *State v. Leatherman*, 38 Ark. 51; High Extr. Legal Rem. § 686, p. 549.

Blaine county collects no taxes for the state of Idaho, but the state of Idaho has demanded a certain sum of money each year from Blaine county as a county and as its portion of the state revenue for the state government, and Blaine county has paid and the state has received, each year, this sum.

Mitchell v. Campbell, 19 Or. 198; *Linck v. Litchfield*, 141 Ill. 469; 1 Beach, Pub. Corp. § 55; *People v. Maynard*, 15 Mich. 463.

Legislative recognition of a *de facto* county makes it a county *de jure*.

State, Atty. Gen., v. Pawnee County Comrs. 12 Kan. 426; *State, Bradford, v. Harper County Comrs.* 34 Kan. 302; *State, Bradford, v. Robertson*, 41 Kan. 200; *Comanche County v. Lewis*, 133 U. S. 198, 33 L. ed. 604; *Koch v. North Avenue R. Co.* 75 Md. 222, 15 L. R. A. 377; *Kanawha Coal Co. v. Kanawha & O. Coal Co.* 7 Blatchf. 391; *Rumsey v. People*, 19 N. Y. 56, 4 L. ed. 556; *People v. Maynard*, 15 Mich. 470.

A judicial decision is to be regarded as conclusive, not only of the point presented in argument and expressly decided, but of every other proposition necessarily involved in attaining the conclusion expressed.

Bloodgood v. Grasey, 31 Ala. 575.

Where a statute has been declared constitutional, an inferior court is bound by the judgment, notwithstanding new reasons are set up against it.

Wheeler v. Rice, 4 Brewst. (Pa.) 129; *Palmer v. Lawrence*, 5 N. Y. 389; *People v. Rensselaer & S. R. Co.* 15 Wend. 113, 30 Am.

Dec. 39; *Oroville & V. R. Co. v. Plumas County Supers.* 37 Cal. 355; *State, Brown, v. Bailey*, 16 Ind. 46, 79 Am. Dec. 408; *Bigelow, Estoppel*, 2d ed. p. 520; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859; *State, Hays, v. Steunenberg* (Idaho) 45 Pac. 462.

Recognition is equivalent to the previous creation, if the legislature had power to create in the first instance.

Leavenworth County Comrs. v. Higginbotham, 17 Kan. 62; *Jameson v. People*, *Nettleton*, 16 Ill. 258, 63 Am. Dec. 304; *Kanawha Coal Co. v. Kanawha & O. Coal Co.* 7 Blatchf. 406; *Speer v. Kearny County Comrs.* 60 U. S. App. 38, 88 Fed. Rep. 762; *State, West, v. Des Moines*, 96 Iowa, 521, 31 L. R. A. 186; *People, Neil, v. Knopf*, 171 Ill. 191; *State, Bradford, v. Hamilton*, 40 Kan. 323.

Messrs. Johnson & Johnson, also for appellants:

Not only has the creation, organization, and existence of Blaine county been repeatedly recognized and declared by the judiciary, but its recognition by the other co-ordinate departments of the state government has been no less unequivocal and explicit.

The court will take notice that Blaine county is, and has long been, organized and its officers chosen and acting under the general laws of the state regulating county government.

"All these laws are constitutional and valid," and it was under these, and not under the law questioned here, that Blaine county is now discharging the functions imposed upon counties, and its officers were elected and are acting.

Speer v. Kearny County Comrs. 60 U. S. App. 38, 88 Fed. Rep. 762; *People v. Mayward*, 15 Mich. 463; *State, West, v. Des Moines*, 96 Iowa, 521, 31 L. R. A. 186; *Rumsey v. People*, 19 N. Y. 41; *Lanning v. Carpenter*, 20 N. Y. 447; *Wellington, Petitioner*, 16 Pick. 96, 26 Am. Dec. 631; *Hampton v. Dilley*, 2 Idaho, 1157; *State, Bradford, v. Robertson*, 41 Kan. 200; *People, Neil, v. Knopf*, 171 Ill. 191; *Bruce v. Schuyler*, 9 Ill. 266, 46 Am. Dec. 447; *People, Dunham, v. Morgan*, 90 Ill. 566; *State, Bradford, v. Hamilton*, 40 Kan. 323; *State, Atty. Gen., v. Paunce County Comrs.* 12 Kan. 426; *Comanche County v. Lewis*, 133 U. S. 202, 33 L. ed. 606; *State, Atty. Gen., v. Ford County Comrs.* 12 Kan. 441; *Fisher v. Horicon Iron & Mfg. Co.* 10 Wis. 354; *Van Valkenburgh v. Milwaukee*, 43 Wis. 582; *Paulson v. Portland*, 16 Or. 454, 1 L. R. A. 673; *Strowbridge v. Portland*, 8 Or. 67; *Seale v. Mitchell*, 5 Cal. 403; *Evans v. Job*, 8 Nev. 334; *Multnomah County v. Sliker*, 10 Or. 66; *Shreve v. Cheesman*, 32 U. S. App. 676, 69 Fed. Rep. 791, 16 C. C. A. 413; *Dunlap v. Kelsey*, 5 Cal. 181.

The principle of *stare decisis* applies with special force to the construction of constitutions, and interpretation once deliberately put upon the provisions of such an instrument should not be departed from without grave reasons.

Black, Interpretation of Laws, p. 34; *People, Atty. Gen., v. Benzie County Supers.* 34 Mich. 211; *People, Mee, v. Benzie County*, 41 44 L. R. A.

Mich. 6; Atty. Gen. v. Lake County Supers. 33 Mich. 289.

The Constitution itself contemplates the application of the rule of *stare decisis* to decisions once made upon constitutional questions.

Kneeland v. Milwaukee, 15 Wis. 455; 1 Dill. Mun. Corp. § 25; *Clark v. Wolf*, 29 Iowa, 197, Affirmed in *Morris County Comrs. v. Hinckman*, 31 Kan. 729; *Tredway v. Sioux City & P. R. Co.* 39 Iowa, 663; *Lyman v. Faris*, 53 Iowa, 498; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122; *Chicago & I. R. Co. v. Pinckney*, 74 Ill. 277; *State, Vidal, v. Lamoureux*, 3 Wyo. 731; *Willoughby v. Chicago Junction R. & Union Stockyards Co.* 50 N. J. Eq. 656; *Van Fleet, Collateral Attack*, § 62; *Florentine v. Barton*, 2 Wall. 216, 17 L. ed. 785; *Oajolle v. Ferrie*, 13 Wall. 471, 20 L. ed. 511.

It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the consideration of the cause, something else was found in the end which disposed of the whole matter.

Florida C. R. Co. v. Schutte, 103 U. S. 143, 26 L. ed. 336; 1 Herman, *Estoppel & Res Judicata*, § 117; *School Dist. No. 28 v. Stocker*, 42 N. J. L. 115; *Richardson v. Marshall County*, 100 Tenn. 346; 23 Am. & Eng. Enc. Law, p. 19; *Michael v. Morey*, 26 Md. 239, 90 Am. Dec. 109; *McFarland v. Bush*, 94 Tenn. 541, 27 L. R. A. 662; *Jonesboro, F. B. & B. Gap Turnp. Co. v. Brown*, 8 Baxt. 490, 35 Am. Rep. 713; *Porter v. Lee*, 88 Tenn. 782.

Mr. Arthur Brown for respondents.

Quarles, J., delivered the opinion of the court:

This action, in the nature of quo warranto, was commenced in the name of the state, *as rel.* attorney general, to recover judgment excluding the defendant, Blaine county, from exercising the rights, privileges, and powers of municipal government within the boundaries fixed by the act creating the county. The two questions raised by the record are these: Was the act of March 5, 1895, creating Blaine county, prohibited by the provisions of article 18 of the Constitution? Was said act passed in the manner prescribed by the provisions of article 3 of the Constitution?

The first of these questions was answered by this court in the decision in the case of *Blaine County v. Heard*, August 4, 1896, reported in (Idaho) 45 Pac. at page 890, where the court, speaking through its present chief justice, said: "Notwithstanding this case, in all its salient points, has been heretofore presented and considered by us, in view of its importance we have again gone carefully over the case as presented in the briefs and arguments of counsel, and are convinced that the contention of the appellant cannot be sustained, and that the acts of the legislative assembly of Idaho (Sess. Laws 1895, pp. 32, 170), establishing the counties of Blaine and Lincoln, are valid and constitutional laws." It will thus be seen that more than two years ago this court held said act to be constitutional. Since then the people of these two

counties, doubtless relying on the judgment of both the legislative and judicial branches of government, have acted on the theory that said act was valid; and the former decision of this court, having been acted upon by the people, who have adjusted the business matters of the county, funded old indebtedness, and created new, should not be disturbed at this late day. No good would be accomplished by overruling that decision, but much evil and confusion would result therefrom. Whether that decision was right or not, public policy and sound legal principles demand that we now adhere to it, and regard that question as a sealed book, which is no longer open to public scrutiny.

But it is argued that the manner of the passage of said act was not considered by the court in *Blaine County v. Heard* (Idaho) 45 Pac. 890, and that that question is now open, and should be determined in this case. If the regularity of the passage of that act had been attacked in the case of *Blaine County v. Heard*, the decision would have been upon the same lines as the decision in *Cohn v. Kingsley* (Idaho) 38 L. R. A. 74. But that question was not raised in the *Heard Case*, or in any other case that has come before this court. We feel that it is our duty, under the circumstances of this case, taking into consideration the nature of the act in question, the long-continued acquiescence in and recognition of the validity of said act, both by the state and by the people residing in the defendant county, to hold that the state is now estopped from questioning the regularity of the passage of the act in question. The legislature has recognized the validity of the act in question in at least four different bills which have been introduced and apparently enacted into law since its passage. At the regular elections in 1896 and 1898, men have been elected by the people of Blaine county to represent "Blaine county" in both houses of our state legislature, and the senators and representatives so elected have been received and recognized in the legislature as legal representatives of Blaine county. In fact, Blaine county, through its senators and representatives, has participated in conducting and carrying on the state government itself, and has been permitted to do so by the state government, through its different branches, without question. Then the defendant county has been recognized as a valid subsisting county by the courts of this state in divers actions,

notably the following cases: *Wright v. Kelly* (Idaho) 43 Pac. 565; *Blaine County v. Heard* (Idaho) 45 Pac. 890; *Bellavue Water Co. v. Stockslager* (Idaho) 43 Pac. 563; *Ravenscroft v. Blaine County Oomra*, (Idaho) 47 Pac. 942; *Blaine County v. Smith* (Idaho) 48 Pac. 286; *Osborn v. Ravenscroft* (Idaho) 51 Pac. 618; *Bingham County v. Bannock County* (Idaho) 51 Pac. 769; *Blaine County v. Lincoln County* (Idaho) 52 Pac. 165. The defendant county has adjusted its business matters, funded a large indebtedness inherited by it from other counties, and has sued, as a county, other counties, and recovered large sums of money. Its existence having been recognized by every department of the state government, and it having been invited and encouraged to act in its municipal capacity, and having acted in such capacity, in the matters suggested, public policy and sound principles of law require that the state now be held estopped from questioning the manner of the passage of the act in question. *People v. Maynard*, 15 Mich. 463; *Rumsey v. People*, 19 N. Y. 41; *Mitchell v. Campbell*, 19 Or. 198; *Speer v. Kearny County*, 88 Fed. Rep. 762; *State, West, v. Des Moines*, 96 Iowa, 521, 31 L. R. A. 186; *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304; *Cooley*, Const. Lim. 4th ed. p. 312.

It is unnecessary to cite further authority or adduce further argument showing why the state should be now held estopped from questioning the legal existence of Blaine county. We do not desire to be regarded as announcing the rule that a legislative act which is void at the time of its passage, because not passed in the manner required by the Constitution, can ripen into a valid act by the mere lapse of time. The conclusion in this case is based upon a rule of estoppel, demanded in this case by public policy. The act in question is different from an ordinary act of legislation, and should not be held subject to the same rules, under the conditions surrounding this case.

The judgment of the District Court is reversed, and the cause remanded, with instructions to sustain the defendants' demurrer to the complaint and enter judgment in favor of the defendants, dismissing the action. Costs awarded neither party.

Huston, Ch. J., concurs. Sullivan, J., while sitting at the hearing, took no part in the decision.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois, *ex rel. C. Vallette KASSON, et al.*,

v.
James A. ROSE, Secretary of State.

(174 Ill. 310.)

NOTE.—For modern forms of insurance, see also *Stensgaard v. St. Paul Real Estate Title Ins. Co.* (Minn.) 17 L. R. A. 575 (title insurance); *Fidelity & C. Co. v. Elckhoff* (Minn.) 30 L. R. A. 586 (employee's fidelity insurance); *Fidelity & C. Co. v. Gate City Nat. Bank* (Ga.) 33 L. R. A. 821; *Anoka Lumber Co. v. Fidelity & C. Co.* (Minn.) 30 L. R. A. 689 (employer's liability); *Shakman v. United States Credit System Co.* (Wis.) 32 L. R. A. 383; *Smith v. National Credit Ins. Co.* (Minn.) 33 L. R. A. 511 (credit insurance); also *Trenton Pass. R. Co. v. Guarantors' Life Indemnity Co.* (N. J.) *post*,—(indemnity to carrier against injury to passengers).

1. (Guaranteeing the fidelity of officers and the performance of contracts is insurance within the meaning of a statute excepting the business of insurance from those for which corporations may be formed.

2. Insurance of a kind not known at

the time of its passage is within a provision of a statute excepting insurance from the kinds of business for the transaction of which corporations may be formed under it, although provision is made in another statute for corporations to transact all kinds of insurance then known.

(*Carter, Ch. J., and Magruder, J., dissent.*)

(June 18, 1898.)

PETITION for a writ of mandamus to compel defendant to issue to complainant a license to open subscription books for the capital stock of a proposed corporation. *Denied.*

The facts are stated in the opinion.

Messrs. Church & McMurdy, for petitioners:

Among the aids to a proper construction of a doubtful statute is, "a contemplation of the object to be accomplished . . . by the clause in which the ambiguity is met with."

Cooley, Const. Lim. 6th ed. p. 80.

The declared object of the legislature in the clause under discussion is to authorize the formation of corporations "for any lawful purpose except insurance."

The legislature had made provision by the statute of 1869 for what was ordinarily and popularly known as "insurance" in that day.

So that when the legislature of 1872 undertook, in obedience to the command of the Constitution (art. 11, § 1), to "provide by general laws for the organization of all corporations hereafter to be created"; the word "insurance" which was employed to designate one of the excepted classes, was no doubt used to avoid interference with the general laws already existing.

The prior state of the law furnishes the clue to the real meaning of the ambiguous provision.

Cooley, Const. Lim. 6th ed. p. 73, note 2; *Stuart v. Hamilton*, 66 Ill. 255; *Epps v. Epps*, 17 Ill. App. 200; *United States v. Dickson*, 15 Pet. 141, 10 L. ed. 689; *Sutherland*, Stat. Constr. §§ 223, 224; *Endlich*, Interpretation of Statutes, § 186.

There is a certain clearly-defined and radical distinction, not only in the meaning of the two words "insurance" and "suretyship," but between the contracts of insurance and of suretyship or guaranty, both in their legal and popular acceptance.

Lucena v. Craufurd, 2 Bos. & P. N. R. 300; *Com. v. Wetherbee*, 105 Mass. 160; *Beach*, Ins. (1895) § 1; *Hartford F. Ins. Co. v. Farrish*, 73 Ill. 166.

The object of the exception was not to exclude the classes of business named from the field of corporate enterprise.

It was the legislative intent that these excepted classes should be provided for by what may be called special general laws, some of which were already in force, and the fact that the legislature, while so providing for the different kinds of insurance, as that term is popularly understood, has passed no specific act for the organization of corporations to carry on the business of suretyship, affords some evidence, at all events, of the 44 L. R. A.

legislative understanding of the meaning and effect of the act of 1872.

The legislature has recognized the business of corporate suretyship.

Act May 13, 1887 (1 Starr & C. p. 1039); Pub. Laws 1897, p. 134.

Messrs. C. A. Hill and B. D. Monroe, with *Mr. E. C. Akin*, Attorney General, for respondent:

The business in which the proposed corporation would engage is insurance business.

People, Stevens, v. Fidelity & C. Co. 153 Ill. 32, 26 L. R. A. 295; 9 Am. & Eng. Enc. Law, p. 65; *Shakman v. United States Credit System Co.* 92 Wis. 366, 32 L. R. A. 383; *Robertson v. United States Credit System Co.* 57 N. J. L. 12; *Anoka Lumber Co. v. Fidelity & C. Co.* 63 Minn. 286, 30 L. R. A. 689; *Smith v. National Credit Ins. Co.* 65 Minn. 283, 33 L. R. A. 511; *Mercantile Credit Guarantee Co. v. Wood*, 35 U. S. App. 381, 68 Fed. Rep. 529, 15 C. C. A. 563; *Tebbetts v. Mercantile Credit Guarantee Co.* 38 U. S. App. 431, 73 Fed. Rep. 95, 19 C. C. A. 281; 1 Joyce, Ins. § 12; *Lucena v. Craufurd*, 2 Bos. & P. N. R. 200; 11 Am. & Eng. Enc. Law, p. 280; 1 May, Ins. §§ 1, 2; 1 Phillips, Ins. § 1; *Smith*, Common Law, 299.

Wilkin, J., delivered the opinion of the court:

This is an original petition for mandamus against James A. Rose, as secretary of state. The petition sets forth that on January 27, 1898, petitioners made application to the respondent for a license authorizing them to open subscription books to the capital stock of a proposed corporation. The application was made in due form, and accompanied by the requisite fee. The object of the corporation, as contained in the statement, is as follows: "To transact in the state of Illinois and elsewhere the business of guaranteeing the fidelity of persons holding public or private places of trust, and the performance by persons, firms, and corporations of contracts, bonds, recognizances, and undertakings of every kind, and of becoming surety on bonds required by law, and on every kind of contract, obligation, and undertaking of persons, firms, and corporations." The secretary refused to issue the license, upon the ground that the statute under which the application is made does not authorize the organization of corporations for the objects stated in the application. Section 1 of the statute entitled "An Act Concerning Corporations," approved April 18, 1872, provides "that corporations may be formed in the manner provided by this act, for any lawful purpose, except banking, insurance, real-estate brokerage, the operation of railroads, and the business of loaning money, provided," etc. The only question here raised is whether or not the objects, or any of them, of the proposed corporation, fall within the exception "insurance."

The following definitions of the term "insurance" are cited from standard authorities on behalf of the respondent: "Guaranty insurance is a contract whereby one, for a consideration, agrees to indemnify another against loss arising from the want

of integrity, fidelity, or insolvency of employees and persons holding positions of trust, against insolvency of debtors, losses in trade, losses from nonpayment of notes and other evidences of indebtedness, or against other breaches of contract. It includes other forms of insurance, which are specifically classified as 'fidelity guaranty,' 'credit guaranty,' etc." 1 Joyce, Ins. § 12. "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified, to certain things which may be exposed to them." *Lucena v. Craufurd*, 2 Bos. & P. N. R. 300. "Insurance, in its most general sense, is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by a specified peril." 11 Am. & Eng. Enc. Law, p. 280. "Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. Such, in its most general terms, is the definition of the contract which is to constitute the subject of the following chapters. It is substantially the definition given long ago by Roccus, and is recommended alike by its brevity, its logic, and its comprehensiveness,—qualities upon which subsequent writers have scarcely been able to improve. . . . It had its origin in the necessities of commerce; it has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields, and, under the guidance of the spirit of modern enterprise tempered by a prudent forecast, it has, from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended or protection required, it holds out its fostering hand, and promises indemnity." 1 May, Ins. §§ 1, 2. "A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks." 1 Phillips, Ins. § 1. "A contract by which a person, in consideration of a gross sum or a periodical payment, undertakes to pay a larger sum on the happening of a particular event." Smith, Common Law, 299. "In law, a contract by which one party, for an agreed consideration, which is proportioned to the risk involved, undertakes to compensate the other for loss on a specified thing from specified causes." Century Dict. Insurance. "An act or system of insuring or assuring against loss; specifically, the system by or under which indemnity or pecuniary payment is guaranteed by one party or several parties to another party, in certain contingencies, upon specified terms." Standard Dict. Insurance. "The act of insuring, or assuring against loss or damage by a contingent event; a contract whereby . . . one party undertakes to indemnify or guarantee another against loss by certain specified risks." Webster, Dict. Insurance. It is said in 9 Am. & Eng. Enc. Law, p. 65 (cited in *People, Stevens, v. Fidelity & C. Co.* 153 Ill. 32, 26 L. R. A. 295): "Guaranty insurance is, in its practical sense, a guaranty or

insurance against loss in case a person named shall make a designated default, or be guilty of specified conduct. It is usually against the misconduct or dishonesty of an employee or officer, though sometimes against the breach of a contract. This branch of insurance is so much more modern in origin and development than fire, marine, life, and accident insurance that there are few decisions upon the subject; but the business is gradually increasing, and is doubtless destined to take an important place in the commercial world. It may be confidently stated, notwithstanding the comparative absence of specific decisions, that the general principles applicable to other classes of insurance are applicable here as well. Thus, the general doctrine of warranty, representation, and concealment, as applied to fire, life, and marine insurance, is applicable also to the subject of guaranty insurance. It was held in a Canadian case that a company was liable on a policy guaranteeing the faithful and diligent performance of the duty of a clerk where such clerk went to lunch, leaving a large sum of money in open bags in his room, which money disappeared while he was gone. Overdrafts allowed without security, by collusion with the party making the overdrafts, is within a policy which insures against loss 'by the want of integrity, honesty, and fidelity, or by the negligence, default, or irregularities of the manager.' In *Shakman v. United States Credit System Co.* 92 Wis. 366, 32 L. R. A. 383, it was held that a contract to indemnify a merchant against loss from insolvency of customers was a contract of insurance, and it was said: "We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is in fact much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. This very contract has been (*sub silentio*) construed as a policy of insurance by the supreme court of New Jersey. *Robertson v. United States Credit System Co.* 57 N. J. L. 12. The contract being, then, a contract of insurance, and the defendant's business being the making of such contracts, it follows that the defendant is an insurance corporation, within the meaning of §§ 1977 and 1978, Rev. Stat." In *Tebbetts v. Mercantile Credit Guarantee Co.* 38 U. S. App. 431, 73 Fed. Rep. 95, 19 C. C. A. 281, the action was upon a policy of insurance against business losses or "uncollectible debts" issued by the defendant to the plaintiff, and it was said: "Insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts.

The necessarily nice adjustments of the respective proportions of loss to be borne by insurer and insured, the somewhat intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract, have naturally tended to make the forms of policy crude and difficult of interpretation.

We do not understand counsel for petitioners to deny that under these authorities and definitions one or more of the objects stated in its application fall within the term "insurance." But it is insisted that inasmuch as at the time of the passage of the general incorporation law of 1872, under which they seek to organize, there were already in existence statutory provisions for the incorporation of companies known as "insurance companies,"—that is to say, fire, inland navigation, and marine insurance companies, also life insurance companies,—and that provisions like those of the charter here sought by petitioners were practically unknown at that time, therefore the legislature did not intend, by the use of the word "insurance," other kinds of insurance than existed at that time, and named in the prior enactments. The proposition is untenable. While corporations of this character have not until recently been organized, they must, under the foregoing authorities, be treated as a form of insurance companies, and as such they fall within the express limitation named in the statute. The language of the exception, in common acceptance, includes all insurance companies, and it is not for the court to say that only certain classes were intended. "Courts cannot, as a general rule, disregard the plain language of a statute. It is their duty to accept it as they find it, and enforce it as plainly written." *Ottawa Gaslight & Coke Co. v. Downey*, 127 Ill. 201, and authorities cited. "It is not the province of the judiciary to make laws, but to construe and interpret them, and pass upon their validity." Referring to authorities cited, it is further said: "A careful examination of all of these cases will show that where the construction given to the words of a statute is variant from their strict and literal meaning, such construction is only justified upon the ground that it effectuates the intention of the legislature as manifestly disclosed by a consideration of the whole context. *Wunderle v. Wunderle*, 144 Ill. 62, 19 L. R. A. 84. The manifest purpose of the legislature in excepting banking, insurance, real-estate brokerage, and other corporations from the provisions of the act authorizing the incorporation of companies for other lawful purposes, was that these excepted corporations should be restrained by more strict requirements, securing the safe conduct and correct administration of their affairs. The object stated in the petitioner's application—especially that of guaranteeing the performance by persons, firms, and corporations of contracts, bonds, recognizances, and undertakings of every kind—is not only to enter into contracts of insurance, within the meaning

of the authorities cited, but within the spirit and reason of the exception.

We think the application of the petition was properly refused, and the petition for a writ of mandamus will be denied.

Magruder, J., dissents.

Carter, Ch. J.: I do not agree to the conclusions reached in this case.

Rehearing denied.

Hermanus G. T. RACK, by Theodore P. H. Rack, His Next Friend, Appt.,

v.

CHICAGO CITY RAILWAY COMPANY.

(173 Ill. 289.)

The gripman of a cable street car is not guilty of negligence in failing to stop or slacken speed upon seeing boys standing near the curb 12 feet from the track, in the street in front of the car, so as to render the company liable for injury to one who suddenly starts to run across the track after the car has reached a point where it cannot be stopped before striking him.

(April 21, 1898.)

A PPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed*.

The facts are stated in the opinion.

Messrs. Burnham & Baldwin for appellant.

Messrs. W. J. Hynes and H. H. Martin for appellee.

Craig, J., delivered the opinion of the court:

This was an action of trespass on the case, brought by Hermanus T. G. Rack, by his next friend, in the circuit court of Cook county, to recover damages on account of personal injuries sustained, he being at the time a boy about four years and seven months old. The accident occurred on the 8th day of August, 1893, on Fifty-Fifth street, west of the crossing of Fifty-Fifth street and Kimbark avenue, in the city of Chicago. The defendant's cable trains at that point run east and west on Fifty-Fifth street. Plaintiff and another small boy were first seen by the gripman of the cable train, which was approaching from the east, standing in the roadway of Fifty-Fifth street, south of the east-bound cable track, 2 or 3 feet from the curbstone. The grip car at that time was about 150 feet away, and was running at the rate of about 10 miles an hour. The distance from the

NOTE.—As to the duty imposed on street-railroad companies to avoid injuring children on tracks, see *Wallace v. City & Suburban R. Co.* (Or.) 25 L. R. A. 663; and *Consolidated Traction Co. v. Scott* (N. J.) 33 L. R. A. 122.

curbstone to the east-bound track was estimated at 12 feet. When the grip car was 30 or 40 feet away, the elder boy started to run north across the street, and when he had gone about 15 feet the plaintiff also started to run across, directly in front of the approaching train. The gripman shouted as soon as the older boy started, and also at plaintiff when he started. He put on the brake, and reversed the lever, when the first boy started, but could not stop in time to save the smaller boy. One witness testified the plaintiff reached the track, stubbed his toe, and fell when the train was about 20 or 30 feet away; others, that he ran against the corner of the grip car and fell, or was knocked down by it. One of his feet was so crushed and lacerated that it became necessary to amputate it at the joint, taking off all the toes on that foot, leaving only the stump. After striking the child, the train ran the length of the grip car and about half the length of the next car, or about 34 or 35 feet, before it came to a stop. At the close of the evidence, on defendant's motion the court instructed the jury to find a verdict for the defendant. A motion for a new trial was made and overruled, and judgment was entered upon the verdict for costs in favor of the defendant. The plaintiff appealed to the appellate court for the first district, which affirmed the judgment of the circuit court, but granted to appellant a certificate of importance, and appellant asks a reversal of the judgment of the appellate court.

The only question necessary to be considered in this case is embraced in appellant's third assignment of error, *viz.*, Did the trial court err in granting defendant's motion by instructing the jury to find the defendant not guilty? In considering the propriety of such an instruction we have nothing to do with any question as to the preponderance of the evidence, or the credibility of the witnesses, or the force to be given to the evidence having a tendency merely to impeach the veracity of the witnesses. The only question is whether any evidence was given which, if true, would have tended to support a verdict for plaintiff. *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132. In *Simmons v. Chicago & T. R. Co.* 110 Ill. 340, this court used the following language (p. 346): "But we think the more reasonable rule, which has now come to be established by the better authority, is that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." *Pleasants v. Fant*, 22 Wall. 120, 22 L. ed. 782; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003; *Martin v. Chambers*, 84 Ill. 579. The case of *Simmons v. Chicago & T. R. Co.* 110 Ill. 340, was referred to with approval by this court in *Lake Shore & M. S. R. Co. v. O'Conner*, 115 Ill. 261, and again in *Bartelott v. International Bank*, 119 Ill. 271.

The alleged cause of action set out in the declaration in the case at bar is that the 44 L. R. A.

Chicago City Railway Company, by its servants, so carelessly and improperly drove and managed the grip car and cable train that by and through the negligence and improper conduct of the defendant, by its servants, the plaintiff was permanently injured. There was no evidence tending to show appellee was guilty of negligence. The evidence shows that the train of which George Eighth was the grip driver, and which injured appellant, was going west on Fifty-Fifth street; that the gong was rung for Kimbark avenue; that just as the train was crossing Kimbark avenue, and when near the center of the avenue, the grip driver noticed a couple of small boys about 3 feet from the curb, on the south side of Fifty-Fifth street; that when he first saw them they were both together, standing by the curbstone on the roadway, about 12 feet south of the south or east-bound track; that on the day of the accident the track was wet and slippery; that when the track was dry a train could be stopped in about 60 or 70 feet, but when slippery or wet it took a longer distance; that, when the car was within 30 or 40 feet from the boys, the older boy suddenly started to run across the track in front of the car, to the north side of the street; that, when he had gone about 15 feet, the smaller boy, the plaintiff, started to follow the first or larger boy, and he was struck by the car and injured. It further appeared from the evidence that when the gripman saw the first boy start to run across in front of the car he immediately applied the brake, reversed the lever, and commenced stopping as fast as he could; that he hallooed as soon as the first boy started, and also when the smaller one started; that he stopped as fast as he could, but says he could not stop in time, possibly, to save the small boy; that he could not have stopped sooner than he did. There was no testimony tending to contradict the gripman, but the testimony shows that he did all that was possible to stop the train and avoid the accident. It appears, also, that the grip car was only about 40 feet from the smaller boy and his companion when the latter started, which was the first thing to indicate that he intended to cross the track. Until this boy started, there appeared no necessity for stopping or slackening the speed of the train. Neither appellant nor the older boy was on the track, but they were by the curb, and in no danger, but started on a sudden impulse to run across the street,—an act which could not be foreseen or guarded against by the gripman,—and under the evidence the car could not have been stopped in time to prevent the accident.

In *Citizens' Street R. Co. v. Carey*, 56 Ind. 396, a child two and a half years old stood on the street crossing 3 to 5 feet from the street-railway track. A car drawn by one horse approached at the usual rate of speed of cars in that city. The driver saw the child when 60 feet away. When the head of his horse was from 3 to 5 feet from the crossing, the driver noticed that the child was about to move towards the track, and he tried to stop the car, but could not do so, and the child was run over. The jury re-

turned a verdict for the plaintiff. On appeal the supreme court held the judgment must be set aside, because there was no evidence of the driver's negligence. The reasoning of the court in that case seems so applicable to the case under consideration that we give a portion of the opinion. The court said: "The duty to the traveling public was to make regular trips, and on time, whenever it could reasonably be done. This necessarily forbade that he should stop his car or slacken its speed except when there was a necessity for it. The running of the street cars, as we have said, conformably to the regulations, was a service useful to the public, and required by implied contract. In our opinion, the facts in this case do not show that a necessity appeared for stopping or slackening the speed of the car till the plaintiff attempted to cross the track; that when that necessity did appear the driver made what effort he could to avert the catastrophe that happened, but that the effort was unavailing, because the necessity was created by the act of the plaintiff when it was too late to avert the unhappy consequences of that act. . . . She stood still beside the track. There she had stood from the moment the driver first saw her, and continued to stand till, it may be said, she, in effect, threw herself under his horse's feet. Nothing indicated to him that she intended to cross the track, but on the contrary, that she was standing there for the purpose, as was the habit of children of the city, to witness the passage of the car. The facts would justify the driver in drawing this conclusion. Everything indicated to him that there was no necessity for stopping the car or slackening its speed. We do not think it is the duty of a street-car driver to stop his car, or to constantly creep along at a snail's pace, for fear or in anticipation that some child may possibly throw itself under his horse, in the absence of anything indicating the probable occurrence of such an act. . . . It seems to us that he was not

bound to slacken his speed, it then being but ordinary, till there was a necessity for it. What necessity for it appeared in this case? The plaintiff was standing beside the track, where she was out of danger, and where it was common for children to stand as the cars passed. She evinced no disposition to enter upon the track, or to approach to a dangerous proximity to it. The presumption was that she would not. In such a case, it seems to us clear that it was not negligence in the driver to continue his usual rate of speed till the plaintiff did commence to move upon the track." The following authorities are of similar import: *Flanagan v. People's Pass. R. Co.* 163 Pa. 102; *Fleishman v. Niversink Mountain R. Co.* 174 Pa. 510; *Chilton v. Central Traction Co.* 152 Pa. 425; *Trumbo v. City Street Car Co.* 89 Va. 780.

Appellant contends that the mere fact that the speed of trains is limited to a certain rate cannot furnish an excuse for running at that rate under all circumstances. The proof shows that the cable runs at the rate of 12 miles an hour; that the gripman had commenced slowing up, and was running at the rate of about 10 miles an hour. There is no testimony showing that the train was running at a rate of speed that was dangerous, or that was prohibited by the ordinances of the city of Chicago. Neither is there any evidence to show but that the train was properly supplied with brakes, and there is no allegation in the declaration of negligence in that regard. There being no evidence tending to show that appellee was guilty of negligence, and the evidence being insufficient to support a verdict for the plaintiff, the trial court properly instructed the jury to find a verdict for the defendant.

The judgment of the Appellate Court is affirmed.

Rehearing denied June 10, 1898.

INDIANA SUPREME COURT.

Albert TUCKER *et al.*, Appts.,
v.

Imogene HYATT.

(151 Ind. 332.)

1. The unsoundness of mind of a co-conspirator at the time of the trial of an action to recover for injuries caused by the conspiracy is no defense to any of the guilty parties.
2. Coconspirators are not relieved from liability for injuries caused by the conspiracy by the fact that one of their number was of unsound mind.
3. Connection with a conspiracy may be established by circumstantial evidence.

NOTE.—On the general question of the civil liability of an insane person for torts or negligence, see *note* to *Williams v. Hays* (N. Y.) 26 L. R. A. 153. See also *Williams v. Hays* (N. Y.) 43 L. R. A. 253.
44 L. R. A.

4. A trial court may permit the filing of a remittitur of part of the verdict, and enter judgment for the balance.
5. The rendition of judgment cannot be questioned on appeal unless the defect or mistake in it is particularly pointed out by the objection.
6. To authorize a judgment for plaintiff upon a special verdict in an action for malicious prosecution the verdict need not state that the prosecution was without probable cause, since that is a question for the court.

(October 25, 1898.)

APPEAL by defendants from a judgment of the Circuit Court for Hamilton County in favor of plaintiff in an action brought to recover damages for an alleged conspiracy to procure the arrest of plaintiff as a common prostitute for the purpose of

destroying her character and the weight of her evidence as a witness in a case against the defendant Tucker. *Affirmed.*

The facts are stated in the opinion.

Messrs. John D. Widaman and Lemuel W. Royse for appellants.

Messrs. Frank D. Butler, Charles E. Averill, and Fertig & Alexander for appellee.

Monks, J., delivered the opinion of the court:

Appellee brought this action against appellants. The complaint was in two paragraphs. It is alleged in the first paragraph, among other things, in substance, that the appellant Tucker had been sued by appellee for breach of promise to marry, and that the trial of said cause had resulted in a judgment in her favor, and the same was pending in this court on appeal; that there was another action pending in the state of Mississippi against said Tucker; that the interest of said Tucker in said cause was great, involving many thousand dollars, and prior to the commissions of the wrongs complained of by appellee she had testified as a witness in each of said causes against said Tucker, and was an important witness against him; that said cause in the state of Mississippi was set for a retrial before a jury on the 26th day of February, 1895, a day subsequent to the commission of the wrongs complained of, and she had promised and agreed to be present and testify as a witness in said cause in the state of Mississippi, all of which was well known to said Tucker prior to the formation of the conspiracy by him and his co-appellants; that some time prior to January 28, 1895, appellants conspired together to unlawfully kidnap and decoy appellee from her residence in Peru, Indiana, to the city of Indianapolis, and there inveigle and entrap her into a house of prostitution, where she should be found, and to cause the fact to be made known and published in the newspapers, and thereby to blacken and defame her character and name, and to degrade and disgrace her, and subject her to the contempt and ridicule of society,—all of which was done and carried out for the purpose of, and with the intent to, destroy the character and standing of appellee as a witness in said cause, and to destroy the force and effect of her testimony so far as the same should be adverse to said Tucker; that appellants did afterwards, in pursuance of said conspiracy, and in furtherance of their said corrupt design, inveigle and entrap her into a house of prostitution in the city of Indianapolis, where she was arrested on the charge of being a prostitute, and taken to the police station; that she had no knowledge or means of knowledge of the character of said house until after her arrest. The second paragraph sets forth the same facts in regard to the suits against Tucker, and the fact that appellee was an important witness against him in said causes; and when the cause was set for trial in Mississippi, and the conspiracy to destroy her character, and thereby destroy the weight and effect of her testi-

mony in said actions against appellant Tucker, the same as the first paragraph. It is then alleged that in pursuance of said conspiracy appellants did, on the 21st day of January, 1895, at the city of Indianapolis, falsely and maliciously cause and procure appellee to be arrested by the police of said city, and to be by them transported through the streets of the city, and to be imprisoned and incarcerated in, and to be slated upon the records of, said police station, as a prostitute; that said prosecution was instituted maliciously, and without any probable cause whatever, in pursuance of said conspiracy; that upon the trial of said cause she was acquitted by the police court in which said charge was tried. A general denial to the complaint was filed by each appellant, and upon the issues so joined the cause was tried by a jury, and a special verdict returned, upon which, over a separate motion for a new trial by each appellant, judgment was rendered in favor of appellee. Each appellant has assigned errors, which are substantially the same: (1) That the court erred in overruling the separate motion of appellant for a new trial; (2) that the court erred in overruling said appellant's motion for a judgment in his favor on the special verdict; (3) that the court erred in permitting appellee to remit \$3,000 of the verdict, and rendering judgment for \$5,000.

It is assigned as one of the causes for a new trial in the motion of each appellant that "the court erred in refusing to allow defendants to prove by the deposition of Robert Anderson that the defendant Eiler was, at the date of the commission of the alleged offense set forth in the complaint, a person of unsound mind and that he was still a person of unsound mind at the time of the trial." The bill of exceptions recites that "the defendants, by counsel, offered to introduce in evidence the deposition of Robert Anderson to prove the unsoundness of mind of William Eiler." The bill of exceptions shows that appellee objected to the introduction of the deposition, and that the objection was sustained. It will be observed that the offer was to prove the unsoundness of the mind of William Eiler. No time was mentioned. The offer so made had reference to the time of the trial. His unsoundness of mind at that time was no defense, either for Eiler or his coappellants. But, if the offer to prove the unsoundness of the mind of Eiler referred to the time of the commission of the wrongs complained of, does the record show that the court below committed reversible error in excluding the same? It will be observed that the offer to prove the unsoundness of mind of Eiler was made by appellants jointly, and the ruling of the court excluding the evidence offered was excepted to by the appellants jointly; that it is assigned in the motion of the appellant Eiler, as well as in each of the motions of the other appellants for a new trial, not that the court erred in not allowing the one making the motion to prove the unsoundness of the mind of Eiler, but that the court erred in "not allowing the defendants to prove the unsound-

ness of the mind of Eiler." No question is presented by the record, therefore, as to whether or not it would have been error to have excluded such evidence if it had been offered on behalf of Eiler alone. The only question presented by the record is whether such evidence was competent on behalf of all the appellants. It is clear that the unsoundness of the mind of Eiler at the time of the commission of the acts complained of, if a defense for him to either or both paragraphs of the complaint, was no defense for his co-appellants. They were liable for his acts, as well as their own, in furtherance of the alleged conspiracy, the same as if he was a person of sound mind. No man can shield himself from liability for his wrongful acts on the ground that the person who assisted in carrying out and executing his wrongful purpose or the wrongful purpose of himself and others, was a person of unsound mind. One who aids or abets or otherwise procures a person of unsound mind to commit a wrongful act or acts to the injury of another is liable in damages therefor to the person injured, whether the person of unsound mind is or not.

It is next insisted that there was no evidence connecting appellant Tucker with said conspiracy, and that he is not, therefore, liable for the acts done by his coappellants in pursuance of said conspiracy. There was no direct evidence that said appellant Tucker was a party to said conspiracy, but there was circumstantial evidence which, when considered in connection with the other evidence in the cause, was sufficient to sustain the special verdict of the jury against said appellant. In order to establish a conspiracy it is not necessary that there should be direct evidence of any agreement. 6 Am. & Eng. Enc. Law, 2d ed. pp. 864, 865. It is true that appellant Tucker testified that he had nothing to do with the acts complained of, but the jury were the exclusive judges of the credibility of the witnesses, and, for all that appears from the record, may have been justified in disregarding his evidence. As there was competent evidence which satisfied the jury, we cannot disturb the verdict on the weight of the evidence.

No motion was made by either of appellants for a judgment in his favor on the special verdict. No question is presented, therefore, by the second error assigned.

Neither is the question whether appellee was entitled to a judgment in her favor on the special verdict presented by the third error assigned. That error challenges the right of the court to permit \$3,000 of the damages assessed to be remitted, and to render a judgment for \$5,000, instead of the whole amount, \$8,000. There was no error in permitting a remittitur by appellee of a part of the damages assessed, and rendering judgment only for the remainder. 28 Am. & Eng. Enc. Law, pp. 309-317; *Cleveland, C. C. & St. L. R. Co. v. Beckett*, 11 Ind. App. 547, 552-554, and cases cited. Even if the assignment of error had been that "the court erred in rendering judgment on the verdict in favor of appellee," no question could have been presented, because only a general objection and exception were taken in the court below to the judgment, and no defect or mistake was specifically pointed out to the rendition of said judgment, nor was any motion made to modify or otherwise change it. It is settled law that, unless the objection particularly points out the defect or mistake in the judgment, and asks that the same be corrected, in the court below, no question concerning the same can be presented on appeal. *Evans v. State*, 150 Ind. 651, 655, 656, and cases cited; *Jarrell v. Brubaker*, 150 Ind. 280, and cases cited; *Cockrum v. West*, 122 Ind. 372, 377, and cases cited; *Rardin v. Walpole*, 38 Ind. 146, 150; *Smith v. Dodds*, 35 Ind. 452, 460; *Buell v. Shuman*, 28 Ind. 464, 466; *Elliot*, App. Proc. §§ 345, 346. We have, however, examined the special verdict, and every fact essential to a judgment on said verdict in favor of appellee is set forth therein. It was not necessary to find as a fact that the prosecution alleged in the second paragraph was without probable cause. When a special verdict is returned in an action for malicious prosecution, the jury must find the facts, and the court determines from the facts found whether or not there was probable cause. *Helwig v. Beckner*, 149 Ind. 131, 133, and cases cited. Neither was it necessary that the special verdict should find the evidence and all the surplusage contained in the complaint.

Finding no available error in the record, the judgment is affirmed.

IOWA SUPREME COURT.

FIRST NATIONAL BANK OF MARSHALLTOWN, App't.,

v.

MARSHALLTOWN STATE BANK.

(.....Iowa.....)

1. The drawee bank which pays the good-faith holder of a forged check cannot recover back the money paid.

NOTE.—As to the duty of a bank to know the signature on a forged check, see note to *Germania Bank v. Boutell* (Minn.) 27 L. R. A. 635. 44 L. R. A.

2. Negligence of a bank which first cashes a forged check and puts it in circulation cannot be imputed to a subsequent good-faith holder of the check, so as to make him liable to the drawee, from whom he has obtained payment of the check.

3. The forgery of an indorsement on a forged check will not make a good-faith holder liable to the drawee, which has paid the check.

(January 25, 1899.)

APPEAL by plaintiff from a judgment of the District Court for Marshall County

in favor of defendant in an action brought to recover from an indorsee money which had been paid to it by the drawee of a forged check. *Affirmed.*

Statement by **Waterman, J.:**

One F. M. Smith, having in his possession a check drawn on plaintiff bank, payable to the order of Smith & Hauser, and purporting to be signed by one J. R. Bradbury, indorsed the payee's name thereon, and presented it to the Citizens' Bank of Union, and obtained of this bank the cash therefor. This last-named bank indorsed the check as follows:

Pay F. A. Balch, cashier, or order.

Citizens' Bank, Union, Iowa.

C. E. Lawrence, Cashier.

—and forwarded it to the Marshalltown State Bank, of which Balch was cashier, and received credit for the amount thereof on the books of the last-named bank. The transaction was concluded by the Marshalltown State Bank indorsing the check, and presenting it to plaintiff bank, which cashed it. Bradbury, the purported drawer of the check, was a depositor in the last-named bank. A few days after the check was paid, plaintiff discovered that the signature of the drawer was forged, and thereafter this action was begun to recover the amount paid. A jury was waived by the parties, and the case tried to the court. From a judgment in defendant's favor, plaintiff appeals.

Messrs. Binford & Snelling for appellant.

Messrs. C. E. Albrook and E. F. Binford for appellee.

Waterman, J., delivered the opinion of the court:

A few facts in addition to those stated above are shown by the record, and something is claimed for them by the parties. We shall set them out, although, in our view of the case, they do not affect the conclusion at which we arrive. One Hauser was engaged in business near Union, and Smith, whose misdeed gives rise to this contention, was stopping with him. Shortly prior to the transaction complained of, Hauser sold some live stock to Bradbury, and Smith, who collected the money therefor, took from Bradbury a check, payable to the order of Smith & Hauser. This check Smith indorsed in the name of Smith & Hauser, and cashed at the bank of Union. There was in fact no such firm as Smith & Hauser. The testimony shows that the check we are now speaking of was made by Bradbury, payable to the firm, at Smith's request, and that Hauser knew nothing of this fact, or of Smith's indorsement of the paper.

2. Some of the text writers on negotiable paper lay down the rule that, when a bank upon which a check is drawn pays it upon the forged signature of the drawer, the money can be recovered as paid under a mistake of fact. Story, *Prom. Notes*, §§ 379, 529; 2 Parsons, *Notes & Bills*, 80. Others, while recognizing a different rule, incline to 44 L. R. A.

the opinion that the one just stated is the most equitable. 2 Dan. Neg. Inst. chap. 48, § 13. But, whatever the text writers may think, a long line of authority sustains the proposition that, as between the drawee and a good-faith holder of a check, the drawee bank is to be deemed the place of final settlement, where all prior mistakes and forgeries shall be corrected and settled at once for all; and if overlooked, and payment is made, it must be deemed final. There can be no recovery over. *Price v. Neale*, 3 Burr. 1355; *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *First Nat. Bank v. Ricker*, 71 Ill. 439, 22 Am. Rep. 104; *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 26 L. R. A. 289; *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10, 7 L. R. A. 49; *Commercial & F. Nat. Bank v. First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 554; *Star F. Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *Iron City Nat. Bank v. Peyton*, 15 Tex. Civ. App. 184; *Bank of St. Albans v. Farmers' & M. Bank*, 10 Vt. 141, 33 Am. Dec. 188; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *Germania Bank v. Boutell*, 60 Minn. 189, 27 L. R. A. 635. See further, 5 Am. & Eng. Enc. Law, p. 1071. This doctrine is founded by some courts upon the thought that the drawee bank is conclusively presumed to know the signatures of its depositors. This, however, may be too narrow a basis. It may well be that such a rule is demanded by the necessities of business in these times, when the currency of the commercial world is composed so largely of checks and drafts. Whether it is the better rule or the one most consonant with reason and justice is no longer an open question. The discussion seems to have been foreclosed by the overwhelming weight of authority. The rule, however, has one qualification, introduced by some cases, and which we feel inclined to adopt. When the holder of the check has been negligent in not making due inquiry, if the circumstances were such as to demand an inquiry, when he took the check, the drawee may recover. *Tiedeman, Com. Paper*, § 399; *First Nat. Bank v. State Bank*, 22 Neb. 769; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280. The appellant seeks to bring its case within this exception. But the only negligence charged here is against the Bank of Union, which first cashed the check, and put it in circulation. Clearly, the negligence, if any, of that bank, cannot be imputed to the defendant. If the plaintiff had desired to take advantage of this qualification of the rule, its action, under the facts here shown, should have been against the bank which first gave currency to the paper. That was the course taken in the Nebraska case cited above.

3. Plaintiff claims, further, some rights from the fact, as it asserts, that the indorsement of Smith & Hauser was forged. The signing of a fictitious name may be a forgery. *People v. Warner*, 104 Mich. 337. We concede the general proposition contended for by appellant that an indorsement of negotiable paper is a guaranty of the genuineness of all prior indorsements, though we must add that this rule has no applicability

under the facts of this case. If, by reason of this forged indorsement, plaintiff has been led to pay this check to one not the owner of it, no doubt it could recover from any prior indorser upon whose guaranty it had a right to rely. *Levy v. First Nat. Bank*, 27 Neb. 557. But how has plaintiff been injured by this so-called "forgery" of an indorsement? The party to whom it paid the money was entitled to it, if the payment was to be made at all. If the indorsement had been genuine, it could not have recovered from Smith & Hauser on the ground that they were indorsers; for, as we have seen as between all good-faith parties to the check, its payment by the drawee is final. If Smith, who actually made this indorsement, did so in bad faith, and with knowledge of the forgery, he is still liable to the bank, not on his indorsement, but because of his fraud. The drawee ordinarily has no recourse upon indorsers. If an indorsement is forged, yet, if the money is paid to the party entitled to it, the drawee has no reason to complain, and no right of action over. That is the case here. Plaintiff is liable to no one else for the amount of the check. It is in no worse situation than it would have been had the signature of Smith & Hauser been genuine.

Affirmed.

FIRST NATIONAL BANK OF MANNING,
Appt.,

v.

GERMAN BANK of Carroll County et al.

(.....Iowa.....)

The negligence of a notary public in failing to learn the residence of an indorser of an inland draft and give him proper notice of its dishonor is not chargeable to a bank of which he is assistant cashier, and which placed the draft, which it held only for collection, in his hands for protest, although no protest of the draft was required by law, but the law recognized the giving of notices in case of protest as part of the official duty of the notary.

(February 6, 1899.)

A PPEAL by plaintiff from a judgment of the District Court for Carroll County in favor of defendant in an action brought to hold the defendant bank responsible for the amount of a draft on which the indorsers had been released by its alleged negligence. *Affirmed.*

Statement by Ladd, J.:

The plaintiff purchased of Farneman a draft indorsed by him, drawn by the Bank of Kirkman, November 7, 1892, on the First

National Bank of Carroll, on November 8, and sent it for collection to the Valley National Bank of Des Moines, which, on the following day, forwarded it to the defendant for collection. It was received and presented to the drawee for payment before 10 o'clock on the 10th day of November, and payment refused. The draft was at once placed in the hands of W. A. Artz, a notary public, and also assistant cashier of the defendant bank, with instructions to protest for nonpayment. He made no inquiry of the residence of Farneman, who was engaged in the chicken business at Carroll, but a short distance from the bank, but inclosed notice to him with those to other indorsers to the Valley National Bank of Des Moines. The plaintiff has been deemed recovery in an action against Farneman. See *First Nat. Bank v. Farneman*, 93 Iowa, 163. This action is for the amount of the draft and the expenses and costs incurred in that case. Trial to court, and judgment for the defendant. The plaintiff appeals.

Mr. F. M. Powers, for appellant:

If, on account of the negligent acts of the German Bank, the indorser, Frank Farneman, was released, and in consequence the owner of the paper damaged, it must be conceded that the German Bank is responsible to the extent of that damage.

There was such negligence upon the part of the officers of the German Bank, who in this instance was acting as collection agent, as to make it liable.

Dan. Neg. Inst. §§ 1115-1121.

The bank is liable for the negligence of its notary public who is also an officer of the bank.

May v. Jones, 88 Ga. 308, 15 L. R. A. 637; *Guelich v. National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110; *Mount v. First Nat. Bank*, 37 Iowa, 457; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; Dan. Neg. Inst. § 343.

Mr. M. W. Beach, for appellees:

The bank is not liable for the negligence or misconduct of the notary public employed by it to protest negotiable paper.

He is under a higher control than that of a private principal. He owes duties to the public which must be the supreme law of his conduct. Consequently, when he acts in his official capacity, the bank no longer has control over him, and cannot direct how his duties shall be done.

First Nat. Bank v. Butler, 41 Ohio St. 519, 52 Am. Rep. 94; *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, 45 Am. Dec. 72; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592.

The bank which places paper in the hands of a notary public with directions to present

NOTE.—The doctrine that a bank is not liable for mistakes of a reputable notary employed by it is given a very striking, if not extreme, application in the above case. The bank escapes liability for the negligence of its own officer in a matter which is plainly within the scope of his employment and in respect to which the bank owes a duty merely because its officer was 44 L. R. A.

a notary public and assumed to act as such, although the employment of any notary was not necessary because the draft protested was an inland draft which it was not necessary to protest. The reasons for holding a bank exempt from liability for the official act of a notary seem to be limited to cases in which the employment of a notary was necessary.

it in such a manner as to protect the right of the beneficial owner and indorser will not be liable for the failure of the notary to discharge his duty.

Wood River Bank v. First Nat. Bank, 36 Neb. 744.

The notary is regarded as acting in the character of an independent officer, whose duties are prescribed by law, and the collecting bank cannot be held liable for default.

Boone, Banking, § 205, p. 181; *Holmes v. Roe*, 62 Mich. 199; *Britton v. Nicolls*, 104 U. S. 757, 26 L. ed. 917; *Warren Bank v. Suffolk Bank*, 10 Cush. 582.

Ladd, J., delivered the opinion of the court:

That the draft was sent to the defendant bank for collection, and was presented to the drawee for payment, in apt time, admits of no doubt. *Hamlin v. Simpson*, 105 Iowa, 125. The exercise of prudence in the selection of a notary public is not questioned. The very gist of the action is that the defendant is chargeable with the negligence of that officer in failing to learn of Farneman's residence and notify him of the dishonor of the draft. But a notary is a public officer, appointed by the chief magistrate of the state, is under bond for the faithful performance of his duties as such, and keeps a public record of his acts, certified copies of which may be received in evidence. Code, §§ 373 et seq. He is not a mere agent of the bank, but a public officer sworn to properly discharge his duties to the public. As such officer, the bank may not control his acts, nor dictate in what manner he shall perform his duties. If guilty of malfeasance in the performance of an official act, he, and not the bank, is responsible. That this notary was also an employee of the bank can make no difference. When acting as such officer, he was not discharging his duties as servant. The positions were distinct, and his acts in the capacity of an officer of the state had no connection with the services he owed the bank. Again, the defendant was a mere agent for the collection of the draft, and, owing to its dishonor, deposited it with a notary for protest. "A subagent is accountable ordinarily only to his superior agent when employed without the assent or direction of the principal. But, if he be employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts. There is, in such a case, a privity between the subagent and the principal, who must therefore seek a remedy directly against the subagent for his negligence or misconduct." *Guelich v. National State Bank*, 56 Iowa, 435, 41 Am. Rep. 110. In making such collections it is usual to employ a notary, and, in forwarding the draft, there was an implied direction to do so, if necessary. See *Mount v. First Nat. Bank*, 37 Iowa, 457. If the defendant exercised prudence in making the selection, its responsibility ended. This is all it could have done had the draft been its own, and surely it will not be held to a higher degree of care when acting for others. *Baldwin v. Bank* 44 L. R. A.

of Louisiana, 1 La. Ann. 13, 45 Am. Dec. 72; *Citizens' Bank v. Howell*, 3 Md. 530, 63 Am. Dec. 714; *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648, 40 Am. Dec. 53; *Bellemire v. Bank of United States*, 4 Whart. 105, 33 Am. Dec. 46; *Britton v. Nicolls*, 104 U. S. 766, 26 L. ed. 917; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Stacy v. Dane County Bank*, 12 Wis. 629; *May v. Jones*, 88 Ga. 308, 15 L. R. A. 637; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592; *First Nat. Bank v. Butler*, 41 Ohio St. 519, 52 Am. Rep. 94; *Mechem, Agency*, § 514. While there is a conflict in opinion, the rule announced is sustained by the weight of authority and the better reason. See collection of cases in 3 Am. & Eng. Enc. Law, 2d ed. p. 808, and note to *Isham v. Post*, 38 Am. St. Rep. 775, 141 N. Y. 100, 23 L. R. A. 90; also *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289.

The distinction between a foreign and an inland bill of exchange should not be overlooked. To charge the makers and indorsers, the former must be protected. Not so with the latter. All that is required is a demand, and, on refusal to pay, notice of dishonor, in order to fix liability of the indorsers of an inland bill; and these may be made and given by the holder or anyone acting in his behalf. By the law merchant, giving notice of dishonor is no part of notary's official duty, and when he does so he is merely acting as agent of the holder. *Swayze v. Britton*, 17 Kan. 625; *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Daniel*, Neg. Inst. § 960. But it is customary for him in protesting a bill, to give the proper notice of dishonor. *Proffatt, Notaries*, §§ 142, 143. And in many of the states the law merchant is so modified that he is required to give notice. Formerly his certificate might not be received as proof of the protest of an inland bill. *Case v. Heffner*, 10 Ohio, 180. By § 378 of the Code, "every notary public is required to keep a true record of all notices given or sent by him, with the time and manner in which the same were given or sent, and the names of all the parties to whom the same were given or sent, with a copy of the instrument in relation to which the notice is served, and of the notice itself." Section 379 requires his record and official papers to be filed with the clerk of the court upon his death, resignation, or removal, and provides for certified copies. Very evidently this is for the purpose of perpetuating proof of the notice as well as of the demand and protest. Section 3054 permits a notary to "inform the indorser or any party to be charged, if in the same town or township, by notice deposited in the nearest postoffice to the parties to be charged, on the day of demand, and no other notice shall be necessary to charge such party." The advantage in having an inland bill protested by a notary, and notice given by him, is that the evidence is thus perpetuated; and notice to indorsers living in the same town or township may be given by mail, instead of per-

sonally. These statutes clearly recognize giving notice as a part of the notary's official duty. Indeed, the term "protest" is ordinarily used as including the entire proceeding necessary to charge indorsers. Notaries are nearly always resorted to for this work, and the owner of the draft may be assumed to have intended this course to be pursued. As said in *Tiernan v. Commercial Bank*: "No agent could have been selected . . . with more propriety for the performance of this duty than one whose profession and office were calculated peculiarly to fit him for its discharge. They are almost universally resorted to for the purpose. We cannot perceive, therefore, that the bank was wanting either in the degree of skill or diligence, which is required under such circumstances to exempt an agent from liability." *Baldwin v. Bank of Louisiana*, 1 La.

Ann. 13, 45 Am. Dec. 72; *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Smedes v. Bank of Utica*, 20 Johns. 384; *Bellemire v. Bank of United States*, 4 Whart. 105, 33 Am. Dec. 46, 1 Miles (Pa.) 173; *Citizens' Bank v. Howell*, 8 Md. 530, 63 Am. Dec. 714; *Fisher v. State Bank*, 7 Blackf. 610; *Turner v. Rogers*, 8 Ind. 139.

Bank of Lindsborg v. Ober, 31 Kan. 599, is based on the finding that the statutes of Kansas do not authorize the notary to give notice.

Our conclusion rests on statutes allowing a notary, as such, to perform this duty. Surely the bank acted prudently in intrusting to a public officer the doing of that which was incumbent on him as an officer of the law to do.

Affirmed.

KENTUCKY COURT OF APPEALS.

L. R. FIGG, *Appt.*,

v.

A. H. THOMPSON, Judge of Louisville City Court, *et al.*

(.....Ky.....)

An ordinance requiring a license for the business of contracting for public work is unconstitutional because it tends to create a monopoly and increase the burden of property owners, where the statutes require the cost of improvements to be assessed upon abutting owners by the front foot.

(January 31, 1899.)

APPEAL by complainant from a judgment of the Circuit Court for Jefferson County in favor of defendants in an action brought to prevent enforcement of an ordinance imposing a license tax upon the business of contracting for public work. *Reversed.*

The facts are stated in the opinion.

Messrs. Lane & Burnett for appellant.

Messrs. C. A. Wilson and H. L. Stone for appellees.

Guffy, J., delivered the opinion of the court:

It is alleged in the petition in this action that by § 35 of an alleged ordinance of the city of Louisville, approved April 1, 1896, entitled "An Ordinance Providing for Certain Licenses for the Sinking Fund of the City of Louisville," it is, among other things, ordained that every person, firm, or corporation engaged in the business of contracting for public, municipal, railroad, or bridge work shall pay a license fee of \$100 per annum; and by § 41 of the alleged ordinance it

is ordained that "all licenses shall be paid for in advance in lawful money of the United States, and it shall be unlawful for any firm, person, or corporation to carry on the business, occupation, or profession, or to use or to exhibit any articles herein mentioned, in the city of Louisville, without first having paid the license herein required for the same"; and by § 44 of said ordinance it is ordained that any person, firm, or corporation violating any of the provisions of this ordinance, where a different fine has not been provided for, shall be fined not less than \$5 nor more than \$100 for each offense; . . . and by § 1 of said ordinance it is ordained that said license fee shall be paid to the sinking fund commissioners of the city of Louisville for the purpose of the sinking fund of the city of Louisville. And the plaintiff says that by the alleged ordinance no penalty or fine is prescribed other than is provided in § 44, as herein set out; that plaintiff is engaged in the business of improving by original construction the carriage way of public streets and alleys, and of improving by original construction and reconstruction the public sidewalks of and in the city of Louisville. It is further alleged that when the board of public works orders any work to be done which is authorized by order of said board, or according to law is to be performed by independent contract, said board prepares and places in the office of said department a complete drawing and specification of said work. Thereupon said board causes a notice to be published in a newspaper published in said city once a week for two weeks, informing the public of the general nature of the work, calling for sealed proposals for said work by a day not earlier than ten days after the first of said publication. " . . . Said board shall, if a satisfactory bid be received, let said contract to the lowest bidder." It is further alleged that "improvements," as applied to public ways, shall mean all work and material used

NOTE.—For provision requiring contractors to employ none but union labor as increasing burden of taxpayers, see *Adams v. Brennan* (Ill.) 42 L. R. A. 718.
44 L. R. A.

upon them in the construction and reconstruction thereof, and that the cost of the improvement of the carriage ways in the construction and reconstruction thereof shall be apportioned against and paid for by the owners of the lots in the tax limits thereof as defined in said acts, and the improving of sidewalks and improving the curbing thereof by original construction and reconstruction shall be apportioned against, and paid for by, the owners of the ground fronting the improvements according to the number of front feet of their lots fronting the improvements respectively. It is further alleged that the ordinance aforesaid is void, because it is in violation of the provisions of an act approved July 1, 1893, in this: that said ordinance limits the right to contract in the city of Louisville for the improvement or original construction of the carriage ways of the streets, and lots in the city of Louisville, and for improvement by original construction and reconstruction of the public sidewalks in the city of Louisville to such persons only as may pay to the city of Louisville a bonus for such privilege in the shape of \$100 per annum as a license so to do. It is further alleged that the ordinance is unconstitutional and void, because it limits the right to submit to the city of Louisville proposals to make such improvements, and limits such proposals to such persons only as may pay said city of Louisville \$100 per annum for the privilege of so doing. It is further averred that there is in law no such organization as the sinking fund commissioners of the city of Louisville, and that, therefore, the ordinance requiring such tax to be paid to such corporation is null and void. The petition further sets out the fact that the plaintiff was prosecuted in the city court of Louisville, charged with the offense of having violated the ordinance complained of, and fined therefor; and under the provisions of § 163 of the act approved July 1, 1893, for the government of cities of the first class, this plaintiff brought this suit in the Jefferson circuit court, law and equity division, and prayed for a writ of prohibition restraining the police judge, R. H. Thompson, *et al.*, from further prosecuting said case against plaintiff. A demurrer was sustained to plaintiff's petition, and judgment rendered dismissing the same and denying the writ of prohibition, and from that judgment this appeal is prosecuted.

It is earnestly insisted for appellant that there is in law no such corporation or organization as the commissioners of the sinking fund of the city of Louisville. That the expression of the act of July, 1893, which says that "the board of sinking fund commissioners is hereby continued under the existing law," is void, and of no effect, and is in violation of §§ 51-59 and 167 of the Constitution. But, inasmuch as said sinking fund commissioners are not a party to this suit, nor does it appear that they are seeking to enforce the collection of the tax, nor the fine imposed by the police court, we deem it unnecessary to enter into a discussion as to the fact whether there are any legal commissioners of the sinking fund of the city of 44 L. R. A.

Louisville. From the allegations made in the petition it seems clear to us that the imposition of the license tends to increase the expenses incident to the improvements of sidewalks, streets, etc., and would be imposing additional burdens upon property owners fronting on such improvements. It is also manifest that the imposition of such a license is inconsistent with the general law and ordinance providing that such improvements or work should be let to the lowest responsible or reliable bidder, and for that reason must be held to be illegal and invalid. It is manifestly just and right that all improvements made, the cost of which is to be taxed against the property owners, should be made at the least possible cost; and it is equally manifest that such ordinance as the one in question tends to lessen the number of persons who would be inclined to file bids or propositions for doing work, and tends to create a monopoly in the business of public works. It is also reasonable that the amount paid for license would increase the cost of the improvements, and thus the property holder would be made to pay, not only for what it cost to make the improvements, but also to pay his part of the license fee required of the contractor, which would be manifestly unjust and illegal. It must be conceded that to pay for the improvements is sufficiently onerous upon the property holder, without also having added thereto a special license to the city as a privilege to the contractor to do the work and charge therefor. It is evidently contrary to natural justice that a city should order improvements to be made at the cost of the abutting property owners, and then add thereto a license fee to the contractor for the benefit of the city at large, which license fee the contractor, according to the well-known rules of business, will estimate in the sum for which he undertakes to do the work. That such license fees as that under consideration tend to lessen the number of bidders, and consequently increase the cost of such improvements is not open to serious question, and it seems to us unreasonable that the city should order improvements to be made, and then impose a license tax upon the party who undertakes to do the work. Hence it follows that any ordinance or act of the legislature authorizing or imposing any such license fee is unconstitutional and invalid. The prohibition asked for should have been granted.

For the reasons stated, the judgment appealed from is reversed, and the cause remanded, with directions to award the writ of prohibition, and for proceedings consistent herewith.

John A. COUCHMAN *et al.*, Appts.,
v.

E. J. COUCHMAN *et al.*

(.....Ky.....)

A county court has no jurisdiction after the end of the term at which it

NOTE.—As to the power to review a decision rejecting a portion of a will from probate, see *Shaw v. Camp* (Ill.) 36 L. R. A. 112.

admitted a will to probate to admit a codicil which is entirely inconsistent with the original will, where the statutes provide for vacating, reversing, or annulling a decree probating a will only by appeal to the circuit court or application to equity to impeach the judgment.

(November 16, 1898.)

A PPEAL by contestants from a judgment of the Court of Common Pleas for Clark County affirming a judgment of the County Court admitting to probate an alleged codicil to the will of B. W. Coughman, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. J. T. Shelby, George B. Nelson, and Gibson Taylor, with Mr. B. F. Buckner, for appellants:

The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the later expressly or in effect revokes the former, or the two be incapable of standing together.

If a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent.

1 Wms. Exrs. 6th Am. ed. p. 199.

Probate is absolute, conclusive, and exclusive after being made by the proper county court in obedience to the formalities of the statute, and no paper of a testamentary character, whether it be in form an original will, or a codicil, or addition, formal or informal to the previous will, can ever be offered in evidence, unless it not only has been probated, but it also constitutes a part of the last will and testament of the decedent.

The whole last will and testament of the testator must be offered for probate. No matter how many separate instruments of a testamentary nature have been executed by the testator, all such as can stand together, and be each partially operative constitute the true last will and testament of the decedent.

Masterman v. Maberly, 2 Hagg. Eccl. Rep. 235; *Stoddart v. Grant*, 1 Macq. H. L. Cas. 163; *Richards v. The Queen's Proctor*, 18 Jur. 540; *Sandford v. Vaughan*, 1 Phillim. Eccl. Rep. 39 and 128; *Harley v. Bagshaw*, 2 Phillim. Eccl. Rep. 48; *Hitchins v. Wood*, 2 Moore, P. C. C. 355; *Re Forman*, 54 Barb. 274. Tucker (N. Y.) 205; *Tonnele v. Hall*, 4 N. Y. 140; *Phelps v. Robbins*, 40 Conn. 250; *Van Wert v. Benedict*, 1 Bradf. 114; *Wilkoff's Appeal*, 15 Pa. 281, 53 Am. Dec. 597; *In Goods of Graham*, 3 Swab. & T. 69; *Geaves v. Price*, 3 Swab. & T. 71; *In Goods of Budd*, 3 Swab. & T. 196; *Birke v. Birke*, 4 Swab. & T. 23; *Lemage v. Goodban*, L. R. 1 Prob. & Div. 57; *In Goods of Nickalls*, 4 Swab. & T. 40; *Gladstone v. Tempest*, 2 Curt. Eccl. Rep. 650.

No statute contains any provision for the separate probate of a codicil, and unless it is received and probated as a part of a pre-existing will and merely supplementary thereto, there is no authority given and no tribunal invested with jurisdiction under the statute to grant such paper a separate probate.

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As the will indubitably disposes of the whole of the testator's estate, and as the codicil was not offered and probated as a part of the will, the effect of the probate of the will alone was undoubtedly to reject the codicil.

When once the probate court of Kentucky has pronounced in favor of any instrument as the last will and testament of a decedent, that judicial fiat is conclusive and final until the same is set aside by reversal or annulment, or suspended by supersedeas.

Hardy v. Hardy, 26 Ala. 526; *Watson v. Turner*, 89 Ala. 220; *Adsit's Estate*, Myrick's Prob. Cal. Ct. Rep. 266.

The tendency of modern legislation and modern decisions is to invest the judicial act of probating a will with absolute conclusiveness, save on appeal within a limited period.

Re Straub, 49 N. J. Eq. 264; *Bent v. Thompson*, 5 N. M. 408; *Re Storey*, 120 Ill. 244; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118.

If the codicil was duly executed and in testator's possession the law presumed that he canceled it, if not found after his death.

Brown v. Brown, 8 Ei. & Bl. 875, note; *Baptist Church v. Robbarts*, 2 Pa. 110; *Weeks v. McBeth*, 14 Ala. 474; *Holland v. Ferris*, 2 Bradf. 334; *Buckley v. Redmond*, 2 Bradf. 281; *Lowley v. Jackson*, 3 Phillim. Eccl. Rep. 376; *Helyar v. Helyar*, 1 Lee, Eccl. Rep. 472; *Davies v. Davies*, 1 Lee, Eccl. Rep. 444; *Lillie v. Lillie*, 3 Hagg. Eccl. Rep. 184; 1 Wms. Exrs. p. 379; *Grant v. Grant*, 1 Sandf. Ch. 235; *Voorhees v. Voorhees*, 39 N. Y. 463, 100 Am. Dec. 458; *Martin v. Laking*, 1 Hagg. Eccl. Rep. 244; *Davis v. Davis*, 2 Add. Eccl. Rep. 224; *In Goods of Thornton*, 2 Curt. Eccl. Rep. 913.

This presumption prevails unless a fraudulent suppression is proved.

Idley v. Bowen, 11 Wend. 227, 1 Edw. Ch. 148; *Buckley v. Redmond*, 2 Bradf. 281; *Holland v. Ferris*, 2 Bradf. 334; *Re Clark*, Tucker (N. Y.) 445.

Messrs. Beckner & Jonett, for appellees:

Courts of equity have no jurisdiction to establish lost, destroyed, or suppressed wills. *Thompson v. Beadles*, 14 Bush, 47.

In matters of probate, county courts have exclusive jurisdiction.

Jacobs v. Louisville & N. R. Co. 10 Bush, 268.

Section 28, chap. 113, Gen. Stat., provides that no will shall be received in evidence until it has been allowed and admitted to record by a county court.

Montgomery v. Miller, 4 B. Mon. 471; *Thomas v. Arthur*, 7 Bush, 245.

The county court may without summoning any party proceed to probate and admit a will to record or reject the same.

Gen. Stat. chap. 413, § 36.

A codicil is a part of a will.

County courts have no power to revise a subsequent term the final orders made by them at a previous term.

Taylor v. Tibbatts, 13 B. Mon. 186.

A codicil known to exist at the time of the probate of the will might be thereafter

"proven and recorded as an appendage to the same will."

Reed's Will, 2 B. Mon. 80.

The county court is to proceed in the hearing of questions of probate upon original evidence.

Thompson v. Beadles, 14 Bush, 49.

The question as to the sufficiency of the order admitting this codicil to probate was never questioned until it had become too late to take the course which appellants now insist was the only proper one to have pursued.

McCarty v. McCarty, 8 Bush, 508.

A codicil is a part of a will, just as a paragraph or a clause is a part.

3 Am. & Eng. Enc. Law, p. 292; *Beall v. Cunningham*, 3 B. Mon. 393, 39 Am. Dec. 469; *Youse v. Forman*, 5 Bush, 348.

On the theory of the appellants' counsel, the only way to get a codicil to record would be to appeal from the order of probate, and, offering the codicil, have the judgment appealed from reversed, and the will and codicil ordered to be probated by the circuit court as the last will. After this has been done, suppose another codicil found even within the period fixed for taking an appeal. Would not the right to appeal have been exhausted? And yet can it be said that a part of the will can be ignored because it may not be probated except through the circuit court, which has exhausted its powers in the premises?

Davis v. Taul, 6 Dana, 53; *Armstrong v. Armstrong*, 14 B. Mon. 333.

The circuit court is not a court of probate.

Moore v. Smith, 88 Ky. 155.

A jury may find one part of a paper produced to be the testator's will, and that another part was procured through undue influence, and therefore not a part of his will.

Randolph v. Lampkin, 90 Ky. 554, 10 L. R. A. 87.

It certainly cannot be maintained that in all cases where the probate court has admitted to probate a paper purporting to be a last will and testament, it has thereby fully exercised its entire jurisdiction over the subject of testamentary disposition of the decedent's estate.

Schultz v. Schultz, 10 Gratt. 373, 60 Am. Dec. 335; *Reed's Will*, 2 B. Mon. 80; *Waters v. Stickney*, 12 Allen, 18, 90 Am. Dec. 122; *Ryno v. Ryno*, 27 N. J. Eq. 522.

White, J., delivered the opinion of the court:

B. W. Couchman died August 12, 1887, in Clark county, Kentucky. August 22, 1887, at the regular term of the Clark county court, his will, bearing date January 4, 1886, was admitted to probate. By this will the testator devises to his wife, appellee E. J. Couchman, \$3,000 cash, and sufficient to purchase horse, harness, and carriage. This to be absolute. He also gave to his wife, during widowhood, his home farm, and the dividends on certain stock in turnpikes. He gave to his niece Amanda \$3,000; to the Bible College of Lexington, \$500; also, to the Foreign Christian Missionary Society, \$500; also, provided for the purchase of a scholarship in the Midway Orphan School; also, de-

vised to his brothers and sisters \$100. He then directs that all the remainder of his estate shall be divided equally, *per capita*, among his nephews and nieces, and, to the end that an equal division may be had, he directs his executors to sell and convey his real estate, except the home place, devised to his wife. He then provides that, upon the marriage or death of his wife, the farm and turnpike stock devised to her shall be sold and the proceeds divided as general estate devised to his nephews and nieces. He appoints his wife, F. J. Couchman, his brother, John A. Couchman, and his friend R. T. G. Bush, as executors. This bears date January 4, 1886. Within a year after the probate of this will the widow, E. J. Couchman, renounced the will, and elected to take under the law. On August 26, 1889, the widow, Elizabeth J. Couchman, propounded for probate a paper purporting to be, in substance, a codicil to the foregoing will; it being alleged that the original was lost or destroyed. This paper was probated as a codicil by the Clark county court, September 23, 1889, and reads: "I, B. W. Couchman, do make and publish this codicil to my last will and testament, as follows, to wit: (1) I give to my wife, Elizabeth J. Couchman, the home place, to have and to hold in fee simple, and the Curry place, to have and to hold during her natural life, and after her death to go to such of my blood kin as she may designate during her life, by will or otherwise. (2) I desire my said wife, in addition to the three thousand dollars given to her in my will, to have a sum equivalent to the rent of the land derived by her from her father's estate, and which I have used, or received rent from, since it became her property." It is claimed that this codicil was written in July, 1887, shortly before B. W. Couchman died. At the time this codicil was probated there had never been an appeal or other proceeding seeking to reverse, supersede, or annul the order probating the will, made August 22, 1887. Nor does it appear by this record that the judgment of probate of the will, of August 22, 1887, has ever been appealed from, superseded, or annulled. From the order and judgment probating the codicil dated September 23, 1889, an appeal was prosecuted to the court of common pleas of Clark county in July, 1892. The trial in the circuit court of Clark county resulted in a judgment probating the codicil, and from that judgment, after motions for new trial had been overruled, this appeal is prosecuted.

This record is very voluminous, and contains numerous exceptions to the admission and exclusion of testimony, and exceptions to the giving and refusing instructions to the jury, and other errors of the trial court. Among the questions raised by counsel, and urged, is the contention by appellants that the judgment of the county court admitting to probate the original will of B. W. Couchman was a bar to the subsequent proceeding to probate the codicil in the county court, and that, subject to review in a trial *de novo* of an appeal from it to the circuit court, it was absolutely conclusive. On behalf of appellees it is contended that the codicil being

merely an appendage to the will, and its probate depending on the probate of the will itself, the order and judgment of probate of the will were not final and conclusive as to the codicil; in other words, that the jurisdiction of the county court as to probate was not exhausted till the whole will was probated, and that this includes all codicils. The county court and the circuit court necessarily took the appellees' view of the law on this question.

This question has never been passed on by this court, and is one of first impression. Counsel for appellees have cited, as tending to support their position, the case of *Reed's Will*, 2 B. Mon. 79, where Chief Justice Robertson uses this language: "A codicil, dated in 1840, and providing for the transportation of the emancipated persons to Liberia, or the sale of them in the event of their refusal to be thus transported, has not been proved or offered for probate; and therefore the only purpose of noticing it in this opinion is to suggest that it may be hereafter proved and recorded as an appendage to the will, if in fact it was legally published, and the testator was competent at the time of its publication." We are also referred to the case of *Schultz v. Schultz*, decided by the court of appeals of Virginia, reported in 10 Gratt. 358, 60 Am. Dec. 335, as sustaining this position of appellees. In that case the court said at page 373: "I think it certainly cannot be maintained that, in all cases where the probate court has admitted to probate a paper purporting to be a last will and testament, it has thereby fully exercised its entire jurisdiction over the subject of the testamentary disposition of the decedent's estate. To affirm this proposition would be, in certain cases, so far as the probate court is concerned, to compel a man to die intestate as to part of his estate, though it might have been his deliberate and expressed intention to dispose of the whole. A man's last will must not of necessity be confined to one testamentary paper. It may consist of several different testamentary papers, of different dates, and executed and attested at different times. It cannot be indispensable, either, that they should be propounded in the court of probate at the same time. If a will has been produced and admitted to probate in the proper court, and subsequently another testamentary paper be found, purporting to be a codicil to the former, it cannot be doubted that the probate court could also receive and admit it to probate at a subsequent period."—citing *Reed's Will*, 2 B. Mon. 80. It may be remarked here that the decision of the Virginia court in the above case was by a divided court,—two dissents; also, that there was no question of codicil before it, but the contest was between two complete wills. That statute governing the probate of wills at the time of the *Schultz Case* was the same as our statute at the time of the case of *Reed's Will*, our statute being copied from that of Virginia. The statute in force at the time of *Reed's Will*, after providing that the county courts shall have power to hear and determine all causes, suits, and controversies testamentary arising within their re-

spective jurisdictions, provides (§ 11): "When any will shall be exhibited to be proved, the court having jurisdiction as aforesaid, may proceed immediately to receive the proof thereof, and grant a certificate of such probate; if, however, any person interested shall, within seven years afterwards, appear, and by his bill in chancery contest the validity of the will, an issue shall be made up whether the writing produced be the will of the testator or not, which shall be tried by a jury, whose verdict shall be final between the parties, saving to the court a power of granting a new trial for good cause, as in other trials; but no such party appearing within the time, the probate shall be forever binding; saving also to infants and *femes covert* and persons absent from the state, or *non compos mentis*, the like period after the removal of their respective disabilities." 1 Litt. Laws, p. 613. Under the statute, this court, in the case of *Wells's Will*, 5 Litt. (Ky.) 273, held that the decision of a county court on the validity of a will, whether for or against the will, is a bar to any subsequent proceedings thereon before that court; that the remedy is by writ of error, or by bill in chancery, within the statutory period. It was also held in *McMillin v. McMillin*, 7 T. B. Mon. 564, that, after the lapse of seven years from the probate, the will could not be successfully assailed in equity, unless complainants are under some disability. In the case of *Taylor v. Tibbatts*, 13 B. Mon. 177, this court, after quoting the statute, says: "The law makes no provision for a retrial in the same court, but, instead of permitting that to be done, substitutes a proceeding in a court of equity by which the validity of the will may be contested. The decision of the court of probate may also be revised in a superior tribunal, but the same court has no power at a subsequent term to set aside or vacate an order establishing a will, and directing it to be recorded. A decision of the county court upon the validity of a will is a bar to a renewal of the controversy in that court upon the same subject-matter." In the above statute there is no provision that the order or judgment of probate shall be binding and conclusive, except after the lapse of seven years, as quoted. By Gen. Stat. chap. 113, § 26, it is provided: "Wills shall be proved before, and admitted to record by, the county court of the county of the testator's residence." By § 27: "An appeal may be taken from the county court to the circuit court of the same county, and thence to the court of appeals, from every judgment admitting a will to record or rejecting it. . . . The appeal to the circuit court shall be within five years after rendering the judgment of probate or rejection in the county court, and prosecuted to the court of appeals within one year after the final decision in the circuit court." Section 28 provides: "No will shall be received in evidence until it has been allowed and admitted to record by a county court; and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until the same is superseded, reversed, or annulled." Under this statute this court, in

McCarty v. McCarty, 8 Bush, 504, said: "A will once admitted to probate by the county court must be contested in the manner pointed out by the statute. This special proceeding is adopted and regulated by law as applicable to wills alone, and the remedies afforded in such cases must be found in the statute, and nowhere else. There is no power given to the county court, after a will has been admitted to record or rejected, to grant to the parties a new trial, or at a subsequent term to annul all the orders made in regard to the case at a previous term. The rights of parties to property acquired under a will would be almost worthless, if a county court, with its limited jurisdiction in such cases, could try and retry the question of will or no will whenever, in the opinion of that court, an erroneous judgment had been rendered." In all these cases *supra* the precise question here presented was not before the court, nor passed on. The question in each of those cases was as to complete wills. In the case of *Reed's Will* the question of the probate of the codicil was not before the court for decision, and, if the statute in force at that time was the same as that applicable to the case at bar,—which it is not,—that part of the opinion in the *Reed's Will Case* would not be binding, as it was *obiter* purely.

Counsel for appellants has referred us to the case of *Hardy v. Hardy* (decided by the supreme court of Alabama) 26 Ala. 524, which reads: "The act of 1806 . . . provides that, when any will has been admitted to probate, it may be contested by any person interested, by bill in chancery, within five years thereafter, and that unless so contested it shall be conclusive and binding upon all parties,—extending, however, to infants, married women, lunatics, and persons absent from the state, the right of contestation to five years after the removal of their respective disabilities. Under this statute the probate is conclusive, unless the will is contested in the mode and within the time fixed. In the present case the application is to establish a paper which, if regarded as a will, is inconsistent with the provisions of the one which had previously been admitted to probate; and, as it is of later execution, it must operate as a revocation of the former, *pro tanto*. To this extent, therefore, it impeaches the validity of the will which had been established; and, if admitted to probate, the consequence would be that there would be two wills established, inconsistent in their provisions. It was to avoid such consequences that the statute to which we have referred was enacted. The paper offered for probate impeaches in part the will already admitted to probate, and this, as we have seen, can only be done in the mode and within the time prescribed by the act." We are also referred to the case of *Watson v. Turner*, 80 Ala. 220, where the court, after citing with approval the *Hardy Case*, 26 Ala. 524, said: "To establish a later will is necessarily to disestablish a former one already proved. The same is obviously true of a codicil, any of the provisions of which are inconsistent with those of the will itself. To prove a codicil is, *pro tanto*, to disprove so

much of the probated will as it may revoke or modify. The distinction is one of extent, not of kind or quality. The attempt to set aside a probated will, therefore, by proving a later one, or by attaching to it a codicil with inconsistent provisions, is a contest of the validity of the former will. In point of reason, we can see no valid distinction in the two cases. The evil results flowing from each are the same,—a like violation of the repose of titles, and a like uncertainty as to the conclusiveness of judicial determinations." We are also referred to the case of *Adst's Estate*, Myrick's Cal. Prob. Ch. Rep. 266, cited in Mr. Freeman's notes to *Waters v. Stickney*, 90 Am. Dec. 137, as supporting this doctrine; but the case is not accessible. This court, in the case of *Hughey v. Sidwell*, 18 B. Mon. 260, said: "This was a petition in equity brought by appellants in the Mason circuit court to annul and vacate a paper which had been regularly admitted to probate by the county court of Mason as the last will and testament of Aaron Sidwell, deceased. . . . The paper sought to be annulled had been regularly admitted to probate as the last will of the decedent by a court of competent jurisdiction; and the order of probate establishing the will, until reversed, superseded, or vacated by another tribunal in the mode prescribed by law, was conclusive between the parties. It is a judgment of a court having jurisdiction over the subject-matter, and cannot be assailed collaterally, nor revised by any indirect proceeding. There is at present but one mode of reaching it, and that is by appeal to the circuit court of the county where the order was made." In the case of *Abbott v. Traylor*, 11 Bush, 335, this court said: "This was a proceeding in equity in the Franklin circuit court to establish the alleged last will and testament of Jasper Clayton, deceased, which it is charged had been destroyed or suppressed. . . . Prior to the institution of this action a paper purporting to be the last will and testament of said Clayton was presented to, and proved in, and ordered record by, the Franklin county court, a tribunal whose jurisdiction is not questioned. This judgment remains unreversed, and, unless affected by the judgment of the chancellor, is to-day in full force and effect. . . . Now it is clear that the chancellor has no jurisdiction to vacate or modify the judgment of a county court admitting a will to probate. This question was directly decided in the case of *Hughey v. Sidwell*, 18 B. Mon. 260. There is but one way in which such a judgment can be affected, and that is by appeal to the circuit court of the county in which the order is made. Proceedings in chancery to set aside or vacate wills that have been admitted to probate can only be maintained in two classes of cases, . . . and not in these cases until after action by the circuit court."

We are of opinion, from a careful review of these authorities, that a judgment probating a will in the county court is final and conclusive, except it be vacated, reversed, or annulled by some one of the modes provided by the statute. The first mode is by appeal

to the circuit court within five years, and thence to this court within one year. This remedy is exclusive of all others while it may be invoked. The second is by a court of equity to impeach the judgment of the circuit court, as provided in sections 35, 37, chap. 113, Gen. Stat. This right of appeal to the circuit court is a matter of right to any person interested, and the trial had in the circuit court is a trial *de novo*, without regard to any evidence heard or offered in the county court. Neither of the statutory remedies provided for was attempted to be used in this case; but the appellees asked the county court, two years after the original will was probated, to admit to probate the codicil, and it is contended that the county court had jurisdiction to probate this codicil as an appendage to the original will. To this we do not assent. While codicils can only be probated as appendages to the original wills, and may, where not in any way inconsistent with the original will, be probated by the county court at a subsequent term from the probate of the original will, yet in this case the codicil propounded is entirely inconsistent with the original will. The original will disposes of the whole of the estate of decedent, B. W. Couchman, and distributes the same to various parties. The codicil practically gives all of his estate to his wife. The parties who take under the original will are entirely ignored in the codicil, and the effect of the judgment probating the codicil would be to annul and vacate the former judgment of probate,—at least, in so far as the two are inconsistent,—and would divest devisees under the first judgment of probate of title to property, and vest the title in devisees as provided by the codicil. This power to annul and vacate its former judgment of probate, the county court did not have. It follows that the judgment of the county court probating the codicil, being not within its jurisdiction, was erroneous, if not void; and likewise the judgment of the circuit court, appealed from, probating the codicil, was erroneous, and must be reversed. Having taken this view of the case, it becomes unnecessary to determine many questions presented in the record, and urged by counsel as cause for reversal.

Wherefore the judgment is reversed, and the cause remanded, with directions to grant appellants a new trial, and to render judgment reversing the judgment of the county court admitting the codicil to probate, and for other proceedings consistent herewith.

Peter BITZER, Appt.,
v.

R. H. THOMPSON, Judge of Louisville City Court, et al.

(.....Ky.....)

An ordinance requiring a license fee to be paid as a condition of buying claims is unconstitutional in case of a person who buys, merely as an investment, a few

NOTE.—The liability of brokers to a license tax is also considered in *Banta v. Chicago* (Ill.) 40 L. R. A. 611.
44 L. R. A.

claims against a city, which are admitted to be just and due, but which are not paid because of the lack of funds.

(January 31, 1899.)

A PPEAL by complainant from a judgment of the Circuit Court for Jefferson County in favor of defendants in a proceeding brought to enjoin the enforcement of an ordinance requiring a license fee for engaging in the business of buying city claims. *Reversed.*

The facts are stated in the opinion.

Messrs. Lane & Burnett, for appellant:

To forbid the purchase of claims except by the person who purchases the privilege of so doing from the debtor is in effect to impair the value of its own obligations, and makes them sell for less than they otherwise would sell for.

Applegate v. Ernst, 3 Bush, 651, 96 Am. Dec. 272.

Mr. H. L. Stone, for appellees:

The judgments appealed from refusing to prohibit and restrain the appellees, as the officers of the police court, in further proceeding to collect the fines imposed for non-payment of license, as provided in said license ordinance of April 1, 1896, and dismissing the appellants' petitions in each of these cases, were correct in all respects and free from error.

Second Compilation of Ordinances of Louisville 1897, pp. 134, 135, 138, § 11; Ky. Stat. §§ 3010, 3024; State Const. § 59, subsecs. 17, 51, 166; Elliott's Digest of Charter & Ordinances of Louisville, pp. 242-250, 511-513, 933-936; Burnett's City Code, p. 701, § 35, pp. 702-705; *Roberts v. Clay City*, 19 Ky. L. Rep. 1046.

Mr. Charles A. Wilson also for appellees.

Guffy, J., delivered the opinion of the court:

The complaint of the plaintiff in this action is that the city of Louisville, by an ordinance passed 1st of April, 1896, ordained that every person, firm, or corporation who bought claims should annually pay a license of \$150 per year into the sinking fund of the city of Louisville for the purpose of said sinking fund, and that such sum of \$150 should be paid in advance in lawful money of the United States, and any person violating the provisions of said ordinance should be subject to a fine of not less than \$5 nor more than \$100; that prior to the 1st of April, 1896, the plaintiff had been engaged, and is now engaged, in buying claims against the city of Louisville, which the city of Louisville admits that it owes, and has not paid said claims because it has not the present means with which to pay same; that he has heretofore bought no claims other than those against the city of Louisville, and that, so far as the ordinance heretofore referred to requires this plaintiff to pay the sinking fund an annual income of \$150 in advance, or at all, for the privilege of buying such claims against the city of Louis-

ville, it is void. It is also claimed that there is no such corporation or body in existence as the commissioners of the sinking fund of Louisville. It is further averred in the petition that the plaintiff had been fined in the police court of Louisville for violation of said ordinance. The appellant instituted this action under § 103 of an act approved July 1, 1893, for the government of cities of the first class, for the purpose of obtaining a writ of prohibition against the appellees prohibiting them from enforcing the collection of the fine assessed against him as aforesaid. A demurrer was sustained to the petition, and same dismissed, and the writ of prohibition denied, and from that judgment this appeal is prosecuted.

It is insisted ably, and at great length, that there is no such corporation or institution in existence as the commissioners of the sinking fund of the city of Louisville: that the provision in the said charter of cities of the first class, which it is claimed continues or creates said sinking fund, is in violation of §§ 51-59 and 167 of the Constitution. But, inasmuch as the said sinking-fund commissioners are not parties to this action, and it does not appear that they are insisting upon the payment of said license, nor engaged in the prosecution in the police court, we deem it unnecessary to determine whether or not there is any such institution or corporation as the commissioners of the sinking fund of the city of Louisville. We are, however, of opinion that the ordinance or statute which requires the license to be paid as a condition precedent to a citizen buying a

claim or claims is unconstitutional and void. It is doubtless true that, if a person was engaged in the general business of brokerage, or making it his business to buy general claims, it would be competent to impose a license fee; but, according to the averments in this petition, the appellant was only purchasing claims on the city of Louisville, which were admitted by said city to be just and due, and it would seem that it would be unreasonable to impose a license tax upon a citizen who merely wanted to buy a few claims, or some of a particular class, as an investment. It would also be injurious to the claimant, whose claim could not be paid when due, to require a tax to be paid to the same authority who owed the claim before the purchaser could be allowed to buy the same. The tendency of such a license would be to impose a hardship upon the claimant as well as upon the purchaser, and it seems that public policy forbids the imposition of any such tax or restriction in regard to the purchase of such claims. Such license would tend to lessen the value of the claim which the city had undertaken to pay at maturity, and consequently would enable the city to derive a profit or revenue from its own laches, and would tend to lessen the number of claim buyers, and, as a consequence, cheapen the claim and thereby wrongfully injure the creditor of the city.

For the reasons indicated, *the judgment appealed from is reversed, and cause remanded, with directions to issue the writ of prohibition prayed for, and for proceedings consistent herewith.*

MARYLAND COURT OF APPEALS.

Caroline WIENECKE, *Appt.*,
v.

William G. ARBIN, *Admr., etc.*, of Henry Arbin, *Deceased.*

(.....Md.....)

An assignment purporting to be signed by the mark of a woman holding an insurance policy on her husband's life, and delivered with the policy by the husband to his creditor, is not sufficiently proved nearly twenty-five years afterward, by the testimony of an attesting witness to the

effect that he certainly saw her sign the paper or he would not have put his name there, when he is unable to recall the circumstances or the place of the alleged signing,—especially when there is no proof that she made or authorized the delivery of the policy to the alleged assignee, or that the assignment was read or explained to her, while it appears that she could not read.

(June 29, 1898.)

A PPEAL by plaintiff from a decree of the Circuit Court, No. 2, of Baltimore City

NOTE.—Proof of signature by mark when attesting witnesses thereto are dead or cannot remember the transaction.

- I. Of testator.
 - a. Where the attesting witness is dead.
 - b. Where the attesting witness is forgetful.
- II. Of maker of other instruments.
 - a. Where the attesting witness is dead.
 - b. Where the attesting witness is forgetful.

I. Of testator.

a. Where the attesting witness is dead.

Where the attesting witnesses are all dead.
44 L. R. A.

See also 45 L. R. A. 682; 47 L. R. A. 695.

proof of their signatures and other circumstances corroborating are sufficient to probate a will signed by mark although some cases sustain the will on proof of the signatures of the attesting witnesses only. In *Goods of Clarke*, 1 Swab. & T. 22; *Lyons v. Holmes*, 11 S. C. 429, 32 Am. Rep. 483; *Scott v. Hawks* (Iowa) 77 N. W. 467; *Jackson, Van Dusen, v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330.

In *Goods of Clarke*, 1 Swab. & T. 22, it was held that the execution of a will was proved where it was signed by mark and both of the attesting witnesses were dead, and the handwriting of one of them was proved, and there was also proof that the testatrix delivered the will in a sealed envelope to one of the executors, in whose custody it remained until after her death,

in favor of defendant in a proceeding brought to recover the proceeds of a life insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. William E. Schloegel and Thomas Ireland Elliott, for appellant:

The alleged assignment by John Wienecke was no assignment because he had no further interest in the policy after naming his wife as beneficiary in the same.

Elliott v. Bryan, 64 Md. 368; Md. Code, Gen. Laws, arts. 23, 117; *Pratt v. Globe Mut. L. Ins. Co.* (Tenn.) 17 S. W. 352; Bacon, Ben. Soc. §§ 292, 294; Bliss, Life Ins. § 318; *Harrison v. McConkey*, 1 Md. Ch. 34; *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 195, 38 Am. Rep. 289; *Pilcher v. New York L. Ins. Co.* 33 La. Ann. 332; *Pence v. Makepeace*, 65 Ind. 345; *Connecticut Mut. L. Ins. Co. v. Baldwin*, 15 R. I. 108; *Whitridge v. Barry*, 42 Md. 140; *Mutual L. Ins. Co. v. Stibbe*, 46 Md. 302.

If by fraud or undue influence a benefi-

telling him "that she wanted him to manage for her."

In this case the testatrix's maiden name was written at her mark by mistake, instead of her real name.

And where the subscribing witnesses to a will signed by mark are dead, but the genuineness of their signatures is proved, it is not necessary to prove the testator's request. *Scott v. Hawks* (Iowa) 77 N. W. 467.

In Iowa, publication, as such, of a will is not required by statute.

And a will signed by mark is sufficiently proved to go to the jury where the attesting witnesses are all dead, and the handwriting of two and the mark of the third are proved. *Jackson, Van Dusen, v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330.

Where one witness is dead the will may be proved by the surviving witness, and proof of the handwriting of the deceased witness, and other corroborating circumstances. *Nickerson v. Buck*, 12 Cush. 332; *Stephens v. Stephens*, 129 Mo. 422; *Re Dockstader*, 6 Dem. 106; *Re Simpson*, 2 Redf. 29; *Re Hyland*, 58 N. Y. S. R. 798, 45 Alb. L. J. 209; *Re Smith*, 61 Hun. 101; *Re Kane*, 2 Connolly. 249; *Re Wilson*, 76 Hun. 1; *Re Murphy*, 15 Mis. 208.

Some cases under N. Y. Code of Civil Procedure sustain a will on the evidence of the surviving witness and proof of the handwriting of the deceased witness. On this question there is some conflict but this is held by the latest decisions.

So, where the attesting witness to a will signed by the testator by mark is dead, the attestation by such witness is then to be shown by proof of the handwriting of the witness, and the will is valid although two remaining witnesses did not see the testator make his mark. *Nickerson v. Buck*, 12 Cush. 332.

The court said it is not necessary that the attesting witnesses see the testator sign his name, as the signature of the testator may be made known to the witnesses in other modes, and in this case the request to attest the will is sufficient.

And where one attesting witness to a will signed by mark dies before probate and the instrument is proved by two other attesting witnesses, but no one testifies to having seen the testator make his mark, the will is valid under Mo. Rev. Stat. 1889, § 8870, providing that every will shall be in writing signed by the testator, or by some person by his direction in his

presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator, and § 6570, providing in all cases where the written signature of any person is required, the proper handwriting of such person or his mark shall be intended. *Stephens v. Stephens*, 129 Mo. 422.

And under 2 N. Y. Rev. Stat. 59, § 13, providing that when any one or more of the subscribing witnesses to a will shall be examined, and the other witnesses are dead or reside out of the state or are insane, then such proof shall be taken of the handwriting of the testator and of the witnesses so dead, absent, or insane, and of such other circumstances, as would be sufficient to prove the will on the trial at law, a will signed by mark may be admitted to probate where one subscribing witness was dead and the other subscribing witness proves that the statute has been complied with, and this is corroborated by three other persons. *Re Simpson*, 2 Redf. 29.

The alleged contract or assignment is vague, indefinite, uncertain.

The contract itself must be clear, certain, definite, and mutual, and the proof to sustain it clear, unequivocal, and satisfactory.

Mundorff v. Kilbourn, 4 Md. 466; *Owings v. Baldwin*, 1 Md. Ch. 120; *Story*, Eq. Jur. § 764.

The alleged assignment is no assignment

presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator, and § 6570, providing in all cases where the written signature of any person is required, the proper handwriting of such person or his mark shall be intended. *Stephens v. Stephens*, 129 Mo. 422.

And under 2 N. Y. Rev. Stat. 59, § 13, providing that when any one or more of the subscribing witnesses to a will shall be examined, and the other witnesses are dead or reside out of the state or are insane, then such proof shall be taken of the handwriting of the testator and of the witnesses so dead, absent, or insane, and of such other circumstances, as would be sufficient to prove the will on the trial at law, a will signed by mark may be admitted to probate where one subscribing witness was dead and the other subscribing witness proves that the statute has been complied with, and this is corroborated by three other persons. *Re Simpson*, 2 Redf. 29.

And a will signed by the testator by his mark may be probated where one of the witnesses whose handwriting is proved is dead, and the other attesting witness proves the execution of the will, and there are other corroborating circumstances, under N. Y. Code Civ. Proc. § 2620, providing that if the subscribing witness whose testimony is required is dead, the will may be established upon proof of the handwriting of the testator and of the subscribing witness, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action. *Re Hyland*, 58 N. Y. S. R. 798, 45 Alb. L. J. 209. In this case the court said: "While it is desirable to have the testimony of both witnesses to prove the making of the mark by a testator, yet when one cannot be produced, and no other persons were present, the testimony of the other, if his character is unimpeached, when supported by the apparent good faith of the transaction and a full attestation clause, I hold to be sufficient."

This rule just stated was adopted in *Re Wilson*, 76 Hun. 1, where it was held, under Code Civ. Proc. § 2620, that where a will was signed by mark, and one of the attesting witnesses was dead, the will may be admitted to probate where the surviving witness testifies to the proper publication of the will and that he saw the testator sign his mark thereto.

The report of this case does not show that the handwriting of the deceased witness was

or absolute sale, because it is not a substitution of beneficiaries.

Insurance Co. of N. A. v. Garland, 108 Ill. 220, 9 Ill. App. 571; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285; *Bowen v. National Life Assn.* 63 Conn. 480; *Palmer v. Merrill*, 6 Cush. 282, 52 Am. Dec. 782; 1 Addison, Contr. 598.

All agreements to be executed in equity must be certain and defined, equal and fair, and proved as the law requires, and it is enough to doubt upon any one of these points to refuse relief.

Mundorff v. Kilbourn, 4 Md. 464; *Wadsworth v. Manning*, 4 Md. 60; *Wilks v. Burns*, 40 Md. 68; *Hopkins v. Roberts*, 54 Md. 317; *Kraft v. Egan*, 78 Md. 41; *Gill v. Wells*, 59 Md. 492; *Williams v. Shipley*, 67 Md. 382.

There is no evidence that Caroline Wiencke, the appellant, ever personally or through her agent or by her order delivered

proved. The court refused to follow *Re Reynolds*, 4 Dem. 68; *Walsh's Will*, Tucker (N. Y.) 132, and in effect overrules them, and cites *Re Phelps*, 1 Connoly, 463, as overruled by the same court in *Re Hyland*, 58 N. Y. S. R. 798, 45 Alb. L. J. 209.

And a will signed by mark may be admitted to probate on proof by the surviving witness that he saw the testator make his mark and the other witness attest such signature, and further proof of the handwriting of the deceased attesting witness. *Re Murphy*, 15 Misc. 208. In this case the proof of the surviving witness was not explicit as to all the contents of the will being read to the testatrix; but it appears from the evidence that the deceased witness did read the will to the testatrix and that she knew its contents prior to its execution.

And where the testator signs by mark, and one of the subscribing witnesses whose signature is proved is dead, the making of the will and mark may be proved by a witness other than the subscribing witness, and by corroborating circumstances, under N. Y. Code Civ. Proc. § 2620. *Re Smith*, 61 Hun, 101.

This case does not show that the evidence of the surviving subscribing witness was used. The court said: "We do not decide that a subscribing witness may not prove the handwriting by a mark of the testator."

And where an attesting witness who had drawn up a will signed by mark was dead, and the other witness proved the handwriting of deceased witness and the due execution of the will, it was held to be sufficiently proved under N. Y. Code Civ. Proc. § 2620, although the witness testified that he had signed the will as a witness before the testatrix had made her mark. *Re Kane*, 2 Connoly, 249.

The court held that this witness evidently was mistaken, as a magnifying glass indicated that both of the signatures were made before that of the witness who testified.

And a will signed by mark may be admitted to probate where one of the attesting witnesses is dead and the other witness testifies that he saw testator make the mark, and proves the handwriting of the other under N. Y. Code Civ. Proc. § 2620. *Re Dockstader*, 6 Dem. 106.

But there are several New York cases which have denied probate in cases of this kind. These, however, have been disapproved in later cases, and are of doubtful authority.

In *Re Porter*, 1 Misc. 262, it was held that under N. Y. Code Civ. Proc. § 2620, a will cannot be admitted to probate where it is signed by

the policy, or ever knew it had been delivered to Henry Arbin.

Pence v. Connecticut Mut. L. Ins. Co. (Ind.) 8 Ins. L. J. 746.

The relationship of husband is no evidence that he was authorized to assign a policy by his wife.

Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116; *Richard*, Ins. § 188.

To make a valid assignment there must be a delivery of the policy.

Ballou v. Gile, 50 Wis. 614; *Deater Sav. Bank v. Copeland*, 17 Me. 263; *Falk v. James*, 49 N. J. Eq. 484; *Travelers' Ins. Co. v. Healey*, 60 N. Y. S. R. 151.

The burden of proving the alleged assignment is thrown on the assignee; it is not enough that the defendant holds possession, nor that the transfer was apparently executed with every legal formality, nor that the delivery was made by one who might be sup-

mark if the execution of the mark is not proved by one of the attesting witnesses, although the handwriting of the other attesting witness who is dead is proved.

So, it was held in *Re Phelps*, 1 Connoly, 463 (overruled in *Re Hyland*, 58 N. Y. S. R. 798), that the evidence of a surviving attesting witness to a will signed by mark is insufficient, where there is no corroboration of another person who saw the testator make his mark.

And in *Walsh's Will*, Tucker (N. Y.) 132, where a will was signed by mark and one of the attesting witnesses was dead and his handwriting was proved by the other witness. It was held that a will subscribed by mark instead of by handwriting cannot be proved at all if one of the witnesses cannot be produced. The court said: "The statute provides that where one or more, or all, of the subscribing witnesses are dead, out of the state, or insane, proof must be taken of the handwriting of the testator and of the absent witness or witnesses on propounding the will for probate."

This decision was under 2 N. Y. Rev Stat. § 13. See *Re Simpson*, 2 Redf. 29.

But referring to this case in *Re Simpson*, 2 Redf. 20, the court said: "I am not willing to follow the learned surrogate in the case just noticed. I believe he has overlooked an important part of the section of the statute to which he refers."

In *Re Reynolds*, 4 Dem. 68, it was held that a will signed by mark cannot be probated on proof of one subscribing witness and proof of the handwriting of the other witness, there being no other evidence as to the signature by mark, under Code Civ. Proc. § 2620.

This was on the ground that there should be more than one witness to prove the mark to a will.

Under this section of the Code of Civil Procedure, a will executed by mark cannot be admitted to probate where it was witnessed by the draftsman since deceased, and by another witness who is afflicted with a defective memory and cannot tell what occurred at the time of the execution of the alleged will, and there is no other proof of other persons or of other circumstances to establish its execution. *Worden v. Van Gleson*, 6 Dem. 237. The court said in this case that if other witnesses than those subscribing could prove the execution by mark it could be probated.

This was affirmed in *Re Van Gleson*, 47 Hun, 5, on the ground that there was no witness to

posed to be authorized, nor that value was received,—all these will confer no right unless assented to by the party in interest.

Hine & Nichols, Assignment of Life Policies, 24; Pingrey v. National L. Ins. Co. 144 Mass. 374.

Caroline Wienecke never saw the alleged assignment, and never read it for she cannot read; she therefore could not have willingly signed it, and if her signature was obtained by fraud or misrepresentation, then she is a competent witness.

First Nat. Bank v. Eccleston, 48 Md. 145; State, Cummings, v. Cass, 52 N. J. L. 77; 2 Taylor, Ev. p. 808 (21).

The courts will not allow anyone who occupies any relation to another, which involves confidence or authority, to take a benefit at the expense of the other, without the clearest evidence that such donor or promisor was in a position fully to comprehend her rights.

Snyder v. Jones, 38 Md. 546; Highberger

prove that the testatrix had signed the will or said that she had signed it.

In *Re Phelps, 1 Connolly, 463*, the court reviewed these cases, and substantially followed them; but subsequently, in *Re Hyland, 58 N. Y. S. R. 798, 45 Alb. L. J. 209*, the question was reviewed again by the same judge, who had changed his opinion. He said that in *Re Walsh's Will, Tucker (N. Y.) 132*, it was held that a will subscribed by mark could not be proved if both the subscribing witnesses could not be produced, and that in *Re Reynolds, 4 Dem. 68*, the same was held on account of absence of evidence other than the surviving witnesses as to the deceased making his mark, and so in *Worden v. Van Gleson, 6 Dem. 237*, where the sole surviving witness did not see the testator make his mark and there was no other witness, and that in *Re Phelps, 1 Connolly, 463*, affirmed in *Re Van Gleson, 47 Hun, 5*, he had held that the will could not be proved by the sole surviving witness in the absence of testimony of others who were present, but that he had now changed his view of the law, and as the question had never been decided by the court of appeals, he now held that under the Code a will made by mark may be proved by the surviving witness and evidence of the handwriting of the other attesting witness if dead, and by other circumstances.

In *Edmonds v. Lower, 11 Jur. N. S. 911*, it was held that a will executed by mark should be refused probate where the draftsman took the whole property and both of the attesting witnesses were dead, and the draftsman had failed to produce the will but had carried it with him in the Crimean war for several years, and there was lack of other evidence of identification of the testatrix.

And a will signed by mark of testator cannot be admitted to probate where one of the attesting witnesses is dead, and the only proof is that of the other attesting witness, who does not state that he attested at the request of the testator, and it is not shown that the testator knew the contents of the paper. *Morritt v. Douglass, L. R. 3 Prob. & Div. 1, 42 L. J. Prob. N. S. 10, 27 L. T. N. S. 591, 21 Week. Rep. 162.*

b. Where the attesting witness is forgetful.

Where an attesting witness to a will signed by mark forgets some of the essentials necessary to its due execution, but these are supplied by 44 L. R. A.

v. Stiffler, 21 Md. 338, 83 Am. Dec. 593; Todd v. Grove, 33 Md. 192; Hatch v. Hatch, 9 Ves. Jr. 292; 1 Story, Eq. Jur. §§ 309, 317-319; Baker v. Bradley, 7 De G. M. & G. 621.

Mr. Albert S. J. Owens, for appellee: With the consent of her husband, a married woman may assign a policy of insurance in payment of her husband's debts.

Dungan v. Mutual Ben. L. Ins. Co. 38 Md. 242; Whitridge v. Barry, 42 Md. 150; Emerick v. Coakley, 35 Md. 188.

The signature of the wife alone, made with her husband's consent, to an assignment of a life insurance policy, is good without his actually joining in the assignment.

Whitridge v. Barry, 42 Md. 151.

The general right of recovery under circumstances similar to those at bar is affirmed in numberless cases.

Dufaur v. Professional Life Assur. Co. 25 Beav. 603; Choune v. Baylis, 31 Beav. 351; Swift v. Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. 96 Ill. 309; Travel-

other evidence, it seems that the will may be admitted to probate.

So, where a codicil was signed by mark by the draftsman and had two other attesting witnesses, and the draftsman did not remember whether he asked the testator if it was his last will when the witnesses came in, but did ask him if it was his signature, and the draftsman proved his own signature, and another witness said he did not see the draftsman sign as an attesting witness, but saw the other witness sit down and take the pen, and did not recollect hearing any portion of the will read, while the other attesting witness testified to seeing the testator have the pen, and that he heard him say he acknowledged the will but did not see the other attesting witness sign, it was held that the proof showed that the testator had declared the instrument to be his codicil to the witnesses, and requested them to subscribe as witnesses, which they did in his presence, and the due execution was not overcome by their want of memory of some of the incidents. *Dack v. Dack, 19 Hun, 630.*

On appeal, 84 N. Y. 663, the decision on the execution of the codicil was approved, but the case was reversed for a new trial as to undue influence.

And a will signed by mark was held to be valid where one attesting witness testified: "My husband made the mark for her, or she made the mark herself, of course. No one guided her hand, as I know of. I cannot remember, it is so long since, but I suppose I saw her take the pen in her hand and make the mark. . . . When she made the cross she had the pen in her hand." The husband testified: "I made the mark with her hand on the pen. . . . I always witness marks in the same way. . . . I take the pen and ask the person who wishes to make their mark, put the hand on the pen, and while the hand is on the pen, I, guiding it, make the cross." *Kearney's Estate, 148 Pa. 218.*

And where one witness to a will signed by mark did not recollect being asked to put the testator's name or his own name to the same, but would not have done so without the testator's request, and the other witness testified as to such request being made to the other witness, the will was held valid without discussing this question. *Long v. Zook, 13 Pa. 400.*

The main question in this case was whether

ers' Ins. Co. v. Healey, 60 N. Y. S. R. 151; *Harrison v. McConkey*, 1 Md. Ch. 34.

The plea of limitations interposed in the answer is inapplicable in a case such as this.

Roots v. Mason City Salt & Min. Co. 27 W. Va. 434; *Jones v. Merchants' Bank*, 6 Robt. 162.

There was no error in the court below refusing to permit Caroline Wienecke to testify as to the making of the contract pledging the policy for the payment of her husband's indebtedness, or the facts connected therewith; the ruling is in conformity with the statute and with the decisions of this court.

Code, art. 35, § 2; *Biggs v. McCurley*, 73 Md. 411; *Robertson v. Mowell*, 66 Md. 531; *Wright v. Gilbert*, 51 Md. 157; *Johnson v. Heald*, 33 Md. 371.

It was a good will under Pa. act 1848, validating wills previously made.

So, in *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567, the positive evidence of one subscribing witness that he signed the testator's name by his express direction to a will made by mark, and the attestation by the other subscribing witness, whose memory failed as to express direction, were held sufficient to probate the will.

II. Of maker of other instruments.

a. Where the attesting witness is dead.

Some cases hold that where the attesting witness is dead the execution of a written instrument may be proved by evidence of his handwriting. But the identity of the obligor must be established.

Proof of the handwriting of a deceased witness is sufficient evidence of the execution of a note, where he attested the signature of the maker who signed by mark. *Sanborn v. Cole*, 63 Vt. 590, 14 L. R. A. 208.

So, where an administratrix acknowledged a note and promised to pay the same by indorsement, and signed by mark, and the attesting witness had died, the writing may be established by proof of the genuineness of the handwriting of the attesting witness to the mark of the administratrix, and also his signature. *Re Romero's Succession*, 43 La. Ann. 975.

And a contract signed by mark, attested by two witnesses, is admissible in evidence, where both attesting witnesses are dead, and their handwriting is proved, with proof also that they were men of such honesty and general uprightness of conduct that they could not have been induced to lend their aid to a forgery. *Tagliasco v. Molinari*, 9 La. 512.

In this case other circumstances were also proved which indicated the execution of the instrument.

In *Smith v. Gibbon*, 6 La. Ann. 684, it was held that a deed forty years old should be admitted in evidence where it was signed by the grantor and wife by mark and attested by two witnesses one of whom was dead and the other probably dead, where the signatures of the two witnesses were proved to be genuine and they were both proved to have been men of good character. In this case a witness testified that the wife refused to sign, and that he had seen the instrument attested by the witnesses without her signature; but the court held that it may have been signed by the wife before delivery, or that after the lapse of forty years this witness may have been mistaken.

And where notes are signed by mark, a default judgment will be sustained on appeal on 44 L. R. A.

On petition for rehearing.

Making a mark is signing, even in the attestation of a last will and testament, which has been fenced around by the law with more than ordinary guards.

Zacharie v. Franklin, 12 Pet. 162, 9 L. ed. 1040; *Collins v. Nicols*, 1 Harr. & J. 245.

When a mark is proved to be the mark of the person who made it, the mark has the same legal effect as a written signature.

See also *Eichelberger v. Sifford*, 27 Md. 331; *Note to Re Guilfoyle* (Cal.) 22 L. R. A. 370; *Devereux v. McMahon*, 12 L. R. A. 205, 108 N. C. 134.

It would be at least peculiar to hold that a mark is a signature, from which the same presumptions flow as from a written signature, and yet to hold that if the person who

evidence of acknowledgment of the debt as to some of the notes, and evidence, as to the other notes, of the handwriting of the attesting witness, and that he is dead. *Chaffe v. Cupp*, 5 La. Ann. 684.

It was insisted that evidence should have been given in regard to the honesty and uprightness of conduct of the deceased witness; but the court held that that was presumed until shown otherwise.

And a mortgage is admissible in evidence where one of the plaintiffs testifies that he wrote the mortgage and a note secured thereby and the defendant's name, at his request, and that a subscribing witness, who has since died, read the mortgage and note to the defendant and held the pen while he made a mark, and then signed his own name as a witness, and the plaintiff identifies such signature. *Johnson v. Davis*, 95 Ala. 293.

And where a grantor signs a deed with her mark, and the parties and witnesses are all dead, evidence of the handwriting of the subscribing witness, with other circumstances as to the execution of the deed, are sufficient without evidence of the grantor's signature. *Lyons v. Holmes*, 11 S. C. 429, 32 Am. Rep. 482.

In *Mitchell v. Johnson*, *Moody & M.* 176, where the plaintiff was the attesting witness to a bond signed by mark, and some evidence of the identity of defendant was given, it was said that unless evidence of the handwriting of the witness was admissible, it would be impossible for the obligee of a bond to recover where the subscribing witness was dead and the obligor a marksman.

So, in *Page v. Mann*, *Moody & M.* 79, it was held that proof of the handwriting of a subscribing witness to an instrument signed by mark is sufficient, he being dead, without any other proof of the identity of the parties except the identity of the name and description. But in *White Locke v. Musgrove*, 1 Cramp. & M. 511, it was held that in an action upon an instrument signed by mark the subscribing witness to which is dead or resides abroad, it is necessary, besides proving the handwriting of the subscribing witness, to give some evidence of the identity of the party sued, with the party who appears to have executed the instrument.

In this case, *Page v. Mann*, *Moody & M.* 79, was referred to, the counsel saying that Lord Tenterden admits that the evidence of the attesting witness is sufficient without any proof of the identity, but subsequently such evidence was given. *Bayley, B.*, said: "That was the case of an agreement for a lease under which the defendants had had possession, so that probably it would contain some description at least of

made the mark says he cannot read, the presumption is destroyed.

The contents of a writing, signed by a party himself, or by another at his request, are presumed to be known to him, and so of a paper drawn up by one for another, and the matters referred to in such writing.

Lawson, Presumptive Ev. p. 18; *Harris v. Story*, 2 E. D. Smith, 367; *Doran v. Mullen*, 78 Ill. 346; 2 Bl. Com. p. 305.

Fowler, J., delivered the opinion of the court:

The New York Life Insurance Company, on the 11th April, 1874, issued its paid-up policy for the sum of \$2,170, on the life of John Wienecke, in favor of his wife, Caroline. The assured died on the 6th of February, 1897, and immediately thereafter the

the place by which the defendants might be connected."

And in an action against an executor on a note alleged to have been executed by his testator, prior to Pa. act April 15, 1869, providing that no interest shall exclude a witness except in actions against executors, administrators, or guardians, the execution of the note cannot be proved by evidence of the handwriting of a deceased subscribing witness who was an interested party. *Mackrell v. Wolf*, 104 Pa. 421.

On a subsequent trial of the same case it was held that the notes are not sufficiently identified to be admissible in evidence by a witness who testifies that about twenty years before the trial he went with the payee to a person who had the same surname as the alleged maker, who on being shown by the payee certain papers (which the witness thought were the notes in suit), said they were his notes and were all right. *Wolff v. Mackrell* (Pa.) 10 Cent. Rep. 58.

b. Where the attesting witness is forgetful.

The case of *WIENECKE v. ARBIN* holds that the execution of an assignment of a life insurance policy purporting to have been made by a wife by her mark is not established by evidence twenty-five years after its date by one attesting witness who is unable to show the time, place, or circumstances of the signing by the wife, who could not read, or that the document was read over to her, where it is not shown by the evidence that she ever delivered the instrument, although the attesting witness testifies that he certainly saw her sign the paper or he would not have put his name there.

There are not many cases on this question. Some allow evidence of the execution of an instrument to go to the jury, where the attesting witness testifies that he witnessed the paper in due course of business, but fails to give any of the circumstances, and when the other evidence tends to show a probability that the obligor executed the instrument.

Evidence of the execution of a mortgage and note signed by mark is sufficient to go to the jury, where the attesting witness testified that he witnessed the execution of the same, but that his recollection of the transaction was general; that he could not say whether the defendant asked him to attest the mortgage and note or not, and could not say from his recollection whether or not the defendant knew that he signed his name as attesting witness, but that he made and witnessed the paper in the usual course of business. *Robinson v. Brennan*, 115 Mass. 582.
44 L. R. A.

administrator of Henry Arbin filed with the insurance company a claim for \$2,603.83, claiming to hold an assignment of said policy. The company refusing to pay the proceeds of the policy to the wife of the assured, in whose favor it was made, she brought suit, and the company filed its bill of interpleader in the circuit court No. 2 of Baltimore city, alleging that fact, and that the administrator of Arbin was also claiming the same fund, and asked that they might be required to interplead. A decree of interpleader was passed, by which Caroline Wienecke was made plaintiff and the administrator of Henry Arbin was made defendant.

They both answered, and without stating fully what the allegations of these answers are, we think it will be unnecessary, from the view we have taken of this case, to do more

A mortgage release signed by mark is held valid where a witness testified at first that he read the instrument over to the releasor but afterwards said that he did not, or that he did not remember that he did, but adhered to his statement that he did fully explain it to her. The court said that "this, however, is not of so much importance as the paper did contain precisely what she said she wanted to do." *Kraus v. Stein*, 173 Pa. 221.

And the execution of a mortgage signed by mark and attested by mark may be proved by the mortgagee, where it is admitted that the attesting witnesses are illiterate and can neither read nor write, nor prove the execution of the instrument, nor identify the instrument or their marks. *Jones v. Hough*, 77 Ala. 437.

It will be seen by comparison of the cases on this subject that much is presumed in favor of the regularity of the execution of an instrument when the attesting witnesses are dead or have forgotten the particulars of the transaction. Such a presumption is reasonable. When reputable persons have signed their names as witnesses to a document it is too much to expect that they will always remember all that took place on the occasion. But it is not too much to suppose that ordinary intelligence was exercised in respect to the details of the transaction, when the instrument appears on its face to be made in legal form. All the analogies support such a presumption. The presumptions of mental soundness, of innocence, of due performance of duty, and others similar to these are no more reasonable than the presumption in favor of the proper performance of their functions by those who long ago signed an instrument as witnesses but have now forgotten some of the incidents of the transaction.

The Maryland case of *WIENECKE v. ARBIN* is exceptional. It refuses to uphold the instrument, not so much because the attesting witness, who says that he must certainly have seen the maker sign the instrument or he would not have put his name there, has forgotten the circumstances and the place of the alleged signing, as because there was no proof that the instrument was read to the maker or that the insurance policy which it purported to assign was ever delivered, while there was express proof that the maker could not read the instrument. These circumstances may possibly be sufficient to overcome the natural presumption of the regularity and validity of an old instrument duly signed and attested, when the witnesses are dead or have forgotten the transaction. But the majority of the cases, as will be seen above, recognize that presumption.
I. T.

than say that the claim of the defendant is based altogether upon an alleged assignment of the policy in question purporting to be signed by the husband, which is followed, written upon the same piece of paper, by an agreement to the effect that the policy should not "be given up until the above agreement be complied with." Much testimony was taken, a great deal of it relating to transactions which took place between the assured and Henry Arbin in the year 1874, but we need not enter into a consideration of the validity of the claim of the latter against the former, for it may be conceded for the sake of the argument that the claim as allowed by the court below was a valid one as against the husband of the plaintiff, Caroline Wienecke. From the decree allowing the claim and sustaining the alleged assignment, this appeal was taken, and the whole question is whether the assignment under the facts of the case is binding as against Caroline, who is the person named in the policy as the beneficiary? The paper on which the claim of the defendant is based is as follows:

It is understood that in case of my (John Wienecke) death that all indebtedness due H. Arbin now and hereafter shall be paid out of my life insurance policy No. 105,364 in the New York Life Insurance Company, after which being paid, the policy is to be delivered to my heirs.

(Signed) John Wienecke.
Witness: W. F. Kunkle.

It is understood and agreed that the above policy No. 105,364 shall not be given up until the above agreement be complied with.

her
Caroline X Wienecke.
mark

Witness: W. F. Kunkle.

This assignment or understanding or agreement, or whatever it may be called, together with the policy, is alleged to have been in the hands of Henry Arbin or his administrator, since the original transaction is alleged to have taken place in 1874. It appears, however, that in the year 1890 the insurance company, upon the representation that the original policy had been lost or mislaid, issued the following certificate:

Certificate No. 32.

This certifies that a paid-up policy of insurance upon the life of John Wienecke, of Baltimore city, Md., in favor of Caroline Wienecke, his wife, No. 105,364, dated April 11, 1874, for \$2,170, was issued by the N. Y. Life Insurance Company.

During all this time, from 1874 until the death of her husband in 1897, the dividends which were paid annually by the company were collected by Caroline. It does not appear that any claim was ever made by Arbin in his lifetime, nor by his administrator since the death of the former in 1877. The whole question presented by this appeal then is simply this: Shall the property of the 44 L. R. A.

wife, without any consideration to her, be taken to pay her husband's debt? If so there should be clear and convincing proof that she executed the assignment, or rather, by making her mark, gave her consent thereto, with full knowledge of its contents and of its legal effect. Have we any such proof before us? We have carefully considered all the evidence in the record, and are of the opinion that it fails to sustain the validity of the assignment.

Recurring now to the assignment, a copy of which we have transcribed in the former part of this opinion, it is seen that the first part of the paper, that which is signed by the husband alone, describes the policy as his, and directs his debt to Arbin to be paid out of it. But, of course, the policy was not his, for it was payable to his wife. The paper is dated April 23, 1874, and is followed by the few lines, claimed to have been executed by the wife, by which it is contended she assigned the policy without any consideration whatever. Now it will be noticed that only one witness is produced to prove the execution of this paper. We will examine his testimony presently. Caroline was offered as a witness on her own behalf to prove that she never saw the paper and did not sign it or make her mark to it. But her testimony was excluded by the learned judge below, and we think properly so. The contract or cause of action in issue here being the alleged assignment, and one of the original parties thereto being dead, her testimony was inadmissible under the express terms of the Code, art. 35, § 2. See also *Biggs v. McCurley*, 76 Md. 411. In his testimony in chief the witness, Kunkle, said that he had signed his name as witness to the signature of John Wienecke and to the mark of Caroline. But when asked if he saw them sign the paper, he replied: "Certainly, or I would not have put my name there." But in his cross-examination he was unable even to say that both signed at the same time or place, and the inference which may be drawn from his testimony is that they did not so sign.

This appears more fully, from his attempted explanation of the difference between his signature as witness to the husband's signature and his signature as witness to the wife's mark, and also from his testimony in regard to the words "Caroline Wienecke, her mark." None of the facts accompanying the alleged execution by the wife are given—not even the place where she made her mark, whether at her own home, at the home of Mr. Arbin, her husband's creditor, or at the place of business of the firm for which the witness was transacting business. However, we have no doubt that this witness was testifying to the best of his recollection. It must be remembered he was speaking of a transaction which took place nearly twenty-five years ago. The serious difficulty in this case arises, therefore, not so much as to defects in the testimony before us, as to the entire absence of proof which we think it was necessary to produce in order to sustain this assignment. In addition to the defects already pointed out, there is no proof what-

ever that the paper was read and explained to her. She was not allowed to testify as to what took place, whether the paper was or was not read to her, and, as we have seen, the alleged assignee failed to furnish this most important and necessary proof. Perhaps if there had been no other testimony in the case to establish the execution of the assignment except that of the subscribing witness, meager and unsatisfactory as it is, it might have been sufficient to make out a *prima facie* case. But where the alleged assignee, Caroline, proved that she could not read, this fact, together with the unsatisfactory character of the evidence of the subscribing witness, raised a presumption against the validity of the assignment, which ought to have been rebutted by evidence that the paper was read to her and that she fully understood its legal effect.

But, in addition to this, it will be observed that there is an entire absence of proof that Caroline personally or through any agent, or in any manner delivered the policy to Henry Arbin. In the case of *Pence v. Connecticut L. Ins. Co.* 8 Ins. L. J. 746, the supreme court of Indiana held that "in order to prove an assignment . . . the plaintiff must prove, not only that she [the wife] signed her name to the assignment, but must prove also that she either delivered or authorized the delivery of the policy to . . . [the assignee]." Certainly either the execution of the assignment or the delivery of the policy, even in a court of equity, should be held necessary. But here in the one case the proof is not sufficient, and in the other there is no proof at all. If, as may be inferred from the testimony of the witness Kunkle, the first part of the paper signed by the husband and that signed by the wife were, in fact, executed on different days, it is possible that the paper signed by the husband alone, together with the policy, were delivered to the assignee without the knowledge or assent of the wife, and that her signature or mark was subsequently obtained. But whether this be so or not we cannot say, the burden of proof to establish the assignment was upon the assignee or his administrator claiming under it, and it has not been discharged to our satisfaction. Being unable to give our assent to the decree appealed from, it will be reversed.

Decree reversed, with costs to Caroline Wienecke above and below.

Rehearing denied October 7, 1898.

Levi Z. CONDON *et al.*, *Appts.*,
v.

MUTUAL RESERVE FUND LIFE ASSOCIATION.

(.....Md.....)

1. Jurisdiction of an inquiry into and control over the internal management of a foreign corporation is not conferred by a statute which in broad and comprehensive terms provides for all actions, suits, or proceedings against foreign corporations.

NOTE.—For a case similar to the above, see *Clark v. Mutual Reserve Fund Life Assn.* (D. C.) 43 L. R. A. 390.

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See also 45 L. R. A. 621, 853.

ment of a foreign corporation is not conferred by a statute which in broad and comprehensive terms provides for all actions, suits, or proceedings against foreign corporations.

2. Things apparently within the words of a statute are outside of its purview if there was no intent to include them.
3. The motive or effect of acts within the internal management of a foreign corporation cannot make them cognizable by a court which does not otherwise have jurisdiction over them.
4. An injunction cannot be granted against illegal assessments upon members by a foreign insurance association, although they are alleged to be unnecessary and made with the dishonest and fraudulent purpose of forcing members to lapse, as this would involve an inquiry into the internal management of the association.
5. An accounting between a foreign mutual insurance association and a member involves an inquiry into the internal affairs of the company, which cannot be made by a court outside of the state in which the corporation has its home.
6. The contract between a mutual insurance association and a member cannot be construed when the application, constitution, and by-laws, which form part of the contract, are not before the court.
7. A receiver of the assets of a foreign corporation within the jurisdiction of the court cannot be appointed merely because the corporation is insolvent, if the court has no jurisdiction over the subject-matter of the proceeding.
8. Assessments paid for a series of years to a mutual insurance association by a member cannot be recovered back simply because he failed to read or to understand the provisions of his contract.

(March 15, 1899.)

APPEAL by plaintiffs from a judgment of the Circuit Court of Baltimore City in favor of defendant in a suit brought to enjoin defendant from increasing the assessment upon plaintiff's benefit certificate, to obtain the appointment of a receiver, to recover back payments made, and for other relief. *Affirmed.*

The facts are stated in the opinion.

Messrs. John P. Poe & Sons, Alonso M. Hurlock, and E. H. Gans for appellants.

Messrs. William Pinkney Whyte, Bernard Carter, and John M. Carter, for appellees.

The court has no jurisdiction of the subject-matter of the bills of complaint in this case.

The whole scope, object, and purpose of the bill of complaint is to have ascertained and maintained the rights which the plaintiffs, as members of the defendant, an insurance company, formed on the mutual co-operative assessment plan, claim to belong to them by virtue of such membership, and only such rights; and all the acts on the part of the defendant corporation, or its officers, complained of in the bill, affect the rights of the plaintiff solely in their capacity as members of said association.

Defendant is a corporation of the state of New York, and not a corporation of the state of Maryland.

The taking by this court of jurisdiction of the subject-matter of said bills of complaint, and the making the inquiries and investigation, and doing the things which it is asked to do by the said bills of complaint, necessarily involve an interference with the internal management of the defendant corporation.

This court has no jurisdiction of the subject-matter of the said bills of complaint, and they must be dismissed for the want of such jurisdiction.

North State Copper & Gold Min. Co. v. Field, 64 Md. 151; *Wilkins v. Thorne*, 60 Md. 253.

Plaintiffs were members of the association by the very terms of their contract of insurance.

May, Ins. 3d ed. § 548; Biddle, Ins. §§ 47, 48; Cook, Life Ins. § 8; 3 Pom. Eq. Jur. § 1405.

The cases proceed on two grounds: (1) The general impropriety of the courts of one state attempting to settle the internal affairs of a corporation created by, and domiciled within another state, (2) the inability of a court in one state to do full justice in such a case, for want of proper parties.

6 Thomp. Corp. § 7901; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Kansas & E. R. Constr. Co. v. Topeka S. & W. R. Co.* 135 Mass. 34; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638; *Stafford v. American Mills Co.* 13 R. I. 310; *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 188; *Leary v. Columbia River & P. S. Nav. Co.* 82 Fed. Rep. 775; *Moore v. Silver Valley Min. Co.* 104 N. C. 545; *Guilford v. Western U. Telegr. Co.* 59 Minn. 339; *Bailey v. Birkenhead, L. & C. Junction R. Co.* 12 Beav. 441; *Murfree, Foreign Corp.* §§ 191, 226.

As this defendant is chartered by the state of New York, and only by it, the legal existence, the home, the domicile, the habitant, the residence, the citizenship, of the corporation, can only be in the state of New York, although it may do business in other states whose laws permit it.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; *Shaw v. Quincy Min. Co.* 145 U. S. 450, 36 L. ed. 772.

Chapter 400 of the Session Laws of the state of New York of 1890 provides: "No order, judgment, or decree, providing for an accounting or enjoining, restraining or interfering with the prosecution of the business of any life or casualty insurance company, association, or society of this state or appointing a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the attorney general, on his own motion, or after his approval of a request in writing of the superintendent of the insurance department, except in an action by a judgment creditor or in proceedings supplementary to execution."

A proceeding in the nature of a bill in equity was brought in the supreme court of the state of New York by Joseph R. Swan, against the present defendant. The court of appeals 44 L. R. A.

disposed of it on the ground of "the want of legal capacity in the plaintiff to sue, in that the action is not brought by the attorney general, nor by a judgment creditor."

Swan v. Mutual Reserve Fund Life Assn. 155 N. Y. 9.

The construction thus placed by the highest court of the state of New York, being a construction of a statute of the said state, is binding and controlling upon the courts of Maryland.

Supreme Council, A. L. of H. v. Green, 71 Md. 266.

Said statute of the state of New York, having been thus adjudged to be a valid exercise of legislative power, and relating to all life insurance associations, and therefore to the defendant, the provisions of said statute are to be treated as an amendment to and a part of the charter of the defendant.

Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 537; *Bockover v. Life Assn. of America*, 77 Va. 85.

Defendant carries its charter wherever it goes, for that is the law of its existence, and every person who deals with it anywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs.

Relfe v. Rundle, 103 U. S. 225, 26 L. ed. 339; *Bockover v. Life Assn. of America*, 77 Va. 89.

Members of a mutual assessment insurance company are bound by the statutes of the state where it was organized.

Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557; *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Assn. v. Robinson*, 147 Ill. 138; *Joyce, Ins.* § 194.

Not being within the scope of the jurisdiction of the Maryland court, a decree in conformity with the prayers of the bill would not be entitled to "full faith and credit" in the state of New York.

Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897.

McSherry, Ch. J., delivered the opinion of the court:

The questions to be decided on this appeal arise on a demurrer interposed by the appellee to a bill in equity filed by the appellant in the circuit court of Baltimore city. The appellant is a resident of Maryland. The appellee is a corporation created under the laws of the state of New York, and having its principal office there, though transacting business in Maryland. It is a mutual insurance company, formed on and conducting the co-operative or assessment plan. The appellant is a member of the body corporate, and holds one of its certificates of membership, issued in 1884. By this certificate, it is provided that, "in consideration of the application for this certificate of membership," the application being expressly made a part of the contract, and in consideration of the payment of certain dues and designated mortuary assessments falling due in February, April, June, August, October, and December of each year, "or from such other periods as the board of directors may from time to time determine," the mutual reserve association

"does hereby receive Levi Z. Condon . . . as a member of said association." It is then stipulated that the association will, upon the death of Condon, during the continuance of the certificate and upon certain conditions, pay to his legal representatives the sum of \$10,000 "from the death fund of the association at the time of said death, or from any moneys that shall be realized to the said fund from the next assessment to be made." The certificate further declares: "If at such date as the board of directors of the association may, from time to time, fix or determine for making an assessment, the death fund is insufficient to meet existing claims by death, an assessment shall then be made upon every member whose certificate is in force at the date of the last death assessed for, and said assessment shall be made at such rates, according to the age of each member, as may be established by the said board of directors, and the net amount received from such assessment (less 25 per cent, to be set apart for the reserve fund) shall go into the death fund." It is also provided that "the net earnings of the association, together with the 25 per cent of the net receipts from each assessment, shall constitute a reserve fund"; and that "after the expiration of each period of five years, during the continuance of this certificate of membership, a bond will be issued . . . for an equitable proportion of the reserve fund, and the principal of said bond shall be available ten years from its date towards paying future dues and assessments under this certificate." It is likewise declared that the contract shall be subject to all the provisions and stipulations contained in the constitution and by-laws of the association, "with the amendments made, or that may hereafter be made, thereto." And it is agreed that "the entire contract contained in this certificate and said application, taken together, shall be governed by, subject to, and construed only according to, the constitution, by-laws, and regulations of said association, and the laws of the state of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York." Upon the back of the certificate there is printed a "Table of Rates," containing, among other things, a statement that "the basis of the assessment rate for each member, according to the age taken at the nearest birthday, on each \$1,000 shall be as follows"; and then the various ages, from twenty-five to sixty-five, are set forth, and the several sums payable at the respective ages are placed opposite. Condon's age upon entering the association was fifty-five, and the amount designated as the assessment upon each \$1,000 at that age is \$3.25. The appellant paid for some years six assessments annually, each of which amounted to \$32.50. Subsequently the assessment was increased to \$48.55, then raised to \$49.10, and later on to \$75.30. These sums were paid by Condon "with extreme reluctance." On February 1, 1898, mortuary call No. 96 was issued, and by it the appellant was required to pay, on or before March 3d, the sum of \$130. He alleges that these assessments were enormously in

excess of what he understood to be the meaning and effect of his contract with the appellee at the time he entered into it. By a written agreement, the time for the payment of the ninety-sixth assessment was extended, first, for thirty days from March 3d, and then for thirty days from April 2d. On the 28th of April, Condon filed a bill in equity against the appellee in the circuit court of Baltimore city, and on June 17 he filed an amended and supplemental bill. These are the bills now before us.

The bill, which was filed by Condon for himself and in behalf of others similarly situated, who might come in and make themselves parties to the proceedings, after setting forth the facts already alluded to, proceeds to charge that the levying of the assessments in excess of \$3.25 per \$1,000 of insurance, and in excess of six per annum, is a gross violation by the appellee of its contract with the appellant, and is both fraudulent and illegal; that the validity of this action cannot be maintained upon the ground that, by a strained interpretation of some of the conditions of the policy, the levying of assessments is remitted to the discretion of the officers, because the discretion referred to means the honest discretion of the corporation and its officers; that these assessments were not levied bona fide, in the honest exercise of any discretion vested in the corporation or its officers, but were levied with the dishonest and fraudulent purpose of forcing the appellant, and others situated as he is, to allow their policies to lapse by a failure to pay illegal, ruinous, and fraudulent assessments. The bill further charges that these increased assessments cannot be defended by the suggestion that the same are "to any extent" needed in order to enable the corporation to meet its death claims, because, if the corporation is in the prosperous financial condition represented in its circulars, the levying of such assessments is a wanton abuse of the power it possesses, and "plainly proves" that the same are illegal, fraudulent, and *ultra vires*. The bill then sets forth clauses 2 and 3 of the policy. It is under these clauses that a reserve fund is created out of the net earnings, plus 25 per cent of the net receipts from each assessment. By these clauses it is further provided that, after five years, a membership bond is to be issued to the policy holder for an equitable proportion of this reserve fund, and this bond is made available, after the expiration of ten years, for the payment of future dues. The bill charges that the amount of the bonds issued to the appellant is greatly less than, according to the face of his policy, he was entitled to; that, in fact, the apportionment made was fraudulent; and that, upon a true accounting, it will be found that he is entitled to sums very much greater than those allowed him in the two bonds which had been issued to him. The bill also charges that the corporation is insolvent. The relief prayed is as follows: First, for a subpoena; second, that an injunction may be issued restraining the corporation from forfeiting the appellant's policy for the nonpayment of mortuary call No. 96, "and adjudging that the said assessment is

fraudulent and void"; third, that, in the event of the policy being construed as conferring the right to make the assessments complained of, the policy may "be declared to have been obtained under such circumstances as demonstrated that there was no real meeting of minds," and that no contract was in fact executed, and therefore that the corporation may be decreed to refund to the appellant all the payments made by him to it from the beginning; fourth, that, if the court shall find that a binding contract was made, then that the contract, "as set out in said policy," in connection with the constitution and by-laws of the corporation, may be interpreted, and the true meaning and effect thereof determined, and that the power of the corporation" in respect of the levying of assessments may be settled and adjudicated"; fifth, that the corporation may be required to give a full and particular statement of its assets and liabilities; sixth, that a receiver may be appointed to take charge of the assets within the jurisdiction of the court, and to administer them under the direction of the court; seventh, and for general relief. Other persons holding like policies became parties plaintiff. The defendant demurred to the bill and the amended bill, and assigned four grounds. The first, second, and third allege that the application for membership, and the constitution and by-laws of the association, forming parts of the contract of insurance, are not exhibited with the bill, and that it is therefore impossible for the court to correctly interpret the contract. The fourth ground is in these words: "For that it appears by the bill of complaint in this case that the acts complained of on the part of the defendant affect the plaintiffs solely in their capacity as members of the said association, and that the said action relates altogether to the management of the internal affairs of the said association, which, as appears by the said bill of complaint, is not a corporation of the state of Maryland, but is a corporation of the state of New York, and therefore this court has no jurisdiction of the subject-matter of the said bill of complaint."

The amended and supplemental bill reaffirmed all the allegations of the original bill, and prayed, in addition, that a further assessment, maturing on July 1st, be declared illegal, and that an injunction be issued prohibiting the forfeiture of the policies because of its nonpayment. The demurrer distinctly challenges the court's jurisdiction to entertain the bill and to grant the relief sought. This issue of law, thus raised, we now proceed to consider.

By § 124, art. 23, Code, it is provided that, before a foreign insurance company can transact business in Maryland, it shall, among other things, file with the insurance commissioner of this state "a power of attorney appointing a citizen of this state, resident within this state, the agent or attorney for the company, upon whom process of law can be served; there must also be filed with the insurance commissioner a certified copy of the vote or resolution of the directors appointing such attorney, which appointment shall con-

tinue until another attorney be substituted. And said writing or power of attorney shall stipulate and agree, on the part of the company making the same, that any lawful process against said company, which is served on such agent, shall be of the same legal force and validity as if served on such company or association within this state; and also, that in case of the death or absence of the attorney so appointed, service of process may be made upon the insurance commissioner of this state; and such power of attorney cannot be revoked or modified (except that a new one may be substituted) so long as any policy or liability remains outstanding against such company in this state. The term (process) used above, shall be held and deemed to include any writ, summons, or order, whereby any action, suit, or proceeding shall be commenced, or which shall be issued in or upon any action, suit, or proceedings, by any court, officer, or magistrate.

Broad and comprehensive as this statute is, it obviously does not confer unlimited jurisdiction on Maryland courts over foreign corporations. The language of an enactment does not always, or necessarily, measure its scope, or mark the limits of its action. And so, on the other hand, it is equally true that things apparently within its words may be actually beyond its operation. If they are, it is not to be assumed that the legislature intended to include them; and, if there be no intent to include them, they are outside of its purview. That which the legislature has no power to authorize a Maryland court to do—that is, to exercise extraterritorial jurisdiction—will not be held as included within the jurisdiction really given, even though the latter may be conferred in such general terms as to apparently embrace the former within the letter of the statute.

A policy holder in a mutual insurance association stands in a twofold relation towards the company. He is a policy holder and he is a member. Growing out of this, as well as altogether apart from it, there may be a distinct relation of creditor, but with this latter we are not now concerned. He is alike insurer and insured, but in both capacities he is a member, and it is solely because he is a member that he occupies either of these positions. His liabilities as insurer and his rights as insured depend wholly upon the obligations and the conditions of his membership. Those obligations and conditions are evidenced by the constitution and the by-laws of the association, and by his application for, and his certificate of, membership, and by the law of the place of the contract. Apart from these, there is nothing by which his duties and his rights as a member are to be determined. Rights as an insured he undoubtedly has. Those rights may be unlawfully invaded. If thus invaded, he is not without redress when he seeks relief in the forum having jurisdiction over the parties and the subject-matter. The mere fact that he is a member of the corporation does not preclude him from asserting against the corporation any right arising out of his contract: but the character of the remedy invoked may measure the limits of the

jurisdiction of the tribunal appealed to, when the domicile of the corporation is considered. It is therefore entirely possible that a state of facts which would authorize a court, in the exercise of its visitatorial power, to inquire into the validity of acts affecting the rights of a policy holder, when done by a corporation located within the jurisdiction of the court, would, as respects a foreign corporation, be wholly insufficient to confer upon the same court jurisdiction to act at all. Thus, in *Rosenberger v. Washington Mut. F. Ins. Co.* 87 Pa. 207, a domestic fire insurance company was sued for the amount claimed to be payable on a policy against loss by fire. The company was a mutual association. An assessment upon all policy holders had been levied some time prior to the loss, but it was alleged by the plaintiffs to be excessive, and therefore illegal, and they refused to pay it. When the loss insured against by the plaintiffs' policy occurred, the company insisted that the policy had been annulled because of the nonpayment of the assessment. Suit was brought to recover on the policy, and it was held that the question as to whether the assessment was excessive ought to have been left to the jury. Speaking for the court, Judge Trunkey said: "By the terms of the charter, the plaintiffs submitted themselves to the acts of the managers as representatives of all the members. They were bound by the assessment, unless they can show fraud or gross mistake." The members "are, as members, subject to liabilities and entitled to privileges. A member may participate in its benefits, is presumed to know its rules and regulations, its books are evidence against him, and he shall bear his proportion of burdens. His corporate rights may be subject to the control of the corporation, but his rights as a party insured rest on the contract. Assurer and insured alike are bound by the charter, and neither can do what it does not authorize." The company was located within the jurisdiction of the court, was subject to its visitatorial power, and it was held, in these circumstances, that evidence tending to show fraud in the levying of the assessment was competent, because if the assessment was, in fact, fraudulent, it was illegal, and if illegal its nonpayment furnished no ground for declaring the policy forfeited. But we have no such state of facts to deal with in the pending case. This litigation was not instituted to recover on the policy a sum payable under it for a loss actually sustained. Its object, as will be shown later on, is to regulate, by a decree of the circuit court of Baltimore city, the management, the conduct, and the internal government of a foreign corporation. And the question is, Does the statute (§ 124, art. 23, Code, already cited) include such a proceeding, or confer jurisdiction to entertain such a bill, as we have now before us? This question must be answered in the negative, and it must be so answered, both upon principle and according to precedent.

If we turn for a moment to §§ 295 and 297 of article 23 of the Code, it will be found that provision is there made in terms quite as broad as, if not broader than, those used 44 J. R. A.

in § 124, for subjecting to suits in this state all corporations not chartered by the laws of Maryland. Such corporations, transacting business in this state, are deemed to hold and exercise franchises within the state, and are made liable to suit "on any dealings or transactions had in the state. Such suits may be brought in any court of the state, or before a justice of the peace, "by a resident of this state, for any cause of action," and by a nonresident, when the cause of action has arisen, or the subject of the action shall be situated, in this state. The scope of these provisions has been defined by this court. In *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, it appeared that the appellee was a citizen of Maryland, and the appellant was a corporation created by the laws of North Carolina. The proceeding was an application for a mandamus. Field claimed to be a stockholder in the North State Company. He alleged that the directors of the company had made an illegal and invalid assessment upon each stockholder, and had then forfeited his stock for the nonpayment of that assessment. He sought to be reinstated as a stockholder. After quoting the sections of act 1868, chap. 471, which are incorporated in the sections of the Code just above alluded to, this court said: "The object of our statute, and of similar statutes passed by other states, is to provide for the collection of debts due from foreign corporations, to our own citizens, and to enforce contracts made here by foreign corporations through its agent, and to protect our citizens from frauds or wrong, whether the wrongdoer be foreign or domestic. But it was not the intent of our statute to give our courts jurisdiction over the internal affairs of a foreign corporation. Our courts possess no visitatorial power over them, and can enforce no forfeiture of charter for violation of law, or removal of officers for misconduct; nor can they exercise authority over the corporate functions, the by-laws, nor the relations between the corporation and its members, arising out of, and depending upon, the law of its creation. These powers belong only to the state which created the corporation." The case of *Wilkins v. Thorne*, 60 Md. 253, is likewise in point. Thorne filed a bill, alleging that he was a stockholder in the North State Copper & Gold Mining Company; that Wilkins and others, fraudulently contriving and intending to get possession of the company's property and divide the same among themselves, to the exclusion of the lawful owners of the stock, assembled in Baltimore, and proceeded to take steps to reorganize the company, intending thereby to cheat and defraud Thorne, and the other lawful holders of the stock, out of their property, by the means of certain pretended by-laws, rules, and regulations; that Wilkins and his confederates were in actual possession of the property and franchises of the company, and had refused to allow any of the stockholders who had not paid an unlawful assessment levied by him and his confederates to have any lot, share, recognition, or authority in the matter of the corporation. The bill prayed for an injunction to restrain Wilkins, and those acting

with him, from intermeddling with the property, stock, or affairs of the company. The corporation was a foreign corporation. This court, while holding that, "if this were a Maryland corporation there could be no question as to the jurisdiction of a Maryland court over the subject," decided that "such controversies must be determined by the courts of the state by which the corporation was created"; because it was "clearly a controversy relating to the internal management of the corporation, and the validity of the acts of those who claim to be, and indeed are admitted to be, *de facto* its president, directors, and stockholders." The relief sought was accordingly denied.

The conclusion reached in both of these cases was adverse to the court's jurisdiction, notwithstanding the provision of the statute making a foreign corporation liable to a suit in the courts of this state by a resident of this state, "on any dealings or transactions, or for any cause of action"; and in spite of the fact that in one case the foundation of the proceeding was an alleged, and as the case was presented and admitted, illegal forfeiture of stock, and in the other an alleged, and by the demurrer a conceded, fraudulent conspiracy to deprive a bona fide shareholder of his stock, and to exclude him from a vote in the management of the company. The language of § 124, heretofore quoted, is less, or, at all events, certainly not more, emphatic than that employed in §§ 295 and 297; for it makes only lawful process served on a non-resident insurance company's agent of the same force and validity as if served on the company within the state. As process, to be lawful, must be process that the tribunal issuing it has authority to issue, and as a judicial tribunal has no authority to issue process (which is a mandate to its officer, commanding him to perform certain services within his official cognizance) unless it be issued in a proceeding which the court has jurisdiction to entertain, to hear, and to decide, it follows that the statute must be interpreted in the same way that §§ 295 and 297 were construed; that is, as not intending to confer an extraterritorial jurisdiction, or a jurisdiction over a cause that involves only an inquiry into, and the exercise of a control over, the internal management of a foreign corporation.

The reasons for thus interpreting these provisions of the Code are conspicuously clear. There are obvious difficulties that would be encountered if the courts of one state undertook to adjust the internal affairs of a foreign corporation formed under the laws of a different state, and having its habitat within the borders of another sovereignty. The absence of a visitatorial power over such a corporation, and the absolute inability to enforce a forfeiture of its charter for a violation of the law, or to remove its officers for misconduct, or to punish them for malversations committed in the place of its domicile, are open and apparent obstacles in the court's pathway, should it assume to exert an extraterritorial jurisdiction. Besides all this, its lack of the means to do full justice, and its want of the machinery to en-

force against the corporation, in the place of its existence, any decree it might render in such a proceeding, indicate, if they do not demonstrate, that the legislature never designed to confer a power the exercise of which would or might be utterly fruitless and vain.

With this limit to the court's jurisdiction established, it becomes necessary to ascertain what is and what is not a controversy relating solely to the internal management of a corporation; in other words, what acts are so distinctively acts pertaining to the internal management of a foreign corporation as to preclude an inquiry into them by any tribunal other than the courts of the corporation's domicile. The motives with which the acts are done, and the effect they may have upon others when done, are altogether aside from the inquiry; because, if they strictly appertain to the internal government of the corporation, neither motive nor effect can convert them from what they intrinsically are into what they obviously are not, and therefore cannot make them cognizable if otherwise they be not cognizable. An act done with a fraudulent motive is, as an act, precisely identical with the same act done without such a motive, in so far as it relates to this jurisdictional question; because it is the quality or nature of the act, and not the incentive that prompted it, or the effect that it produces, which determines whether it does pertain to the internal management of the corporation or not. In *Field's Case*, 64 Md. 161, which has been followed by many other courts of the country, it was said: "Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, that then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation, our courts will not take jurisdiction. Where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction." In *Field's Case* the controversy arose entirely out of the internal management of the affairs of the company. "It is the complaint of a stockholder that he has been deprived of his rights, as a stockholder, by the illegal action of the board of directors." In *Thorne's Case*, 60 Md. 253, it was the complaint of a stockholder that he was deprived of his right to the stock by the fraudulent conduct of persons claiming to be directors. In *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638, it was held that the court would not, at the suit of a resident stockholder against a foreign corporation, set aside unwise, dishonest, and useless contracts, which depreciated and destroyed the value of the stock, although the visible, tangible property of the corporation, consisting of conduits in streets for electric lighting, was within the state, because the wrong complained of was an act done in the internal management of the corporation. In *Clark v. Mutual Reserve*

Fund Life Asso. (February 7, 1899) 13 App. D. C. —, 27 Wash. L. Rep. 114, 43 L. R. A. 390, 1. was held that this same corporation was not amenable to the process of the courts of the District, under a bill substantially the same as the one before us, and seeking precisely the relief asked for in this proceeding. See, too, 8 Am. & Eng. Enc. Law, p. 378, note 4; Id. p. 379, note 1; *Republican Mountain Silver Mines v. Brown*, 19 U. S. App. 203, 58 Fed. Rep. 645, 7 C. C. A. 412, 24 L. R. A. 776.

We turn now to the allegations of the bill to ascertain whether the acts complained of are, according to the definition in *Field's Case*, acts of internal management or not. Laying aside for the moment the question as to whether the certificate of membership, by its terms, authorizes an increase in the amount of the assessments above \$3.25 per \$1,000 of insurance, and permits the levying of more than the designated bimonthly ones, it is obvious, we think, that the whole fabric of the bill with respect to these alleged illegal assessments involves, as its foundation, the right of a Maryland court to inquire into the internal management of this New York corporation. The substance of the allegations of the bill, as we have heretofore stated them on this subject, is that these excessive assessments are not only void, because not authorized, but because, the condition of the death fund not demanding that they should be laid, they were made with the dishonest and fraudulent purpose of forcing the appellant's policy, and the policies of others similarly situated, to lapse. Now, it is perfectly apparent that no tribunal can possibly decide whether the condition of the death fund required these extra assessments to be levied, until it knows what the condition of the death fund was and what demands there were upon it. And it is equally clear that, in order that these factors may be known, the whole internal management of the association must be investigated. The disposition made of the money assessed for, and payable to, the death fund, the validity of claims against that fund, the propriety of expenditures charged against it, and other like inquiries, strictly relating to the internal management and to the proper disbursement of the money which the many thousand members have intrusted to the directors' control, would all have to be solved, before a court could say that these assessments were unnecessary or fraudulent. No court could declare them excessive until it knew what sum was not excessive, and no court could decide what sum was not excessive until it was placed in the full possession of all the facts pertaining to the whole internal conduct of the company. These observations apply, also, to the charges of the bill in respect to the amount of the reserve fund bonds issued to Condon. It is alleged that a true accounting will show him entitled to bonds for larger amounts. A true accounting can only be had by an examination of all the entries relating to this fund, and by correcting errors, if any there are. Obviously, this would involve a control of the

company's internal affairs by the agency of an injunction issued by a Maryland court, though that court possesses no power to enforce the injunction if its commands were treated with contumely by the corporation. These matters thus complained of do not affect the appellant's individual rights solely. They relate also to the rights, and bear upon the liabilities, of every other member as an insurer; and while in a sense they may, by their consequences, affect him individually as assured, they do not affect him exclusively, but concern, as well, the internal management of the company. His relation to the corporation is, as we have stated, of a two-fold character. He is insurer and insured. It is possible that the same act of the body corporate may affect both of these relations. In that event, it could not be said that the act affected a member's individual rights only. In *Madden's Case*, 181 Pa. 617, 38 L. R. A. 638, the fraudulent and dishonest contracts complained of impaired the value of the shareholder's stock, and in that regard injured his individual rights; but the wrong imputed arose, not from the violation of a contract with him, but from want of fidelity to duty on the part of the directors in the fiduciary position occupied by them. These acts not only depressed the value of the stock, but they concerned the internal management of the corporation, and, therefore, though causing injury, furnished no ground for a Pennsylvania court to interfere with the government of a New Jersey corporation.

If the whole of the contract between Condon and the company were before us for construction in a case where we were authorized to construe it, we would be confronted by a provision of the policy which places in the director's power and discretion, when the death fund is insufficient to meet existing claims by death, to levy an assessment "at such rates, according to the age of each member, as may be established by the board of directors." Here, then, by this term of the contract, provision is made for additional assessments beyond the bimonthly ones previously specified in the certificate. Whether this is the meaning of the contract, when all of its parts are brought together, we do not, for we cannot now, decide.

From what we have said, it is apparent that the second and fifth prayers for relief cannot be granted. We cannot, by injunction, control the internal management of a corporation which is located beyond the reach of that process. It is equally clear that the fourth prayer for relief must be denied, because it asks for the construction of a contract, when but part of the contract is before us. We are called on to interpret the contract as set out in the certificate of membership, in connection with the constitution and laws, though the application and the constitution and laws, all forming part of the contract, are not before us. The constitution and by-laws all form part of the agreement of insurance, whether mentioned or not. 16 Am. & Eng. Enc. Law, p. 41, and cases in note 1. A construction of the con-

tract, as set out in the policy alone, would not be a construction of the contract as contained in the application, the constitution, the by-laws, and the policy.

There is no averment cognizable by a Maryland court justifying the appointment of a receiver as asked for in the sixth prayer for relief. The allegation of insolvency is not sufficient to found such a drastic measure on. Unless the plaintiff has a standing in court, unless he presents on the face of his bill a case of which jurisdiction can be taken, a bare allegation of insolvency will not warrant the appointment of a receiver. If the court has no jurisdiction over the subject-matter of the proceeding, it has no authority to appoint a receiver.

The second prayer for relief is in the alternative. It asks that the money paid in by Condon during the time he has been a member be restored to him, if the court should hold that his understanding of the meaning of the policy is not its correct interpretation. He alleges that he understood the contract to mean one thing, and he claims, if the court shall find it to import something else, that then there never was any contract at all, because there was no meeting of minds in regard to its terms. Now, the bill nowhere charges that Condon was induced by fraud, deceit, or misrepresentation to enter into the contract of insurance, nor does he ask to have the policy canceled on any such ground. His claim is simply that he understood the contract to signify that he was to pay only six assessments per annum, each one of which would be for the sum of \$32.50, and no more. He insists that if this is not the limit of his liability he is entitled to have his money refunded. For more than fourteen years the policy has been in his possession. Its provisions were plainly before his eyes. He has given no explanation for not reading them, and, although he has had the benefit of an insurance on his life for that period of time, he asks to have all he has paid in refunded him. The sums he paid in were not paid for his use exclusively, nor mainly. They were collected to pay the losses occasioned by the deaths of other members. They were paid in for a specific purpose, and were paid by him as an insurer. They were not assets of the corporation. May, Ins. § 550 A, and note. The corporation acted in the receipt of them as a collecting agency, for the benefit of those persons to whom they were ultimately payable, and there is no pretense in the bill that a single dollar of the sums paid in by Condon has not been disbursed or appropriated precisely in the way and to the uses he expected and intended that it should be. And, if his contributions have been expended and appropriated in that way, obviously he has no claim to recover them back simply because he failed to read, or if he read failed to understand, the provisions of the policy, the constitution, and the by-laws. As we have already stated, the whole contract is not before us, and, even if this were a case in which we

44 L. R. A.

were authorized to construe it, we could not interpret it in the absence of material and essential portions of it.

Every right asserted by Condon is a right founded on his membership. Every prayer for relief is for relief sought by a member against the concern of which he is a member, in respect of some matter pertaining to the management and internal government of the association. While the acts complained of may affect him, they do not affect him alone, and they only affect him in any way because of his membership. If these acts are unwarranted, they are certainly not more grave than the forfeiture of Field's stock for the nonpayment of an illegal and void assessment. And if the latter gave no ground for the interposition of a court of equity, because it was an act of internal management done by a foreign corporation, it is difficult to see how the former can be classed as acts affecting only the individual rights of Condon. In *Field's Case* an injury was done to him by the misconduct complained of, but the injury was not an injury solely to his individual rights. The act which occasioned the wrong was a corporate act, relating to the internal government of the company. Its effect upon him did not deprive it of its character as a corporate act. The results to Condon do not define the nature of the acts which he complains of, or prevent them, because they do him injury as he alleges, from being acts pertaining to the internal government of a foreign corporation of which he is a member. Were he suing on the contract of insurance, the situation would be different.

If this were a suit on the insurance policy to recover a loss insured against, it would be a case within the jurisdiction of the courts of Maryland. In such a proceeding, it would be incumbent on the court to construe the policy, and to determine whether it had been forfeited or not, because it would have the authority to decide whether a recovery could be had. Necessarily, therefore, the validity of any assessment, and the inquiry as to whether an assessment was fraudulent, would be a legitimate inquiry; because in a suit on the policy in Maryland the courts of this state would not be called on to regulate, by injunction or otherwise, the government of a foreign corporation, but would be required merely to enforce the contract or to award damages for its breach. There is a broad difference between compelling a foreign corporation, at the suit of a member, to conform its internal conduct to the views of a Maryland court, and adjudging it, at the suit of a beneficiary, liable in damages for a failure to comply with its contract of indemnity. In the one instance the Maryland court has no jurisdiction; in the other, it has. As we agree with the conclusion reached by the circuit court, its decree sustaining the demurrer, and dismissing the original and amended bills, will be affirmed.

Decree affirmed, with costs in this court and in the court below.

MAINE SUPREME JUDICIAL COURT.

Albert N. WATSON

v.

PORTLAND & CAPE ELIZABETH RAIL-
ROAD COMPANY.

(91 Me. 584.)

1. Riding on the front platform of an electric street car is not negligence as matter of law.
2. The question whether or not a person riding on the front platform of an electric street car took such precautions to avoid injury as the obvious and usual dangers of his position required is for the jury where the facts are disputed or are susceptible of more than one conclusion.

(June 13, 1898.)

EXCEPTIONS by plaintiff to the ruling of the Supreme Judicial Court for Cumberland County directing a verdict in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Sustained.*

The facts are stated in the opinion.

Messrs. L. M. Webb, H. Knowlton, and W. J. Knowlton, for plaintiff:

The question as to whether there was room inside the car, and whether, under the circumstances, the plaintiff was justified in riding on the platform, and as to his position, are all facts for the jury.

Groswell, Electricity, §§ 727-729, p. 606; *Beal v. Lowell & D. Street R. Co.* 157 Mass. 448; *Palmer v. Delaware & H. Canal Co.* 120 N. Y. 174.

If the car was so crowded that riding upon the steps or platform was a necessity there can be no negligence imputed to plaintiff; but whether the car was so crowded is a question for the jury.

Maquire v. Middlesex R. Co. 115 Mass. 239; *McDonough v. Metropolitan R. Co.* 137 Mass. 210; *Pray v. Omaha Street R. Co.* 44 Neh. 167.

The question of plaintiff's due care is properly one of fact for the jury.

Beal v. Lowell & D. Street R. Co. 157 Mass. 448.

Standing upon the front platform of a car, even if there is standing room inside, is not of itself conclusive evidence that a person, injured by the negligence of the person managing the car, was not in the exercise of due care.

Maquire v. Middlesex R. Co. 115 Mass. 239; *Wilde v. Lynn & B. R. Co.* 163 Mass. 533; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Ann. Rep. 345; *Vail v. Broadway R. Co.* 147 N. Y. 377, 30 L. R. A. 626; *Hastings v. Central Crostown R. Co.* 7 App. Div. 312; *Sias v. Rochester R. Co.* 92 Hun, 140; *Ginna v. Second Ave. R. Co.* 87 N. Y. 596; *Meisel v. Lynn & B. R. Co.* 8 Allen, 234.

Calling for and receiving fare from per-

sons standing on the front and rear platform of a car authorizes the jury to find that those so riding had been invited by those having charge of the car to ride in that place, and that an implied assurance had been given by them that that was a suitable and safe place for them to ride.

Clark v. Eighth Ave. R. Co. 36 N. Y. 135, 93 Am. Dec. 495; *Edgerton v. New York & H. R. Co.* 39 N. Y. 227.

When negligence on the part of plaintiff is connected with the cause of injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury; if he could have done so the negligence of plaintiff cannot be set up as an answer to the action.

Pollard v. Maine C. R. Co. 87 Me. 55.

Mr. Clarence Hale, for defendant:

The plaintiff could not recover because he was voluntarily riding upon the platform of a car while there was standing room inside.

Goodwin v. Boston & M. R. Co. 84 Me. 211; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L. R. A. 326; *Gavett v. Manchester & L. R. Co.* 16 Gray, 502, 77 Am. Dec. 422; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Torrey v. Boston & A. R. Co.* 147 Mass. 412; *Quinn v. Illinois C. R. Co.* 51 Ill. 495; *Wood, Railway Law*, § 303; *Reber v. Pittsburgh & B. Traction Co.* 179 Pa. 339; *Aikin v. Frankford & S. P. City Pass. R. Co.* 142 Pa. 47; *Francisco v. Troy & L. R. Co.* 78 Hun, 13; *Clark v. Eighth Ave. R. Co.* 36 N. Y. 138, 93 Am. Dec. 495; *Willmott v. Corrigan Consol. Street R. Co.* 106 Mo. 535, 25 Alb. L. J. 84; *Booth, Street Railways*, ed. 1892, § 338.

Wherever courts have said that it was not negligence to ride upon the front platform of a street car, it has been in cases where the cars were crowded and the occupancy of the platform was held to have been invited or permitted.

Mann v. Philadelphia Traction Co. 175 Pa. 122.

A person who rides upon the front platform of an electric passenger car is guilty of contributory negligence.

Worthington v. Central Vermont R. Co. 64 Vt. 107, 15 L. R. A. 326; *Torrey v. Boston & A. R. Co.* 147 Mass. 412; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Francisco v. Troy & L. R. Co.* 78 Hun, 13; *Clark v. Eighth Ave. R. Co.* 36 N. Y. 138, 93 Am. Dec. 495.

While the question of contributory negligence is ordinarily a question of fact, there being no dispute about the facts, it becomes a question of law for the court as to whether or not the plaintiff was in the exercise of due care.

Elwell v. Hacker, 86 Me. 416; *Romeo v. Boston & M. R. Co.* 87 Me. 540; *Wormell v. Maine C. R. Co.* 79 Me. 397; *McPeck v. Cen-*

NOTE.—As to negligence in riding on platform on a street car, see *Upham v. Detroit City R. Co.* (Mich.) 12 L. R. A. 129, and note; also 44 L. R. A.

Elliott v. Newport Street R. Co. (R. I.) 23 L. R. A. 208; and *Vall v. Broadway R. Co.* (N. Y.) 30 L. R. A. 626.

tral Vermont R. Co. 50 U. S. App. 27, 79 Fed. Rep. 590, 25 C. C. A. 110; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003; *Seefeld v. Chicago, M. & St. P. R. Co.* 70 Wis. 223.

Even if plaintiff had rights of a passenger, it was his duty on getting aboard of the car to place himself in a safe position; and it is no excuse for him to place himself in an unsafe position that the persons in charge knew that he was in an unsafe position and did not drive him therefrom.

Clark v. Eighth Ave. R. Co. 36 N. Y. 138, 93 Am. Dec. 495; *Olivier v. Louisville & N. R. Co.* 43 Ia. Ann. 805.

The injured party cannot recover where his own or his agent's ordinary negligence or wilful wrong approximately contributed to produce the injury of which he complains, so that but for his concurring or co-operating fault the injury would not have happened to him.

Shearm. & Redf. Neg. § 35; *Woodman v. Pitman*, 79 Me. 456; *Conley v. American Exp. Co.* 87 Me. 353; *Little Schuylkill Nav. R. & Coal Co. v. Norton*, 24 Pa. 465, 64 Am. Dec. 672; *Jeffersonville R. Co. v. Swift*, 26 Ind. 459; *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336.

The plaintiff on his own showing was guilty of contributory negligence in occupying a place of known danger without taking suitable care.

Although the court should go to the extreme point of saying that the presiding justice was incorrect in ordering a verdict for the plaintiff, and that he should have submitted the whole question to the jury, even then the exception should be overruled because the case shows that the testimony cannot support a verdict for the plaintiff.

Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003; *McPeck v. Central Vermont R. Co.* 50 U. S. App. 27, 79 Fed. Rep. 591, 25 C. C. A. 110; *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780; *Herbert v. Butler*, 97 U. S. 319, 24 L. ed. 958; *Holland v. West End Street R. Co.* 155 Mass. 388; *Morrison v. Erie R. Co.* 56 N. Y. 302.

If a passenger unnecessarily exposes himself to danger he cannot recover if such conduct contributed to the injury which he would otherwise have escaped.

Todd v. Old Colony & F. River R. Co. 7 Allen, 207, 83 Am. Dec. 679, 80 Am. Dec. 49; *Hoar v. Maine C. R. Co.* 70 Me. 66, 35 Am. Rep. 299; *Dunn v. Grand Trunk R. Co.* 58 Me. 187, 4 Am. Rep. 267; *Harvey v. Eastern R. Co.* 116 Mass. 269.

Wiswell, J., delivered the opinion of the court:

The plaintiff, while riding upon the front platform of one of the defendant's electric street cars, was thrown from the car by its sudden jolting, and, striking the ground with considerable violence, sustained more or less injury.

It is claimed that this was caused by the negligence of the motorman in allowing his car to come towards a switch with such speed that he was unable to see whether it was properly set or not, and, the switch be-

ing open, that the car was propelled so rapidly onto a siding as to cause violent jarring and jolting.

After the evidence upon both sides had been closed, the presiding justice directed a verdict for the defendant; to which direction exception is taken. It becomes necessary, therefore, to decide whether, upon all the evidence, regarding it in the most favorable aspect for the plaintiff that it is susceptible of, the jury would have been justified in returning a verdict for the plaintiff.

Upon the question of the alleged negligence of the defendant, it is only necessary to say that in our opinion there was sufficient evidence to submit this question to the jury. Was there also sufficient evidence upon the question of the plaintiff's own care to sustain the burden of proof resting upon him in that respect?

The question of negligence is ordinarily one for the jury,—it is always so, not only when the facts are in dispute, but also when the facts are undisputed; but intelligent and fairminded men may reasonably differ as to the conclusions and inferences to be drawn from such facts,—because, in passing upon this question, a jury must not only decide what was in fact done or left undone, but also as to what should have been done in the situation. But this is not true when the facts are not in dispute, and when the undisputed facts are susceptible of but one conclusion. In such cases it is not only proper, but it is the duty of the court, to take the case from the jury. *Romeo v. Boston & M. R. Co.* 87 Me. 540.

In this case the presiding justice, in directing a verdict for the defendant, gave certain reasons why, in his opinion, a verdict for the plaintiff would not be warranted, and could not be sustained, saying, among other things, "that the riding upon the platform of a passenger car upon the railroad is such negligence upon the part of the passenger as would bar his recovery for injury sustained by being thrown from the platform in rounding a curve." And, again: "It is settled as a question of law that one who rides upon the platform of a car and is injured by being thrown from it as the car rounds a curve is guilty of contributory negligence."

In our opinion, this was not a correct statement of law when applied to a street-railroad car, whether propelled by horses, electricity, or otherwise. Riding upon the platforms of such cars is too much encouraged by transportation companies, and too much indulged in by the public, for the court to say, as a matter of law, that the mere riding upon the platform of such a car is conclusive evidence of negligence, or is negligence *per se*, or is negligence in law. It depends upon too many other circumstances and conditions for a court to lay down any hard and fast rule in regard to it; but it is a fact which should ordinarily be submitted to the jury, in connection with all of the other circumstances of the case.

That this is true with respect to horse street cars is not questioned, and has been frequently decided. *Meessel v. Lynn & B. R.*

Co. 8 Allen, 234; *Maguire v. Middlesex R. Co.* 115 Mass. 239; *Fleck v. Union R. Co.* 134 Mass. 480; *Germantown Pass. R. Co. v. Walling*, 97 Pa. 55, 39 Am. Rep. 796; *Vail v. Broadway R. Co.* 147 N. Y. 377, 30 L. R. A. 626; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345; *City R. Co. v. Lee*, 50 N. J. L. 435.

But it is claimed upon the part of the defense that, while this is true in the case of a horse car, as to electric cars the rule laid down in this state, and generally, with respect to trains of cars upon steam railroads, should apply. *Goodwin v. Boston & M. R. Co.* 84 Me. 203. We do not think so. An electric street car is still a street car, and, in our opinion, the conditions, especially with respect to riding upon platforms, are more similar to those of the horse street car than those of a railroad train upon a steam railroad.

It is a notorious fact that street-railroad companies whose cars are propelled by electricity constantly accept and invite passengers to ride upon the platforms of their cars when there is no room inside, and that persons having occasion to use such cars are frequently glad for even a foothold upon the platform step, or footboard. Neither carrier nor public have regarded the street-car platform as a known place of danger, and we are not disposed to say, as a matter of law, that a passenger who rides upon the platform of an electric street car is thereby guilty of such contributory negligence as to prevent his recovery for injuries sustained through the fault of an employee of the transportation company. We hold, rather, that it is a circumstance to be submitted to and decided by the jury.

Such is the conclusion that many of the courts of this country have arrived at: *Elliott v. Newport Street R. Co.* 18 R. I. 707, 23 L. R. A. 208; *Pray v. Omaha Street R. Co.* 44 Neb. 167; *Wilde v. Lynn & B. R. Co.* 163

Mass. 533; *Reber v. Pittsburg & B. Traction Co.* 179 Pa. 339.

It is further urged by counsel for defendant that the verdict was properly ordered, even if the reasons given therefor by the presiding justice cannot be sustained; that, if the court should hold that a person cannot be said, as a matter of law, to be guilty of negligence from the mere fact that he was standing upon the platform of an electric street car in motion, this plaintiff was nevertheless negligent in not taking such precautions as the obvious and usual dangers of his position required; and that it is immaterial that the reasons given by the presiding justice in ordering a verdict were erroneous, if, upon the facts, the verdict was properly ordered.

There is no question about the correctness of these propositions of law. A passenger who rides on the platform of a car necessarily takes upon himself the duty of looking out for and protecting himself against the usual and obvious perils attendant upon his position; such as, for instance, the danger of being thrown from the platform by the jolting or swaying of the car. *Elliott v. Newport Street R. Co.* 18 R. I. 707, 23 L. R. A. 208.

But the court is of the opinion that the evidence in this case does not sustain the defendant's contention; that is, in the opinion of the court, the evidence does not so clearly show contributory negligence upon the part of the plaintiff as to authorize the withdrawal of this question from the determination of the jury. The case comes within the general rule that the question of negligence is ordinarily one for the jury, and not within the exception that, when the facts are undisputed, and are susceptible of but one conclusion, it is the duty of the court to take the case from the jury.

The entry will therefore be: *Exceptions sustained.*

MASSACHUSETTS SUPREME JUDICIAL COURT.

TELEGRAM NEWSPAPER COMPANY

v.

COMMONWEALTH of Massachusetts.

GAZETTE COMPANY

v.

SAME.

(172 Mass. 294.)

1. A corporation may be held liable for criminal contempt for publishing in a newspaper printed and circulated in a place where a trial is had an article concerning the cause on trial which is calculated to prejudice the jury and prevent a fair trial.

NOTE.—As to the lawfulness of publications respecting pending suits, see *Cooper v. People, Wyatt (Colo.)* 6 L. R. A. 430; also *State v. Kaiser (Or.)* 8 L. R. A. 584, and note. 44 L. R. A.

2. A formal complaint is not necessary to authorize a court to take cognizance of a contempt consisting in publishing newspaper articles calculated to prejudice the jury in a trial pending before it.

3. Publishing in a newspaper the figures named by the respective parties to a suit on trial in an effort to compromise the controversy, so that they are likely to be brought to the notice of the jury, is punishable as a contempt of court, although there was no intent to pervert the course of justice.

4. That the jurors did not in fact see a newspaper article published during a trial in such a way as to be likely to come to their notice and prejudice the judgment will not relieve the publisher from punishment for contempt of court.

5. The necessity for instituting contempt proceedings to vindicate its authority in case of publication of newspaper

articles calculated to prejudice the jury in a pending trial is for the trial court, and will not be considered on appeal.

(January 4, 1899.)

WRITS of error to the Superior Court for Worcester County to review judgments punishing plaintiffs in error for contempt of court in publishing newspaper articles calculated to interfere with the due course of justice in cases on trial before the court. *Affirmed.*

The facts are stated in the opinion.

Messrs. F. P. Goulding, D. Manning, and W. C. Mellish for plaintiffs in error.

Messrs. Herbert Parker and George S. Taft, for defendant in error:

The power of punishment for contempt is an incident to all courts, necessary to their maintenance, and independent of any statutory provisions.

Cartwright's Case, 14 Mass. 240; *State v. Morrill*, 16 Ark. 384.

It is not necessary that the action of defendant should have actually embarrassed or impeded justice; it is enough if it had such tendency.

Respublica v. Passmore, 3 Yeates, 441, 2 Am. Dec. 388; *Re Sturoc*, 48 N. H. 428, 97 Am. Dec. 626.

The construction and tendency of publication as determining its character as contempt are matters of law for the court.

People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; *State v. Morrill*, 16 Ark. 384; *Respublica v. Oswald*, 1 Dall. 319, 1 L. ed. 155.

Publication such as that proved is considered to have been in the presence of the court.

State v. Post, 4 Ohio N. P. 157; *Myers v. State*, 46 Ohio St. 473.

A complaint, sworn to, is not a necessary prerequisite to jurisdiction.

Cartwright's Case, 114 Mass. 240; *State v. Morrill*, 16 Ark. 384; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Re Sturoc*, 48 N. H. 428, 97 Am. Dec. 626; *Golden Gate Consol. Hydraulic Min. Co. v. Yuba County Super. Ct.* 65 Cal. 187; *People. Greeley, v. Court of Oyer & Terminer*, 27 How. Pr. 14; *Re Cheeseman*, 49 N. J. L. 115, 60 Am. Rep. 596.

Even if such a preliminary complaint were requisite, it has been waived by plaintiff in error not having interposed any objection in the trial court.

Randall, Petitioner, 11 Allen, 473; *Re Cheeseman*, 49 N. J. L. 115, 60 Am. Rep. 596; *Ex parte Keeler*, 45 S. C. 537; 31 L. R. A. 678; *Bishop v. Donnell*, 171 Mass. 563.

The court had jurisdiction of the party. Even if it were not so, this objection has been waived by the plaintiff having filed no dilatory plea, by general appearance, and by hearing on merits.

The court did have authority to impose a fine.

United States, Southern Exp. Co., v. Mcmphs & L. R. R. Co. 6 Fed. Rep. 237; *New York v. New York & S. I. Ferry Co.* 64 N. Y. 622; *People v. Albany & V. R. Co.* 12 Abb. Pr. 171; *Golden Gate Consol. Hydraulic* 44 L. R. A.

Min. Co. v. Yuba County Super. Ct. 65 Cal. 187.

It is necessary only to show by the record that court had jurisdiction of the cause, not of the parties. The latter is matter to be raised by plea in abatement, or motion to dismiss.

Piper v. Pearson, 2 Gray, 121, 61 Am. Dec. 438.

The presumption of law is that the court had jurisdiction of the cause and parties until the contrary is shown.

Cuddy, Petitioner, 131 U. S. 280, 33 L. ed. 154.

Field, Ch. J., delivered the opinion of the court:

These are two writs of error, and, although the pleadings may possibly raise issues of fact as well as issues of law, the cases were entered, without objection on the part of any of the parties, upon the docket of the full court, and each case was heard upon the plea. *In nullo est erratum.* The Telegram Newspaper Company is a Massachusetts corporation, having its usual place of business in Worcester, and publishing there a daily newspaper. The Gazette Company is a corporation established under the laws of the state of Maine, having its usual place of business in Worcester, and publishing there a daily newspaper. It is understood that it had complied with Stat. 1884, chap. 330, and had made the commissioner of corporations its attorney, upon whom legal process might be served. The record in the cases recites that the corporations, respectively, appeared in the superior court, with counsel, in obedience to the summons of that court to show cause why they should not be adjudged in contempt for publishing certain articles in their newspapers, of the dates of January 13 and 14, respectively, of the year 1898, which articles dealt with and discussed the matter of the trial before said court of the action or petition of Silas H. Loring against the town of Holden, and that the corporations appeared, and were heard, so that any question of due service of the summons upon the foreign corporation has become immaterial.

At the time of the publication of the articles in the newspapers the petition of Silas H. Loring against the town of Holden was on trial before the superior court then sitting at Worcester, and it was for the assessment of damages suffered by the taking of land of the petitioner for the abolition of a grade crossing of the Fitchburg Railroad Company. The portion of the articles published which the court found was calculated to obstruct the course of justice in said court, and prevent a fair trial of said petition, was, after describing the petition of Loring against the town of Holden, the following: "The town offered Loring \$80 at the time of the taking, but he demanded \$250, and, not getting it, went to law," which appeared in the Worcester Daily Telegram; and "The town offered the plaintiff \$80, but he wanted \$250," which appeared in the Worcester Evening Gazette. Where-

there is any truth in these statements does not appear. The facts stated, even if they were true, were not admissible in evidence at the trial of the petition before the superior court; and, so far as appears, they were no part of the proceedings at the trial, and, if they were brought to the knowledge of the jurors before they rendered their verdict, were calculated to influence them upon the amount of the damages to be given by their verdict. The newspapers were published and circulated in Worcester, and it was not improbable at the time of publication that the articles would be read by some of the jurors before the trial of the petition was finished.

The record before us in each case, after setting out the whole of the articles published, and the summons, service, and appearance of the corporation, and the hearing, concludes as follows: "When, after hearing all matters and things concerning said publication by said respondents, it appearing to said court that said article was calculated to obstruct the course of justice in said court, and prevent a fair trial of said case, and that it was a contempt of said court for said corporation to publish the said article during the said trial, it was, therefore, ordered by said court that said respondent corporation be adjudged guilty of contempt of said court for said publication of said article; and it was thereupon ordered by said court that said respondent corporation pay a fine of \$100, and it was further ordered that, if said fine be not paid within twenty-four hours, an execution be issued against said respondent corporation for the collection of said fine by a levy on its property."

It is contended that a corporation cannot be guilty of a criminal contempt of court, although it may be fined for what is called a "civil contempt." It is said that an intent cannot be imputed to a corporation in criminal proceedings. It has been decided in this commonwealth that a corporation may be liable civilly for a libel or a malicious prosecution. *Fogg v. Boston & L. R. Corp.* 148 Mass. 513; *Reed v. Home Sav. Bank*, 130 Mass. 443. 39 Am. Rep. 468. We think that a corporation may be liable criminally for certain offenses, of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings; but its property may be taken, either as compensation for a private wrong or as punishment for a public wrong. In most of the states of this country corporations may be formed, under general laws, for the purpose of doing almost any kind of business, as easily as partnerships, and many of the newspapers are published by corporations. Although natural persons who publish or assist in publishing a libel in a newspaper owned by a corporation may be punished criminally by fine or imprisonment, or both, yet, if the corporation cannot be punished by a fine, it will escape all criminal liability. The au-

thors of libels are often irresponsible persons, and the remedy by private action against corporations for the publishing of libelous statements is often inadequate. That a corporation may be indicted for a misfeasance as well as for a nonfeasance has been decided in this commonwealth. *Com. v. Proprietors of New Bedford Bridge*, 2 Gray, 339. See *Queen v. Great North of England Ry. Co.* 9 Q. B. 315, 326. A corporation may be indicted for a libel. *State v. Atchison*, 3 Lea, 729, 31 Am. Rep. 663, and note; *Brennan v. Tracy*, 2 Mo. App. 543; *Pharmaceutical Soc. v. London & P. Supply Asso.* L. R. 5 App. Cas. 857, 809, 870; 2 Bishop, New Crim. Law, §§ 9, 35; Newell, *Defamation, Slander, & Libel*, 2d ed. 362, 363; *Odgers, Libel & Slander*, 3d ed. 436; 5 *Thomp. Corp.* §§ 6418 *et seq.* The publication of an article in a newspaper which is printed and circulated in the place where a trial is had pending the trial, and which concerns the cause on trial, and is calculated to prejudice the jury in the cause and prevent a fair trial, often has been held to be a criminal contempt of the court trying the cause. *O'Shea v. O'Shea*, L. R. 15 Prob. Div. 59; *Ex parte Green*, 7 Times Law R. 411; *Daw v. Eley*, L. R. 7 Eq. 55; *Ramsbotham v. Senior*, L. R. 8 Eq. 575; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Re Sturoc*, 48 N. H. 428, 97 Am. Dec. 626; *Re Cheeseman*, 49 N. J. L. 137, 60 Am. Rep. 596; *State v. Freu*, 24 W. Va. 416, 49 Am. Rep. 257; *Oswald, Contempt*, 2d ed. pp. 58 *et seq.*; 7 Am. & Eng. Enc. Law, 2d ed. p. 59. If a corporation publishes the article, we see no reason why it should not be held liable for a criminal contempt. 5 *Thomp. Corp.* §§ 64, 68 *et seq.*; 7 Am. & Eng. Enc. Law, 2d ed. p. 647, and cases cited. There are no statutes in this commonwealth regulating the proceedings in the trial and punishment of contempt of court. "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the 12th article of our Declaration of Rights." *Cartwright's Case*, 114 Mass. 230, 238; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91.

In the present cases it was not necessary that a formal complaint should first have been made to the court. The contempt, if there was one, was not, strictly speaking, committed in the presence of the court, but it related to a trial then proceeding before the court. In each case a summons to the plaintiffs in error was issued by the court, of its own motion, and without complaint made, to show cause why the corporations should not be adjudged in contempt for publishing an article dealing with a matter on trial before the court. When it comes in any manner to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the court is held which are calculated

to prevent a fair trial of a cause then on trial before the court, the court, of its own motion, can institute proceedings for contempt. Such a power in the court is necessary for its own protection against an improper interference with the due administration of justice, and it is not dependent upon the complaint of any of the parties litigant. If the publication amounts to a contempt of court, because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt committed in the presence of the court. The proceedings in the present cases, after the service of process, show that the plaintiffs in error were specifically informed of the nature of the charge against them, and were given a full opportunity to be heard with the aid of counsel.

The most important question is whether the publication of these articles under the circumstances stated could be adjudged a contempt. The articles published were not defamatory either as regards the presiding justice of the court, or the jurors before whom the cause referred to was being tried, or the parties to the cause. In one case the court discharged the treasurer and manager of the newspaper, and in the other the editor and the publisher, on the ground that they were not shown to be directly responsible for the publications. It is probable (although this does not expressly appear in the papers before us) that the person or persons employed to report for each newspaper the proceedings of the court wrote the articles, and caused them to be published. The superior court has not found that there was an intent to influence the trial of the cause referred to on the part of anybody. The articles are objectionable only because they purport to state the amount of money which the town offered to pay the plaintiff, and the amount the plaintiff demanded, before the petition was brought. The law encourages attempts to settle or compromise disputes, without subjecting the parties to any liability, if the attempts fail, of having any concessions therein made to avoid litigation put in evidence against them in the subsequent litigation. *Upton v. South Reading Branch R. Co.* 8 Cush. 600; *Harrington v. Lincoln*, 4 Gray, 563, 64 Am. Dec. 95; *Gay v. Bates*, 99 Mass. 263; *Draper v. Hatfield*, 124 Mass. 53. We are content to assume that the person or persons who wrote and caused the articles to be published did not know this rule of law, and acted without any intent to pervert the course of justice. As the only intent which can be imputed to the corporation is the intent of its officers or agents, the question is whether the publication of these articles without any intent to pervert the course of justice can be adjudged a contempt. In *Metropolitan Music Hall Co. v. Lake*, 58 L. J. Ch. N. S. 513, it is said that it must be shown that the articles were published with knowledge of the pending cause, 44 L. R. A.

and that appears in the present cases. In *Cartwright's Case*, 114 Mass. 230, 238, it is said by the court: "But the jurisdiction and power of the court do not depend upon the question whether the offense might or might not be punished by indictment. . . . 'As regards the question whether a contempt has or has not been committed, it does not depend upon the intention of the party, but upon the act he has done.' By Taney, Ch. J., in *Wartman v. Wartman*, Taney, 362, 370." If a person talk with or send a statement to a juror about a cause, during the trial of it, in such a manner that it may cause prejudice or bias in the cause, although the intent with which the person acted may affect the amount of his punishment, he cannot justify his conduct by showing that he had no evil intent, and knew no better.

It was not necessary that the superior court should find that the articles published actually had been read by some of the jurors while trying the cause to which the articles referred. They plainly had been read by the presiding justice during the trial, and it was likely that they had been read by some of the jurors. The intention of the publisher of a newspaper is that it should be bought and read by persons within the place where it circulates. Cases before a court should be determined on the evidence presented in court. It is an inevitable perversion of the proper administration of justice to attempt to influence the judge or jury in the determination of a cause pending before them by statements outside of the courtroom, and not in the presence of the parties, which may be false, and, even if they are true, are not in law admissible in evidence. We cannot say that it appears that the superior court erred in adjudging that the publication of these articles, under the circumstances stated, was a contempt of that court; and it was for that court to determine whether it was necessary to institute proceedings for contempt in order to vindicate its authority to secure the due administration of justice in a cause pending before it. The publications contained statements of facts, evidence of which was not competent at the trial, and was not introduced at the trial; and they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and the natural and probable effect of them would be improperly to influence the court and jury in the determination of the cause.

The proper method of collecting a fine imposed upon a corporation is by levy of an execution, issued by the court. *King v. Woolf*, 2 Barn. & Ald. 609, 1 Chitty, 583; *Huddleson v. Ruffin*, 6 Ohio St. 604; 1 Chitty, Crim. Law, 2d ed. 811; 1 Bishop, New Crim. Proc. §§ 1303 et seq.

Judgment affirmed.

MICHIGAN SUPREME COURT.

John A. MAY, Receiver of the Ingham County Savings Bank,
v.

Rollin J. CLELAND *et al.*, and
Frederick THOMAN, *Appt.*

(.....Mich.....)

A purchaser at execution sale of corporate stock with notice that it has been pledged to a third person takes subject to the rights of the pledgee, although the pledge has not been entered on the books of the corporation.

(May 17, 1898.)

APPEAL by defendant Thoman from a decree of the Circuit Court for Ingham County sitting in Chancery in a suit brought to enforce a lien on certain corporate stock. *Affirmed.*

Statement by Grant, Ch. J.:

The facts are undisputed, and are as follows: The complainant, as receiver of the Ingham County Savings Bank, filed the bill of complaint in this cause to foreclose a lien on certain shares of the corporate stock of the Michigan Knitting Company, pledged December 13, 1895, with said bank, by the defendant Rollin J. Cleland, as collateral security for the payment of a certain loan made to him, and certain indebtedness owing said bank by one George M. Dayton. At the time of receiving the stock, the bank did not notify the Michigan Knitting Company of its rights therein, nor did it have or seek to have a transfer of the stock upon the books of the company until after the levy of the execution hereinafter mentioned. On the 9th day of July, 1896, a levy was made upon this stock under a writ of execution, issued on a judgment in the circuit court for Ingham county, in favor of one Phillip Perkins, and against the defendant Cleland and others. The levy was regularly made, and proper proceedings to a sale thereof followed. On August 13, 1896, said shares of stock were sold by Sidney Edson, deputy sheriff, to the defendant Frederick Thoman, for the sum of \$7.50, such sum being the highest bid made therefor. While the sale was in progress, and before Mr. Thoman purchased, the complainant caused public notice of its rights in said stock to be given to all bidders attending the sale; and the defendant Thoman had full notice of complainant's rights and equities in the stock. The case was heard upon pleadings and proofs, and a decree made in favor of the complainant establishing his prior rights and equities in the stock, and decreeing a sale thereof for the satisfaction of the debts for which it had been pledged. Defendant Thoman alone appeals.

NOTE.—As to the effect of a pledge of stock certificates, see, in general, cases in note to *Re Argus Printing Co.* (N. D.) 12 L. R. A. 781.

For pledgee's liability as a stockholder, see note to *Andrews v. National Foundry & Pipe Works* (C. C. App. 7th C.) 36 L. R. A. 139. 44 L. R. A.

Messrs. Stewart & Heck and Harris E. Thomas, for appellant:

The attachment is preferred to the unrecorded transfer.

"Priority as between unrecorded transfers of shares and attaching creditors," 30 Am. L. Rev. 223; *Jones v. Latham*, 70 Ala. 164; *Berney Nat. Bank v. Pinckard*, 87 Ala. 577.

Under statutes like ours an unrecorded transfer is void as to subsequent ones.

Weston v. Bear River & A. Water & Min. Co. 5 Cal. 186, 63 Am. Dec. 117; *Naglee v. Pacific Wharf Co.* 20 Cal. 530; *Conway v. John*, 14 Colo. 30; *Oxford Turnp. Co. v. Bunnell*, 6 Conn. 552; *Dutton v. Connecticut Bank*, 13 Conn. 493; *Northrop v. Newton & B. Turnp. Co.* 3 Conn. 544; *People's Bank v. Gridley*, 91 Ill. 457; *Coleman v. Spencer*, 5 Blackf. 197; *State, Koons, v. First Nat. Bank*, 89 Ind. 302; *Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270, 60 Am. Rep. 789; *Topeka Mfg. Co. v. Hale*, 39 Kan. 23; *Fiske v. Carr*, 20 Me. 310; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Fisher v. Essex Bank*, 5 Gray, 371; *Central Nat. Bank v. Williston*, 138 Mass. 244; *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424; *Buttrick v. Nashua & L. R. Co.* 62 N. H. 413; *Berchick v. Marye*, 9 Nev. 312; *State, Guerrero, v. Pettinelli*, 10 Nev. 141; *State Ins. Co. v. Saa*, 2 Tenn. Ch. 507; *Cheever v. Meyer*, 52 Vt. 66; *Murphy's Application*, 51 Wis. 519.

New York, Louisiana, and the United States courts have held both ways.

See *Stebbins v. Phœnia Ins. Co.* 3 Paige, 350; *Johnson v. Underhill*, 52 N. Y. 203; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 80; *Friedlander v. Slaughter House Co.* 31 La. Ann. 523; *Williams v. Mechanics' Bank*, 5 Blackf. 59.

New York, Louisiana, New Jersey, Pennsylvania, South Carolina, and Texas have no statutes making transfers invalid as does the Michigan law.

Mr. Charles F. Hammond, for appellee:

The entry of a transfer of shares of stock upon the books of a corporation is not necessary to the validity of the transferee's title, which becomes absolute upon the delivery to him of the certificates with an assignment of the shares indorsed thereon signed by the owner.

Mandlebaum v. North American Min. Co. 4 Mich. 465; *McLean v. Charles Wright Medicine Co.* 96 Mich. 479.

A sale, transfer, or pledge of corporate stock, although not entered upon the books of the corporation, is effectual as between the parties, and takes precedence of a subsequent levy thereon in behalf of the vendor's creditors.

1 Cook, Stock & Stockholders, §§ 486, 487; 1 Morawetz, Priv. Corp. §§ 193 *et seq.*; *Newberry v. Detroit & L. S. Iron Mfg. Co.* 17 Mich. 141; *Colebrooke, Collateral Securities*, § 294.

This seems to be the rule, with some modifications, in Connecticut, Maine, Vermont, Indiana, Maryland, Wisconsin, Alabama, and California.

Fisher v. Essex Bank, 5 Gray, 373; *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Skowhegan Bank v. Outler*, 49 Me. 315; *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161; *Fort Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270, 60 Am. Rep. 789.

The defendant Thoman purchased the stock with full notice of the complainant's rights, having at least such notice as put him upon inquiry, which is sufficient in equity.

1 Cook, Stock & Stockholders, § 489; *Wilson v. St. Louis & S. F. R. Co.* 108 Mo. 588; *Columbia Bank v. Jacobs*, 10 Mich. 349, 81 Am. Dec. 792.

A court of equity will not compel a corporation to allow a transfer of stock by a purchaser at execution sale, where the price paid at such sale is so small as to shock the conscience of the court.

1 Cook, Stock & Stockholders, § 488; *Mississippi & M. R. Co. v. Cromwell*, 91 U. S. 643, 23 L. ed. 368; *Newberry v. Detroit & L. S. Iron Mfg. Co.* 17 Mich. 141.

Grant, Ch. J., delivered the opinion of the court:

The sole question is: Does the transfer of shares in a corporation at an execution sale take precedence of a previous bona fide sale and transfer not entered on the books of the corporation? The authorities are in conflict. In 30 Am. L. Rev. 223 *et seq.*, the decisions in the various states are collected. In that article the author argues forcibly for the execution creditor and reaches the conclusion that the weight of authority supports that theory. He, however, says: "As a theory this ground is opposed by most of the text writers, including Cook, Morawetz, Lowell, and Pomeroy." Counsel for the defendant have given us the benefit of an able and exhaustive examination of the decisions in the states where the question has arisen. We deem it unnecessary to discuss or to distinguish them. We think our own court has settled the question. *Mandlebaum v. North American Min. Co.* 4 Mich. 465; *Newberry v. Detroit & L. S. Iron Mfg. Co.* 17 Mich. 141; *McLean v. Charles Wright Medicine Co.* 96 Mich. 479. In the *Newberry Case* it was held that a transfer of stock, though unrecorded, conveys the interest of the holder, and is valid, except as against persons having equities; and a judgment creditor buying at an execution sale, with notice of the transfer, can get no better title than his creditor had. One Russell was the owner of the stock, as appeared by the books of the corporation, but had sold and transferred his shares to two other parties before Newberry's levy was made. Chief Justice Cooley said: "The levy was entirely ineffectual." Justice Campbell said: "No title passed under the execution sale, as Russell's rights had been already divested." In the *Mandlebaum Case* it was held that these certificates of stock were "not commercial paper, in the strict sense of the term; but . . . that the holder is entitled to every right respecting it, as against third parties, which the law confers upon the holder of commercial paper." In the *McLean Case* we cited with 44 L. R. A.

approval the *Mandlebaum Case*, and held that the transfer upon the books is not essential to the validity of the purchaser's title. An execution creditor has no prior equities, nor are we able to see that he has any existing equities in consequence of his levy. He has parted with no interest or right, and is in no worse condition by the failure of the levy than he was before. If his debtor has no title, he can acquire none by a levy and sale of land, the title to which, upon the record, stood in the debtor, but with which he had parted, or by a levy and sale of personal property in his possession, but to which he had no title. 1 Cook, Stock & Stockholders, §§ 486, 487; 1 Morawetz, Priv. Corp. §§ 193-195.

The decree is affirmed.

The other Justices concur.

PEOPLE of the State of Michigan

v.

Frank J. DETTENTHALER.

PEOPLE of the State of Michigan, *ex rel.*

Elliott O. GROSVENOR, Dairy and Food Commissioner, *Plff. in Certiorari*,

v.

Erastus PECK, Circuit Judge for Jackson County.

(.....Mich.....)

1. The clerk of one branch of the legislature has no power to amend a bill which has been sent over from the other house so as to add an enacting clause without definite action by the legislative branch upon the matter.
2. A bill in which the enacting clause is not inserted by the legislature is void under a constitutional provision requiring it to contain such clause.

(December 6, 1898.)

EXCEPTIONS by defendant to rulings of the Superior Court of Grand Rapids which resulted in his conviction of violating the terms of the statute against the unlawful sale of oleomargarine. *Reversed.*

CERTIORARI to the judge of the Circuit Court for Jackson County to review his refusal to grant a writ of mandamus to J. Jay Calkins, police justice of Jackson City, to compel him to proceed with a prosecution against Henry A. Lincoln for the alleged unlawful sale of oleomargarine. *Affirmed.*

The facts are stated in the opinion.

Mr. John G. Hawley for plaintiff in certiorari.

NOTE.—For extrinsic evidence as to unconstitutionality of statute, see *note* to *Stevenson v. Colgan* (Cal.) 14 L. R. A. 459.

For conclusiveness of enrolled bill, see *note* to *State, Reed, v. Jones* (Wash.) 23 L. R. A. 340; also *Union Bank v. Oxford Comrs.* (N.C.) 34 L. R. A. 487; and *Lafferty v. Huffman* (Ky.) 32 L. R. A. 203.

Messrs. Rood & Hindman and E. F. Sweet, for defendant in certiorari:

The Constitution, art. 4, § 48, provides that the style of the laws shall be "The People of the State of Michigan Enact."

This constitutional provision is mandatory—its omission is fatal.

Article 6, § 35, as to the style of processes "In the Name of the People of the State of Michigan," is strikingly similar to the provision here under consideration. It has been held by this court that the omission of these constitutional words is fatal to a process, and the constitutional requirement held to be mandatory.

Forbes v. Darling, 94 Mich. 621.

To now hold the provision as to the style of laws to be merely directory when it is so nearly the provision with reference to processes, would be approaching too closely an inconsistency.

State v. Patterson, 98 N. C. 660; *State, Chase, v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738; *McPherson v. Leonard*, 29 Md. 377; *Re Swartz*, 47 Kan. 157; *Cooley, Const. Lim.* 5th ed. p. 93; *State v. Wright*, 14 Or. 365.

Messrs. Fred A. Maynard, Frank A. Rodgers, and Benn M. Corwin for the People.

Hooker, J., delivered the opinion of the court:

These cases involve the validity of Act No. 76, Laws 1897, which is as follows:

An Act to Prevent Deception in the Manufacture and Sale of Imitation Butter.

Sec. 1. The people of the state of Michigan enact, that no person, by himself or his agents, or servants, shall render or manufacture, sell, offer for sale, expose for sale, or have in his possession with intent to sell, any article, product, or compound made wholly or in part out of any fat, oil, or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream from the same; provided, that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter.

Sec. 2. Whoever violates any of the provisions of § 1 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$50, nor more than \$500 and the costs of prosecution, or by imprisonment in the county jail, or state house of correction and reformatory at Ionia, for not less than six months nor more than three years, or by both such fine and imprisonment in the discretion of the court, for each and every offense.

Approved, April 15, 1897.

The evidence in the first-entitled cause shows that one of the defendants was convicted of the alleged offense of selling oleomargarine in contravention of this act. In the other, a complaint was made of a similar act to a justice, who refused to issue the warrant; and, on application, the circuit court denied a mandamus to compel it. The cases raise substantially the same questions, and were argued, and will be considered, together.

The validity of the law is questioned. The record shows that this was a senate bill, and passed the senate without the constitutional enacting clause. The records of the house show that the bill was reported by the committee on agriculture and by the committee of the whole without amendment, and with the recommendation that it be passed. Under the head of "Third Reading of Bills upon Passage," the record of the house shows that: "Pending the third reading of the bill, Mr. Chamberlain moved that the bill be recommended to the committee of the whole, which motion did not prevail. The bill having been read a third time, and the question being upon the passage, pending the taking of the vote Mr. Graham demanded the previous question. The question being, 'Shall the main question be now put?' the same was ordered. The bill was then passed, a majority of all the members-elect voting therefor by yeas and nays as follows: Yeas 56; nays, 19." As this is the only time the bill was before the house, we must find that the bill passed the house without an enacting clause, unless the contrary can be shown by the other evidence. Counsel undertook to show that it was amended in this particular, by the records of the senate, and the testimony of the clerk of the house. The evidence is, in brief, that previous to the passage of the bill in the house the clerk noticed the absence of the enacting clause, and brought it to the attention of the house, and said that he would enter one, and accordingly wrote the words in the original bill; i. e., the one which was then before the house. He did not testify that the house took any action upon it, or that any record was made of it. The senate record shows that the bill was subsequently returned to the senate, accompanied by a letter from the clerk of the house, reading as follows:

House of Representatives,

Lansing, April 7, 1897.

To the President of the Senate—Sir:

I am instructed by the house to return to the senate the following bill: Senate bill No. 6, file No. 24, entitled "A Bill to Prevent Deception in the Manufacture and Sale of Imitation Butter,"—and to inform the senate that the house had amended the same as follows: By inserting in line 1, § 1, after the words "Section 1," the words "The People of the State of Michigan Enact."

Very respectfully,

Lewis M. Miller,

Clerk of the House of Representatives.

In the passage of which, as thus amended, the house has concurred by a majority vote of all members-elect.

It further appears that the senate concurred in such amendment.

We must determine, therefore, whether the house is shown to have amended the bill by inserting an enacting clause, and, if not, whether the law is valid without it. The most that can be claimed is that there is oral testimony that the clerk announced its absence, and stated that he would supply it. Inferentially, perhaps, we may say that there was no objection made; but the evidence is silent as to what, if anything, occurred. There is nothing but this inference of silence which imports acquiescence in the amendment. There is nothing to show definite action by the house, which alone had power to amend the bill before it. So that, if the clause is essential to the validity of the act, we need not discuss the propriety of admitting parol evidence to prove an amendment which should be shown by the record, if one was authorized. See *Atty. Gen. v. Rice*, 64 Mich. 391; *People, Hart, v. McElroy*, 72 Mich. 440, 2 L. R. A. 609; *Sackrider v. Saginaw County Supers.* 79 Mich. 68. Is the constitutional enacting clause a requisite to a valid law? This must depend upon whether the constitutional provision is to be considered a mandatory provision or directory merely. See Const. art. 4, § 48. Among the authorities cited by the relator in support of his contention is that of *Swann v. Buck*, 40 Miss. 270. The constitutional provision is similar to ours, and it was held that a substantial compliance was sufficient. In that case the style of the resolution was "Resolved by the legislature of the state of Mississippi." The court was unable to discover a previous judicial decision of the question, but quoted Mr. Cushing to the effect that the prescribed "form . . . must be strictly pursued, and that no equivalent language will be sufficient," and, while declining to accept his rule, said: "It is necessary that every law should show on its face the authority by which it is adopted and promulgated, and that it should clearly appear that it is intended by the legislative power that enacts it that it should take effect as a law. These conditions being fulfilled, all that is absolutely necessary is expressed. The word 'resolved' is as potent to declare the legislative will as the word 'enacted.'" The case of *McPherson v. Leonard*, 29 Md. 377, holds that the provision of the Constitution of Maryland was directory, and that the omission of the words "by the general assembly of Maryland" did not render the law invalid. The question appears to have been treated as a new one. The case of *Cape Girardeau v. Riley*, 52 Mo. 427, 14 Am. Rep. 427, follows the Maryland case in holding the provision directory; the court saying that, after diligent search, no case holding to the contrary had been found. In this case, like the one before us, the entire enacting clause was wanting. In this connection we may add that previous decisions of the same court, holding the provision that writs should run in the name of the state was directory, were given weight. In our state a contrary holding will be found. See *Forbes v. Darling*, 94 Mich. 621. There are, how-

ever, cases which take a contrary view of the law, and adhere to the doctrine asserted by Mr. Cushing, and the late Mr. Justice Cooley, in his work on *Constitutional Limitations*, 5th ed. p. 93, viz.: "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a Constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding except when such rules are looked upon as essential to the thing to be done, and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and, if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a Constitution provisions which the people in adopting it have not regarded as of high importance, and worthy to be embraced in an instrument which for a time, at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end. Especially, when, as has been already said, it is but fair to presume that the people in their Constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication." There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions, as they now stand, do not sanction the application. The question arose in Washington territory, over a law fixing the seat of government, and the opinion of Cushing was quoted and followed. *The Seat of Government Case*, 1 Wash. Terr. 116. The case of *State, Chase, v. Rogers* (decided in 1875) 10 Nev. 250, 21 Am. Rep. 738, did the same. An extended discussion of the subject will be found in that case, in support of the proposition that the language of the Constitution should be literally followed. The opinion concludes with the following pertinent and emphatic language: "Our Constitution expressly provides that the enacting clause of every law shall be, 'The people of the state of Nevada, repre-

sented in senate and assembly do enact as follows: This language is susceptible of but one interpretation. There is no doubtful meaning as to the intention. It is, in our judgment, an imperative mandate of the people, in their sovereign capacity, to the legislature, requiring that all laws, to be binding upon them, shall, upon their face, express the authority by which they were enacted; and, as this act comes to us without such authority appearing upon its face, it is not a law." The case of *State v. Patterson*, 98 N. C. 662, is strong in its condemnation of the practice of treating constitutional requirements as directory. The case of *Powell v. Jackson*, 51 Mich. 130, is not in point, as the bill was duly and seasonably amended, if we may accept the statement of the briefs of the counsel and the syllabus. The trend of the weight of the authority is, in our opinion, against the relator's contention.

It is urged with some plausibility that the insertion of this provision previous to the signature by the governor is a sufficient compliance with the Constitution, from which we understand the claim to be made that, although the enacting clause was wanting when the bill came to the governor, it might have been supplied by him. But it is thought that this proposition is tenable only upon the assumption that the constitutional provision is directory merely. The governor has no power to make laws. The legislative power is in no part vested in him, being by § 1 of article 4 of the Constitution vested in the senate and house of representatives. It is not the design of the Constitution that he should legislate. His office is a check upon the legislature, and he may compel a reconsideration of a bill by seasonably returning it to the appropriate house with his objections to it; and, when the legislature has adjourned, his neglect to sign it prevents it from becoming a law, but he has not the slightest power in framing the law. Indeed, it is a fundamental principle in American Constitutions that the executive shall not make laws. The following language from the opinion in the case of *State, Chase, v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738, is *appropos* to this subject: "Without the concurrence of the senate, the people have no power to enact any law. Every person at all familiar with the practice of legislative bodies is aware that one of the most common methods adopted to kill a bill, and prevent its becoming a law, is for a member

to move to strike out the enacting clause. If such motion is carried, the bill is lost. Can it be seriously contended that such a bill, with its head cut off, could thereafter, by any legislative action, become a law? Certainly not. The certificates of the proper officers of the senate and assembly that such an act was passed in their respective houses do not and could not impart vitality to any act which upon its face failed to express the authority by which it was enacted." This being so, the only justification for the insertion of the enacting clause by the governor is to be found in the assumption that it is a clerical omission of an unimportant matter; and it might as well be held that one of the houses, or a clerk, or even the printer of the laws, might make the correction, as that the governor might do it.

Some of the states have sustained laws without enacting clauses, but we do not know of one that has made their validity depend upon the unauthorized action of some officer or person. They have preferred to rest their action upon the well-recognized distinction between mandatory and directory provisions. If the provision is mandatory, that the law shall have a prescribed style, and the making of laws is confined to the legislative branch of the government, it cannot be consistently held that omissions of essential parts of a law may be supplied and corrections made by persons without authority; and the public necessities should be much greater than in the present case, before such a proposition should be seriously considered. If, on the other hand, there is warrant for treating the provisions as directory, a much less dangerous precedent is established. But, as has been shown, the weight of authority forbids it; and, in our opinion, it will be an unfortunate day for constitutional rights when courts begin the insidious process of undermining constitutions by holding unambiguous provisions and limitations to be directory merely, to be disregarded at pleasure. In the present case it will be much better that the legislature shall correct its mistake, than that the court shall sanction the irregular correction in this case.

We are therefore constrained to hold that the law under discussion is void, and that in the *certiorari* case the order is affirmed; in that of *Dettenthaler* the judgment is reversed, and no new trial ordered.

The other Justices concur.

NEW HAMPSHIRE SUPREME COURT.

Edourdina BELIVEAU, by Next Friend,
v.
AMOSKEAG COMPANY.

(.....N. H.....)

1. A discharged attorney who is permitted to remain the attorney of record.

NOTE.—The above case seems to recognize to an unusual extent the power of an infant's attorney to bind the infant by an act against the infant's interest.

As to this general question, see *note* to *Kromer v. Friday* (Wash.) 32 L. R. A. 671.
44 L. R. A.

ord without notice to the opposite party may enter into an agreement for settlement of the suit which will bind his former client.

2. A final disposition of a cause may be made by agreement of the attorney of record as to whose authority no limitation is or might be known by reasonable inquiry by the opposite party which is entered of record, made an order of court, and executed by the adversary in good faith.

On rehearing.

3. An attorney employed by the next friend of an infant to prosecute a suit on

the infant's behalf has power to make a settlement of the suit which will bind the infant.

4. That an agreement by an attorney for settlement was not brought to the attention of the court, and did not obtain its sanction before it was entered of record, does not impair its effect.

(Doe, Ch. J., dissents.)

(March 15, 1895.)

ON MOTION in an action brought to recover damages for personal injuries to set aside an entry of satisfaction of judgment in favor of plaintiff. *Denied.*

The plaintiff having received the injury for which defendant was alleged to be responsible employed one Cormier, an attorney at law, to prosecute a suit for recovery. While he was still attorney of record, but, as plaintiff alleged, after he had been discharged and other attorneys substituted in his place, he entered into an agreement for satisfaction of judgment upon payment of \$1,000. The money was paid by defendant to the attorney who absconded without paying it to plaintiff.

Further facts appear in the opinion.

Messrs. Streeter & Walker, for plaintiff:

The compromise agreement entered into in this case by the counsel of record was fraudulent in law and void, and did not bind this unfortunate plaintiff.

Tripp v. Gifford, 155 Mass. 108; *Biddell v. Dowse*, 6 Barn. & C. 255; *Swinfen v. Swinfen*, 1 C. B. N. S. 403.

An infant cannot employ an attorney or an agent.

Biddell v. Dowse, 6 Barn. & C. 255; *Armitage v. Widoe*, 30 Mich. 124; *Lawson, Rights, Rem. & Pr.* § 824; *Philpot v. Bingham*, 55 Ala. 435; *Tapley v. McGee*, 6 Ind. 56; *Wainwright v. Wilkinson*, 62 Md. 146.

An infant cannot make a valid agreement to compromise his suit.

Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88.

The "next friend" of an infant is not his agent or attorney, but an officer of the court, who derives his authority, not from the infant, but from the court.

Guild v. Cranston, 8 Cush. 506; *Morgan v. Thorne*, 7 Mees. & W. 400; *Tripp v. Gifford*, 155 Mass. 108.

It is the duty of the court to protect carefully the right of infants.

Tate v. Mott, 96 N. C. 19; *Hardy v. Scanlin*, 1 Miles (Pa.) 87.

An attorney employed by a next friend is his attorney only.

A next friend cannot compromise the suit except under the direction of, and with the consent of, the court from which he derives his authority to manage the litigation.

Tripp v. Gifford, 155 Mass. 108; *Biddell v. Dowse*, 6 Barn. & C. 255; *Swinfen v. Swinfen*, 1 C. B. N. S. 403; *Hargrave v. Hargrave*, 12 Beav. 408; *Eidam v. Finnegan*, 48 Minn. 53, 16 L. R. A. 507; *Clark v. Croul*, 34 S. C. 417; *Edsall v. Vandemark*, 39 Barb. 589; *Isaacs v. Boyd*, 5 Port. (Ala.) 388; *Crotty v. Eagle*, 35 W. Va. 143; *Kingsbury v. Buck*, 44 L. R. A.

ner, 134 U. S. 680, 33 L. ed. 1059; *Miles v. Kaigler*, 10 Yerg. 10, 30 Am. Dec. 425; *O'Donnell v. Broad*, 2 Pa. Dist. R. 84.

The authority of the next friend terminates with the judgment which he has no authority to collect.

Smith v. Redus, 9 Ala. 99, 44 Am. Dec. 429; *Miles v. Kaigler*, 10 Yerg. 10, 30 Am. Dec. 425; *Klaus v. State*, 54 Miss. 644.

Even if the agreement to settle and judgment thereon must stand, the marking of "judgment satisfied" is erroneous, and should be stricken off.

Tapley v. McGee, 6 Ind. 56.

Messrs. J. W. Fellows and C. F. Stone also for plaintiff.

Mr. David Cross, for defendant:

An attorney has the power to enter a judgment by agreement in court so as to bind his client.

The plaintiff cannot now repudiate a settlement made in good faith by Cormier, or he cannot repudiate a settlement without first restoring the \$1,000 paid in good faith.

Alton v. Gilmanton, 2 N. H. 520; *Berkenhead v. Fanshaw*, 1 Salk. 86; 1 Tidd, Pr. 34; *Hanson v. Hoyt*, 14 N. H. 56; *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468; *Bryant's Case*, 24 N. H. 153; 2 Wharton, Contr. § 594; *Whipple v. Whitman*, 13 R. I. 514, 43 Am. Rep. 42; *Bonney v. Morrill*, 57 Me. 368; *Robinson v. Murphy*, in note to 41 Am. Rep. 847. See note of Prof. Green, Story, Agency, 8th ed. § 24; Wharton, Agency, §§ 587-592; *Christie v. Sawyer*, 44 N. H. 298; *Wieland v. White*, 109 Mass. 394; *Swinfen v. Swinfen*, 18 C. B. 485; *Strauss v. Francis*, L. R. 1 Q. B. 379; *Thomas v. Harris*, 27 L. J. Exch. N. S. 353; *Re Wood*, 21 Week. Rep. 104; *Brady v. Curran*, Ir. Rep. 2 C. L. 314; *Berry v. Mullen*, Ir. Rep. 5 Eq. 368.

The defendant is not responsible for what the plaintiff's counsel did with the money after it was paid.

If either party must suffer, the plaintiff, who has led the defendant into what he now calls a mistake, should be bound by the acts of his agent or restore the money before asking for any further hearing.

The offer of the defendant to show that the injuries to the plaintiff, if any, were occasioned wholly by her fault without any fault of the defendant, and that Cormier knew such to be the facts, should have been granted or the judgment allowed to stand.

Mr. William L. Foster, also for defendant:

The next friend of an infant plaintiff is, in theory of law, appointed by the court. This is not usually true in fact, where the party volunteering and assuming to act as next friend in the prosecution or defense of a suit stands in the relation of a parent or guardian, or other person in *loco parentis*.

But if a stranger appointed by the court as the next friend of an infant is bound to protect the infant's interests by the prosecution, defense, or compromise of the infant's suit, much more, it is manifest, will the parent, as the natural guardian, and in fact the best friend, of the infant, be presumed to exercise a wise discretion in that respect.

Prime v. Foote, 63 N. H. 52; *Drew's Appeal*, 57 N. H. 181.

Considerations like these have probably influenced courts in holding, as they do, that the natural guardian of an infant is the fittest person to sustain the relation of a *prochein ami* in court.

Bartlett v. Batts, 14 Ga. 539; *Watson v. Fraser*, 8 Mees. & W. 660; *Miles v. Boyden*, 3 Pick. 213; *Archer v. Frowde*, 1 Strange, 304.

The *prochein ami*, commencing his authority with the writ and declaration, can only maintain the suit for such causes of action as may be prosecuted without special demand; as for personal injuries done to the infant, or for sums of money where the writ itself is considered as the demand.

In this case, the next friend, being the father and natural guardian of the plaintiff, did not "consent to be named as next friend, in the sense of granting a request that he act in that capacity; but by voluntarily and of his own motion assuming that position, did "become personally bound for the infant's acquiescence" in the compromise made by the attorney.

Carpenter, J., delivered the opinion of the court:

The rights of the defendants are not affected by the plaintiff's undisclosed discharge of C. So long as she permitted him to remain her attorney of record, she was bound, as against parties ignorant, without fault on their part, of his discharge, by any act that, by virtue of his retainer, he was authorized to do. *Lewis v. Sumner*, 13 Met. 269. It is the constant practice of the court to enter defaults and judgments, assessments of damages, judgments for the defendant, judgment satisfied, and to make various other orders finally disposing of actions, upon the agreement of the counsel for the parties expressed orally in open court. These orders have the same effect as if made upon the personal consent of the parties. In the absence of fraud or mistake, they are conclusive. The authority of attorneys to make such agreements is, in practice, never questioned. It is essential to the orderly and convenient despatch of business, and necessary for the protection of the rights of the parties. Exigencies are frequent where the want of power on the part of the attorney to dispose of the action finally by agreement made in and under the sanction of the court would be disastrous to his client. The interests of the public and of the parties to actions alike require that executed agreements of the character in question be not disturbed, except, as in other cases, for fraud or mistake. It is not now necessary to consider the question of the extent of an attorney's authority to bind his client by agreement *in pais*, in collateral matters, or in what cases his executory agreements will be enforced. *Daniels v. New London*, 58 Conn. 156, 7 L. R. A. 563; *Alton v. Gilmanston*, 2 N. H. 520; *Fernald v. Ladd*, 4 N. H. 370; *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468; *White v. Hildreth*, 13 N. H. 104; *Eanson v. Hoitt*, 14 N. H. 56; *Bryant's Case*, 24 N. H. 149; *Buntion v. Lyford*, 37 N. H. 44 L. R. A.

512, 75 Am. Dec. 144; *Smyth v. Balch*, 40 N. H. 363; *Lisbon v. Holton*, 51 N. H. 209; *Brooks v. New Durham*, 55 N. H. 559; *Everett v. Warner Bank*, 58 N. H. 340. For the disposition of the present motion, it is enough to say that, in the absence of any limitation of his authority known, or that by reasonable inquiry might be known, by the opposite party, an attorney may by oral or written agreement, entered on the record, made an order of court, and executed by the adversary in good faith, bind his client to a final disposition of the action. That the agreement and order of court thereon effect a compromise of the client's cause of action is an immaterial circumstance. *Swinfen v. Swinfen*, 18 C. B. 485, 1 C. B. N. S. 364, 2 De G. & J. 381; *Swinfen v. Chelmsford*, 5 Hurlst. & N. 890; *Fray v. Voules*, 1 El. & El. 539; *Prestwich v. Poley*, 18 C. B. N. S. 806; *Strauss v. Francis*, L. R. 1 Q. B. 379; *Mathews v. Munster*, L. R. 20 Q. B. Div. 141; *Holker v. Parker*, 7 Cranch, 436, 3 L. ed. 396. Motion denied.

Smith, J., did not sit. The others concur.

A petition for rehearing having been filed, **Blodgett, J.**, handed down the following response:

In arriving at the conclusion that the motion must be denied, the authorities have not been overlooked which hold that an infant cannot employ an attorney or an agent, or make a valid agreement to compromise his suit (*Biddell v. Dowse*, 6 Barn. & C. 255; *Armitage v. Widoe*, 36 Mich. 124; *Lawson, Rights, Rem. & Pr.* § 824; *Tapley v. McGee*, 6 Ind. 56; *Wainwright v. Wilkinson*, 62 Ind. 146), or those which hold that the "next friend" of an infant is not his agent or attorney, but an officer of the court, who derives his authority, not from the infant, but from the court (*Guild v. Cranston*, 8 Cush. 506; *Tripp v. Gifford*, 155 Mass. 108; *Morgan v. Thorne*, 7 Mees. & W. 400). However this may be, it must be conceded that rights and remedies are as much the inherent birth-right of an infant as of an adult, and, if this be so, it necessarily follows from his disability to enforce such rights and remedies that the infant must have the right to enforce them through the assistance of another. By what name such other person may be called is immaterial. He may be styled, or may be in fact, the guardian, the parent, or the next friend; but, in the very nature of things, he is, and must be held to be, the representative of the infant, and to have the power to bind him by his proper and lawful acts. Among such acts is that of bringing suit for any cause of action which has accrued in the infant's favor; and for this purpose the representative may, in the exercise of an undoubted authority, employ an attorney at law in the management and control of the suit (*Davis v. Merrill*, 47 N. H. 208, 210, 211), which, "although attended by a next friend, is the suit of the infant" (*Bartlett v. Batts*, 14 Ga. 539). In such a case, the attorney becomes clothed with the ordinary powers pertaining to an attorney of record. *Baltimore & O. R.R. Co.*

v. Fitzpatrick, 36 Md. 619, 628. His authority is as extensive as it is in other cases, and the infant, through his representative, is bound by the attorney's acts within the ordinary scope of his authority the same as an adult would be, and has a like remedy against the attorney for any abuse of such authority, express or implied. The bringing of a suit in the infant's behalf being rightful, it follows, as a legal consequence, that, if judgment is properly rendered against him, he will be concluded by it (*Guild v. Cranston*, 8 Cush. 506, 509; *Tripp v. Gifford*, 155 Mass. 108), for there is no distinction between an infant and an adult with regard to the binding effect of a judgment (*Smith v. McDonald*, 42 Cal. 484; *Ralston v. Lahee*, 8 Iowa, 23, 74 Am. Dec. 298, note; *Waring v. Reynolds*, 3 B. Mon. 59; *Wills v. Spraggins*, 3 Gratt. 567; *Porter v. Robinson*, 3 A. K. Marsh. 254, 13 Am. Dec. 159, note; *Albee v. Winterink*, 55 Iowa, 184; *Freeman*, Judgm. 4th ed. §§ 151, 513). "He will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it, such as fraud, collusion, or error" (*Freeman*, Judgm. § 513); and no recognizable distinction is believed to exist between the case of an entry of judgment in regular course by an attorney of a party *sui juris* and the case of a like entry by an attorney properly employed by the representative of an infant to conduct the suit. The authority of attorneys of record to make entries is always presumed, if nothing appears to the contrary, and when made they are conclusive, as between the parties,

in the absence of fraud or mistake; and we apprehend it makes no difference, practical or legal, whether the agreement of the counsel to make them is expressed orally in open court, and the entries are thereupon made upon the records by its order, or whether the agreement is reduced to writing by the counsel, and duly filed and entered upon the records, without being expressly brought to the court's attention, and without obtaining its sanction, which in practice is never refused, and, at most, is but the merest formality. In such a case, the assent of the court is to be presumed. In our opinion, the law in cases like the present one is correctly stated in *Tripp v. Gifford*, 155 Mass. 108, which recognizes the fact of an extensive practice with regard to the adjustment and settlement of such cases, and in which it is said (155 Mass. page 109): "Sometimes, but very rarely, the proposed arrangement is brought to the attention of the court, and its sanction obtained. In most instances, however, the settlement is made and the judgment entered without calling the attention of the presiding justice to it, or obtaining his approval. That such judgments conclude the minor, we have no doubt; . . . and even in equity, if a decree is rendered against him by consent without special inquiry, he will be bound by the decree."

Motion for rehearing denied.

Smith, J., did not sit. **Dee, Ch. J.**, dissents. The others concur.

NEW YORK COURT OF APPEALS.

Adelaide E. T. BUCHANAN, Appt.,

v.

George H. TILDEN, Resp't.

(158 N.Y. 109.)

A woman may sue on a contract of a third person with her husband to pay her certain moneys in the event of success in contesting a will, where the husband procured an advancement of funds for the contest, and there were strong moral and family reasons why she should be regarded as one of the heirs, although she was not legally such.

(*Parker, Ch. J.*, and *O'Brien and Gray, JJ.*, dissent.)

(January 24. 1899.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment of the Trial Term for New York County in her favor in an action brought to enforce defendant's contract to pay plaintiff a certain amount in consideration of services

rendered by her husband in procuring a declaration of invalidity of a clause in a will. *Reversed.*

The facts are stated in the opinion.

Messrs. William B. McNiece and Louis S. Phillips, for appellant:

An action lies on the part of the plaintiff to enforce the specific promise made by defendant to Robert D. Buchanan, the husband of plaintiff, in consideration of the services rendered by Robert D. Buchanan to the defendant, to pay to plaintiff or her order the sum of \$50,000, upon a contingency which has happened.

The services rendered by Robert D. Buchanan to the defendant, which were concededly valuable, formed a sufficient consideration for defendant's promise.

Jefferson v. Asch, 25 L. R. A. 257, note, 53 Minn. 446; *St. Mark's Church v. Teed*, 120 N. Y. 583.

There can be no question about the legality of such a consideration.

Sedgwick v. Stanton, 14 N. Y. 296; *Bundy v. Newton*, 29 Abb. N. C. 66; *Fowler v. Callan*, 102 N. Y. 395.

The promise having been made to the husband of the plaintiff, who owed to her the obligation of support and maintenance (an obligation both legal and moral), she, as the designated beneficiary, is entitled to enforce

NOTE.—The right of a third person to sue upon a contract made for his benefit is the subject of a note to *Jefferson v. Asch* (Minn.) 25 L. R. A. 257. See also *Baxter v. Camp* (Conn.) 42 L. R. A. 514.
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the contract expressly made for her benefit and on her behalf.

Shepard v. Shepard, 7 Johns. Ch. 57, 11 Am. Dec. 396; *Coleman v. Whitney*, 62 Vt. 123, 9 L. R. A. 517; *Bourne v. Mason*, 1 Vent. 6; *Dutton v. Pool*, 1 Vent. 318, Affirmed in 2 Lev. 210; *Lawrence v. Fox*, 20 N. Y. 268; *Todd v. Weber*, 95 N. Y. 193, 47 Am. Rep. 20; *Knowles v. Erwin*, 43 Hun, 150, Affirmed in 124 N. Y. 633; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Coster v. Al-lany*, 43 N. Y. 399; *Barlow v. Myers*, 64 N. Y. 41, 21 Am. Rep. 582; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Gifford v. Corrigan*, 117 N. Y. 257, 6 L. R. A. 610; *King v. Whitely*, 10 Paige, 465; *Smith v. Perine*, 121 N. Y. 376; *St. Mark's Church v. Teed*, 120 N. Y. 583; *Durnherr v. Rau*, 135 N. Y. 219; *Babcock v. Chase*, 92 Hun, 264; *Whitcomb v. Whitcomb*, 92 Hun, 443; *Townsend v. Rackham*, 143 N. Y. 516; *Clark v. Howard*, 150 N. Y. 232; *Coleman v. Hiler*, 85 Hun, 547; *Jefferson v. Asch*, 25 L. R. A. 257, note, 53 Minn. 446; *Lawson, Contr.* § 113, subd. c; 15 Am. L. Rev. 231; 7 Am. & Eng. Enc. Law, 2d ed. pp. 104-110; *Mellen v. Whipple*, 1 Gray, 323:

A person has a right to sue on a contract made in his favor.

15 Am. L. Rev. 231.

The plaintiff is the real party in interest and the person intended to be benefited by the very words of the contract, and so is entitled to enforce it.

Code Civ. Proc. § 449; 1 Lawson, Contr. § 113d; Pom. Rem. & Rem. Rights, § 139; *Rice v. Savery*, 22 Iowa, 470; *Beveridge v. New York Elev. R. Co.* 112 N. Y. 1, 2 L. R. A. 648; *Ellis v. Harrison*, 104 Mo. 270.

In view of the legal identity of husband and wife, which the married women's acts have not wholly abolished, the plaintiff may be regarded, not only as privy to the consideration of the contract, but as virtually a party thereto.

Wetmore v. Wetmore, 149 N. Y. 520, 33 L. R. A. 708.

Cases of life insurance may be instanced as within this class. The right of a wife to sue in such a case had never been doubted.

Pom. Rem. & Rem. Rights, § 139; *Cone v. Niagara F. Ins. Co.* 60 N. Y. 619; *Olmsted v. Keyes*, 85 N. Y. 593; *Walsh v. Mutual L. Ins. Co.* 133 N. Y. 418; *Cyrenius v. Mutual L. Ins. Co.* 145 N. Y. 576.

The New York rule has been adopted in at least thirty states, and also by the United States Supreme Court.

See *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855; *Constable v. National S. S. Co.* 154 U. S. 73, 38 L. ed. 914; 1 Beach, Modern Law of Contracts, §§ 195-200; Pom. Rem. & Rem. Rights, 3d ed. § 139; Lawson, Contr. § 113.

The obligation of the husband to provide for the wife, whether in his lifetime or after death, is such an obligation or duty as will sustain the promise to the husband for the benefit of the wife.

Shepard v. Shepard, 7 Johns. Ch. 57, 11 Am. Dec. 396; *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631; *Romaine v. Chauncey*, 129 N. Y. 566, 14 L. R. A. 712; *Wetmore v. Wet-* 44 L. R. A.

more, 149 N. Y. 520, 33 L. R. A. 708; *People, Public Charities & Correction Comrs., v. Cullen*, 153 N. Y. 629; *Spencer v. Myers*, 150 N. Y. 269, 34 L. R. A. 175.

No distinction whatever exists.

Thorp v. Keokuk Coal Co. 48 N. Y. 253; *Todd v. Weber*, 95 N. Y. 193, 47 Am. Rep. 20; *St. Mark's Church v. Teed*, 120 N. Y. 583; *Whitcomb v. Whitcomb*, 92 Hun, 443.

If the wife finally recovers in this action her husband will be debarred from recovery upon the same contract or for the services which furnished the consideration therefor.

Stamp v. Franklin, 144 N. Y. 607; *Cone v. Niagara F. Ins. Co.* 60 N. Y. 619.

Mr. De los McCurdy, for respondent:

Dutton v. Pool, 1 Vent. 318, is a very peculiar case, and if it established the general proposition that a stranger to the promise and to the consideration could maintain an action on the contract, it would be impossible to reconcile it with adjudged cases of its own period.

1 Vin. Abr. *Actions of Assumpsit*, Z, pp. 333-337; 1 Comyn's Dig. note to 1st Am. from 5th Eng. ed. pp. 309, 312.

Carefully considered, the case amounts to no more than this: That the defendant having, for his own benefit and advantage, prevented the father from applying his timber to the payment of his daughter's portion, and so deprived her of that portion by his promise, that if the father would forego his purpose he himself would pay her £1,000; and the daughter having lost, in consequence of the defendant's promise, the money which but for this promise her father would have given her, and the defendant having got the timber,—the fund out of which the portion was to be paid,—this loss to her, effected by the defendant, constituted a sufficient consideration moving from her to entitle her to demand and enforce the fulfilment of the defendant's promise.

Comyn, Contr. pt. 1, chaps. 2, 10, p. 21; *Bourne v. Mason*, 1 Vent. 6; *Crow v. Rogers*, 1 Strange, 592; *Pigott v. Thompson*, 3 Bos. & P. 147; Bull. N. P. 134.

In *Barford v. Stuckey*, 2 Brod. & B. 333, Park, J., remarks that he finds it difficult to understand the reasoning of *Dutton v. Pool*, or to see how the parties in that case stood.

Although there is some apparent conflict in the other cases, they will be found on examination to result in the principle that, upon a parol contract, none but the party to it,—the promisee,—or the person from whom the consideration moves, can maintain assumpsit, much less debt, in his own name. A stranger both to the promise and the consideration can maintain no action on a contract.

Bourne v. Mason, 1 Vent. 6; *Crow v. Rogers*, 1 Strange, 592; *Ward v. Evans*, 2 Ld. Raym. 928; *Israel v. Douglass*, 1 H. Bl. 239; *Weston v. Barker*, 12 Johns. (V. C.) Eng. 276; *Price v. Easton*, 4 Barn. & Ad. 433.

Griffith v. Ingledew, 6 Serg. & R. 442, 9 Am. Dec. 444, says *Dutton v. Pool* cannot, in all reason, be considered as having settled the law.

Taylor v. Foster, Cro. Eliz. pt. 2, p. 807;

Crow v. Rogers, 1 Strange, 592; *Pine v. Morris*, cited in T. Jones, 103, and *Pigott v. Thompson*, 3 Bos. & P. 147,—are in flat contradiction to it, while it is supported only by *Bourne v. Mason*, 1 Vent. 6, and *Bell v. Chaplain*, 1 Hardr. 321. So far from being conclusive, it does not even furnish a general rule.

It is now firmly settled in England that a mere stranger to the consideration cannot enforce performance of the contract by an action in his own name, although he is the party avowedly intended to be benefited thereby.

Ticeddle v. Atkinson, 1 Best & S. 393; *Jones v. Robinson*, 1 Exch. 454.

In this country the uniform rule is that the plaintiff in action on a simple contract must be the person from whom the consideration of the contract actually moved, and a stranger to the consideration cannot sue on the contract.

Mellen v. Whipple, 1 Gray, 321; *Millara v. Baldwin*, 3 Gray, 484; *Field v. Crawford*, 6 Gray, 116; *Morrison v. Decey*, 6 Watts, 349; *Blymire v. Boistie*, 6 Watts, 182, 31 Am. Dec. 458; *Butterfield v. Hartshorn*, 7 N. H. 345, 26 Am. Dec. 741; *Warren v. Batchelder*, 15 N. H. 129; *Dow v. Clark*, 7 Gray, 200; *Treat v. Stanton*, 14 Conn. 445; *Hubbert v. Borden*, 6 Whart. 79; *Colburn v. Phillips*, 13 Gray, 64; *Brewer v. Dyer*, 7 Cush. 337; *Frost v. Gage*, 1 Allen, 262; *Putnam v. Field*, 103 Mass. 556; *Carnegie v. Morrison*, 2 Met. 381; *Carr v. National Security Bank*, 107 Mass. 47, 9 Am. Rep. 6; *Exchange Bank v. Rice*, 107 Mass. 41, 9 Am. Rep. 1; *Stimpson v. Monmouth Mut. F. Ins. Co.* 47 Me. 385.

If the judgment in the case of *Dutton v. Pool* can be considered as establishing the general principle that the relationship of father and child enables the child to maintain an action against a third person to enforce a promise made by that third person to the father, to give money or property to such child for a consideration supplied to the third person by the father, this principle has not been so extended as to give the same effect to any other or different relationship.

Bartlett, J., delivered the opinion of the court:

At the close of plaintiff's case both parties moved for a directed verdict, and neither asked to go to the jury on any question. The trial judge thereupon directed a verdict for the plaintiff. The appellate division, with a divided court, reversed the judgment in plaintiff's favor entered upon the verdict, and ordered a new trial. The plaintiff has appealed from that order, stipulating for judgment absolute in case of affirmance, and presents for our determination a single question of law arising upon undisputed facts. Before stating that question, reference will be made to the material facts:

The plaintiff is the adopted daughter of Moses Y. Tilden, a brother of the late Samuel J. Tilden. The defendant is an heir at law and next of kin of Samuel J. Tilden. On the 20th day of October, 1836, the defendant began an action against the executors of the

estate of Samuel J. Tilden and others praying judgment that the thirty-fifth article of Mr. Tilden's will be adjudged void, and that the property therein mentioned be declared undisposed of by any provision thereof. The defendant, being without means to prosecute this action, applied to Robert D. Buchanan, the husband of the plaintiff, for assistance in raising the funds necessary to carry on the litigation. Buchanan expressed his willingness to aid defendant, if certain arrangements were made, and said that his uncle, Robert G. Dun, might be willing to advance the money required. The defendant expressed himself as willing "to do anything in the world to raise the money,—to make any arrangement that was reasonable,"—and said to Buchanan that, if the contest was successful, Mrs. Buchanan "should come in, share alike, with the rest of them." It was evidently within the contemplation of the parties that, if this action of the defendant was successful, the result would be that, as to a very large part of his estate, Mr. Tilden died intestate, and that, while the plaintiff, as an adopted child of Moses Y. Tilden, and not of Samuel J. Tilden's blood, might take no part thereof, yet there were the strongest moral and family reasons why she should be regarded as an heir at law and next of kin. Buchanan induced Dun to make certain necessary advances, to the extent of \$5,000, and Dun consented to do so solely on the ground that plaintiff was to share the fruits of a successful contest, he being unacquainted with the defendant. This portion of the money was advanced by Dun about the time defendant began his action, and he was then presented to Dun, and repeated to him the promise, in regard to plaintiff sharing alike with the rest of the heirs, that he had made to her husband.

In February, 1887, the defendant asked Buchanan if he could raise more money. Buchanan testified that, in response to this application, "I told him that I thought, before any more money was talked about, that the arrangement that had been talked about had better be whipped into line, . . . and he said they were all perfectly willing to share and share alike in that matter. I said, 'That does not satisfy me; that is not what I want; I want some positive agreement.' After considerable further talk, he said that his brothers and sisters were scattered; that he could not get it into shape just then, but that he had to have some more money, and had to have it right away, and, in order to get the money, and have it right away, he, on his own personal behalf, having nothing to do with his brothers or sisters in any sense, would obligate himself to pay personally \$50,000." Thereupon defendant and Buchanan went to the office of counsel, where the following letter was drawn up, signed by defendant, and delivered by Buchanan to Dun:

New York, February 19th, 1887.
Robert G. Dun, Esq., No. 314 B'way, N. Y.
City—

My Dear Sir: It is understood between Mr. R. D. Buchanan and myself that, in the event of the success of the proceeding now

pending, or any which may be taken, to practically set aside the thirty-fifth section of the will of my late uncle, Samuel J. Tilden, in view of the assistance, looking to that end, which has been and may be rendered by Mr. Buchanan, as well as by yourself, that I will, and hereby do, become responsible for the payment to Mrs. Adelaide E. Buchanan, or her order, of the sum of fifty thousand dollars. It is further understood between us, that, while I am not strictly authorized to speak in behalf of my brothers and sisters in that respect, from what has already transpired between me and them, in the event of such success, they will be disposed to act generously with Mrs. Buchanan in the premises.

Yours, very resp'y,
George H. Tilden.

It will be observed that this letter, while charging defendant in a fixed sum, leaves open the general adjustment between plaintiff and defendant's brothers and sisters. After receiving this written declaration of the defendant, Dun continued his advances, until they aggregated over \$20,000. A long contest followed in the courts. Defendant succeeded in his action, and he and others became entitled to a very large sum of money that the late Samuel J. Tilden supposed he had dedicated to public uses under the thirty-fifth article of his will. Dun testified that the defendant had repaid his advances; that they were collected through his attorney, but he thought an action was brought against him. Defendant paid plaintiff \$8,150, on account of the \$50,000, under the letter of February 19, 1887. As nothing more was paid, and plaintiff received no recognition from the heirs at law and next of kin of Mr. Tilden, she brought this action to recover the balance of the \$50,000 and interest.

One of the learned judges of the appellate division thus states the question of law presented in this case: "Can a wife enforce payment in her own name, where the husband renders valuable services, and stipulates with the person to whom the same are rendered that compensation therefor shall be made, not to him, but to her?" In answering this question in the negative, the main positions of the court below may be briefly stated: While admitting that there is a distinct class of cases where promises have been made to a father, or other near relative, for the benefit of a child, or other dependent relative, in which the person for whose benefit the promise was made has been permitted to maintain an action for the breach of it, and further admitting, for argument's sake, that the duty and obligation of the husband to the wife is, as a consideration, quite equal to the duty and obligation of the father to the child, yet the fact still remains, in the case at bar, that this is not a contract looking towards the discharge of the obligation which the husband owed to support the wife, and must, therefore, be supported, if at all, upon the mere relation of husband and wife. The learned court then states that it has found no authority for holding that a promise made to the husband by a third person

for the benefit of his wife, which was not intended to provide for her support, or to discharge the husband's duty in that regard, could be enforced by the wife. It is also intimated that there is no disposition to extend the principle of some of the cases relating to father and child to any other relationship. As to this latter suggestion, we do not think it will be seriously questioned, on principle, that the relation of husband and wife is fully equal to that of parent and child as a consideration to support a promise.

Before discussing this appeal in the light of the authorities, we have to say that, in our judgment, the learned appellate division have failed to give due weight to certain controlling features of this case. In the first place, the question formulated by the court below does not contain what we regard as one of the most important points disclosed by the evidence, to wit, the large equitable interest the plaintiff had in this scheme to attack the will, under the provisions of the agreement made to raise funds for that purpose. This is not the case, simply, of a husband rendering valuable services to a third party upon the latter's promise to pay the compensation, not to him, but to his wife. While this case embraces that feature, it involves the further element of the wife's joint interest in the scheme to attack the will. It may fairly be inferred, from this record, that the defendant was powerless to conduct the action he had begun unless someone furnished him the funds. This assistance was rendered by Buchanan and Dun, upon the express agreement and understanding that the plaintiff should receive, in case of success, \$50,000 from defendant as part of her share of the estate, and generous treatment from his brothers and sisters. Plaintiff, in equity and good conscience, as an adopted child of Moses Y. Tilden, was entitled to come in and share with the other heirs and next of kin the large fund that had been freed from the provisions of the will. When this equitable right or interest is coupled with the relation of husband and wife, we have presented a situation that affords ample consideration for the contract sued upon,—a situation that distinguishes this case from any of the cases where the party suing upon a promise rests exclusively upon a debt or duty owed him by the promisee.

Another general feature of this case, to which we think the court below has failed to give due prominence, is the extent of the legal and moral obligation resting upon a husband to support and provide for his wife. A brief quotation from one of the opinions below will make this point clear: The court says: "It is quite true that the husband is under an obligation to support his wife, and it may be that any contract which he makes with a third party, having for its object the carrying out of that obligation, would be enforced by the courts." Then, coming to the case at bar, the court continues: "There is no obligation, legal or equitable, here, on the part of the husband towards the wife, to entitle her to the performance of this contract.

This was not a contract for her support, nor was it one to do anything which, under any circumstances, the husband could be compelled to do. It was simply an obligation on the part of the defendant to pay the plaintiff a sum of money, as an independent fortune for her separate estate, in case the husband rendered some service to him. So far as the plaintiff and her husband were concerned, as to this contract there were no legal relations between them. They occupied no different relations from that of any other man and woman," etc. [5 App. Div. 354]. It seems to us that this is an entire misconception of the duties and relations existing between man and wife. It is, in effect, said that it is only the duty of bare maintenance that is a consideration sufficient to support the promise of a third party. We are of opinion that a husband rests under other, and far higher, moral and legal obligations that the law will recognize as a sufficient consideration to support a covenant in favor of the wife. There is no evidence in this case to bear out the statement that this was not a contract for the wife's support; but, assuming that she had food, raiment, and shelter,—the necessities of life,—can it be said that these represent the full measure of the moral and legal obligations imposed upon a husband by the common law? Is it not his bounden duty, if opportunity offers, to provide for his wife against that day when he may be incapacitated by disease or removed by death? If, as in the case at bar, the husband seeks to provide for his wife, beyond the duty of furnishing food and shelter, by securing a fund to which she is equitably entitled, that may perpetuate his protecting care after he has departed this life, shall it be said that this is not an obligation that a court can recognize as a sufficient consideration to support a covenant on her behalf? We are of opinion that this broader view of the duties and obligations of a husband is to be invoked in determining the rights of this plaintiff.

We come then to a consideration of this case in the light of precedent. The court below recognized the strong equities of the plaintiff's case, and expressed regret that the action is not sustainable in her behalf. Our full discussion of the facts and the position of the court below discloses, we think, a very strong case in favor of the plaintiff maintaining this action. While it is true that for more than 200 years the courts of England and this country have been discussing the vexed question of when a party may sue upon a promise made for his benefit to a third party, yet we are of opinion that, under the peculiar facts of this case, the plaintiff can recover by invoking legal principles that are well established by authority. In order to maintain the plaintiff's cause of action, it is not necessary to invoke the principle established by *Lawrence v. Fox*, 20 N. Y. 268, and the cases that have followed it in this state, to the effect that an action lies on a promise made by the defendant upon valid consideration to a third person for the benefit of the plaintiff, although the latter was not privy to it. It will be recalled in that case one

Holly loaned the defendant, Fox, money, stating at the same time that he owed the amount to the plaintiff, Lawrence, for money borrowed, which he had agreed to pay the then next day. The defendant, in consideration of the loan to him, agreed to pay plaintiff the then next day. This court, in holding that the plaintiff, Lawrence, could enforce that promise in an action at law, established a legal principle that the courts of England have never recognized. The plaintiff in the case at bar, if driven to it, might doubtless derive aid and comfort from the doctrine laid down in *Lawrence v. Fox*, by parity of reasoning; but we think her case rests upon very different principles.

The first case to be considered is *Dutton v. Pool*, 1 Vent. 318, and 332, decided in England in the reign of Charles II. The plaintiff declared in assumpsit that his wife's father, being seised of certain lands now descended to the defendant, and being about to cut £1,000 worth of timber to raise a portion for his daughter, the defendant promised to the father, in consideration that he would forbear to fell the timber, that he would pay the daughter £1,000. After verdict for the plaintiff on nonassumpsit, it was moved in arrest of judgment that the father ought to have brought the action, and not the husband and wife. The court said: "It might be another case if the money had been to have been paid to a stranger; but there is such a nearness of relation between the father and child, and 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned." The judgment was affirmed in the exchequer. 2 Lev. 212. T. Raym. 303.

In one of the opinions of the appellate division in the case at bar, it is stated that *Dutton v. Pool* has been repudiated by the English courts in *Tweedle v. Atkinson*, 1 Best & S. 393. A careful examination of this latter case shows that Justice Blackburn, while attacking *Dutton v. Pool*, says: "We cannot overrule a decision of the exchequer chamber." Lord Mansfield said of *Dutton v. Pool*, 100 years later, that it was difficult to conceive how a doubt could have been entertained about the case. *Martyn v. Hind*, 2 Cowp. 443, 1 Dougl. 142. It has also been repeatedly followed in this state.

The learned counsel for the defendant, in an able and comprehensive brief, complains that *Dutton v. Pool* has on several occasions been cited to sustain the broad doctrine that a stranger to the consideration and to the promise may maintain an action on a contract. He points out that such an alleged erroneous citation appears in *Schemerhorn v. Vanderheyden*, 1 Johns. 139, 3 Am. Dec. 304, and that it has led to confusion in subsequent cases. We are not concerned at this time whether this is a just criticism or not, as there can be no doubt that *Dutton v. Pool* rests upon the nearness of the relation between father and child, and to this extent is undoubted authority.

In *Shepard v. Shepard*, 7 Johns. Ch. 57, 11 Am. Dec. 396, *Dutton v. Pool* is approved and followed, and Chancellor Kent also recognizes the principle, contended for in this

case, that the consideration of natural affection, and to make sure the maintenance of a wife in case she survived her husband, is "very meritorious." There were two principal points decided by Chancellor Kent in this case; the first being that, although a deed from a husband directly to his wife is void in law, yet, where the conveyance of the husband is for the purpose of making a suitable provision for the wife "in case she should survive him," equity will lend its aid to enforce its provisions. The second point held that, where a husband conveyed land to his son for a nominal sum, on his covenanting to pay an annuity to his mother during her widowhood, the wife could sue on this covenant so made for her benefit, and that an attempted release of the son from the covenant by the husband, in his lifetime, was fraudulent and void. The learned chancellor said: "But, if the deed of 1808 was cut of the question, I should then have no difficulty in declaring that the defendant was bound to pay her the stipulated annuity, or the gross sum of \$400, in lieu of it, on her releasing," etc. "The relationship between husband and wife was sufficient to entitle the plaintiff to her action upon the covenant to her husband, and which was made for her benefit. The consideration inured from the husband and arose from the obligations of that relation," etc. The chancellor then comments approvingly and at length upon *Dutton v. Pool*, points out the subsequent commendation of it by Lord Mansfield, and concludes by saying: "The same doctrine appears in the more early case of *Starkey v. Will*, Style, 296, and it has had the sanction, also, of Mr. Justice Buller in *Marchington v. Vernon*, 1 Bos. & P. 101, *in notis*. But it is quite unnecessary to dwell longer on this second point." While the chancellor allowed relief to the plaintiff by enforcing her deed in equity, yet he distinctly held that she had the additional remedy of an action on the covenant between her husband and the son if there were no deed, by reason of the relations and obligations of husband and wife, resting his decision squarely on the case of *Dutton v. Pool*.

With this case approved by Lord Mansfield, Justice Buller, and Chancellor Kent, and followed in this state, it is not of controlling importance that the doctrine of this and other early cases is said to be questioned in England at the present day. In a jurisdiction where the doctrine of *Lawrence v. Fox* is the settled law, there is no difficulty in sustaining, both in law and equity, the kindred principle announced in *Dutton v. Pool*.

It is quite impossible to follow the learned counsel on both sides of this case in the exceedingly interesting and exhaustive discussion of the questions involved, as the limits of an ordinary opinion forbid it. We shall content ourselves with the citation of but one more case. In *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20, this court held that the relation of parent and child, even between a father and his illegitimate daughter, was a sufficient consideration for a contract made by him with the relatives of his unfortunate

child to pay for her support and maintenance, and that she could enforce it by action. The learned judge writing for the court in that case, in an opinion that does honor to his heart as well as his intellect, quotes with approval *Dutton v. Pool*. We see no valid distinction, in principle, between the relation of parent and child and husband and wife, as affording an ample consideration for covenants inuring to the benefit of the child or wife. The relation of husband and wife has been twice recognized in this state, in cases just cited, as a sufficient consideration for supporting a covenant in the wife's favor, and amply sustains the plaintiff's cause of action in the case at bar. This court has recently held that, while the common-law rule that husband and wife are one has been to some extent abrogated by special legislation, yet there are situations where that unity still exists. *Wetmore v. Wetmore*, 149 N. Y. 520, 529, 33 L. R. A. 708; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361. The case before us illustrates a situation where that unity survives for the purpose of aiding the wife to enforce a covenant for her benefit made by her husband, and which equity and good conscience approve.

The appellate division refer to *Dumherr v. Rau*, 135 N. Y. 219, as a case, which, "while not directly in point, is in its controlling principles, adverse to the plaintiff's right to maintain this action." We think that case has no application to the one before us. The husband of plaintiff conveyed to the defendant certain premises, the latter covenanting to pay all encumbrances on the premises "by mortgage or otherwise." The deed declared that the wife (the plaintiff) reserved her right of dower. By the foreclosure of mortgages on the premises, existing at the time of the conveyance and in which the wife joined, her dower interest was extinguished. The wife sued on the defendant's covenant in the deed to pay all encumbrances, and sought to recover the value of her dower interest cut off by the foreclosure. This court held that the covenant was with the husband alone, as the wife was not bound to pay the mortgages, and that the joinder of the wife in the mortgages was a voluntary surrender of her right of dower for the benefit of the husband, and bound her interest to the extent necessary to protect the securities. It is perfectly clear, under this state of facts, that the husband rested under no duty to protect the wife's dower interest. There was no legal or equitable obligation which the wife could lay hold of to enable her to sue on the covenant. The court points out that it is not sufficient that the performance of a covenant may benefit a third person, but it must have been entered into for his benefit.

The case at bar is decided upon its peculiar facts. We do not hold that the mere relation of husband and wife alone constituted a sufficient consideration to enable the plaintiff to maintain this action. We deem it unnecessary to decide that question at this time. What we do hold is that the equities of the plaintiff were such that, when considered in connection with the duty of her husband to provide for her future, and, with

that purpose in view, the money was procured for the defendant to institute and pursue the necessary litigation to secure the fund to which her equities related, they, all taken together, were sufficient to sustain the plaintiff's action.

The order of the Appellate Division granting a new trial, and the judgment entered thereon, should be reversed, and the original judgment in favor of the plaintiff and against the defendant affirmed, with costs in all the courts.

Haight, Martin, and Vann, JJ., concur:

Gray, J., dissenting:

I think that the order appealed from should be affirmed, and that any other doctrine than that laid down by the appellate division would be without support in principle or in the cases. The defendant needed money in order to prosecute an action to set aside certain provisions of the will of Samuel J. Tilden, deceased. He applied to the plaintiff's husband for that purpose, and the latter procured Dun to advance the money. The agreement between the defendant and the plaintiff's husband was that, in the event of the success of the action, in view of the assistance, rendered by the latter as well as by Dun, the defendant would become responsible for the payment to the plaintiff of the sum of \$50,000. The action was successful, and the defendant repaid the money loaned. In addition, he gave to the plaintiff a sum of \$8,500; but she has brought this action to compel the payment by the defendant of the whole sum mentioned in the agreement.

The question is whether the plaintiff had a cause of action upon the contract. It seems to me that this case is not brought within that class of cases wherein a third person is entitled to enforce a promise which has been made by one person to another, because of the absence of the essential element that some liability or duty must exist from the promisee to such third person in connection therewith. As it was held in *Durnherr v. Rau*, 135 N. Y. 219, the rule is that, to permit a third party to enforce such a promise, the promisee must have a legal interest that the covenant be performed in favor of the party claiming performance. How was that the case here? Could it be because of the general obligation on the part of the plaintiff's husband to support and maintain her? That, of course, is a well-recognized obligation in the law. But did the contract in question have that for its object? I cannot so regard it. It related solely to the payment of a large sum of money contingently upon the

success of a certain litigation, of which the defendant was the promoter, and promised a reward or compensation to the party with whom made for his aid in furnishing the needed moneys. It is perfectly clear that this contract was not based upon marital obligations, but that it was simply a mode, suggested by the husband and adopted by both parties, for the payment by the defendant of the consideration for his (the plaintiff's husband's) services in the matter. It does not appear that the plaintiff's cause of action has any other basis than the mere fact of the marital relation. While that relation imposes strong legal and moral obligations upon the husband, it is difficult to see that they involve a liability on his part to provide a separate estate for his wife; and yet, if there is not that liability, what liability was there towards the plaintiff, which furnished the element required to exist in order that the third person, the plaintiff here, might claim the right to enforce the promise? It is not necessary that the wife should be privy to the consideration of the promise; but it is necessary that the promisee, her husband, should owe some debt or duty to her, in connection with the promise, to enable her to sue upon it.

I think that the insuperable legal objection to the plaintiff's cause of action is that the contract in question was not one which looked towards the discharge of any obligation owing by him to her, and, therefore, is not enforceable, upon the doctrine which underlies the cases where, as in the relation of parent and child, the promisee owed a duty which the contract was supposed to meet. I am prepared to admit, as it is argued, that we should recognize the obligation of the husband to support the wife to be as meritorious as the obligation of the parent to support the child, and, if this contract could be regarded in that light, I might be prepared to extend to the present case the principle of the cases referred to. But, as previously suggested, the relationship between the parties here does not help us out in endeavoring to find support for the plaintiff's cause of action, for the reason that the contract which is sought to be enforced does not bear upon the husband's obligation, and is not connected with it, but simply provides for the payment of a sum of money as a compensation for his services in the event of success. In view of the more elaborate discussion in the opinion below, I think nothing more need be said, and that the order should be affirmed.

Parker, Ch. J., and O'Brien, J., concur with Gray, J., for affirmance.

ILLINOIS SUPREME COURT.

NORTH CHICAGO STREET RAILROAD
COMPANY, *Appt.*,

v.

Lemuel M. ACKLEY.

(171 Ill. 100.)

1. A decree *pro confesso* entered on default of defendant to a bill in chancery concludes him only as to the averments of the bill, and not as to the sufficiency of the bill itself or the averments contained in it to justify the decree.
2. A right of action for personal injuries is not assignable.
3. A contract by which a person in whose name an action is brought and to whom it belongs attempts to transfer his control over it so as to restrict him from compromising or settling the claim is not valid.

(Craig and Magruder, JJ., dissent.)

(December 22, 1897.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a decree of the Superior Court for

Cook County in favor of complainant in a suit brought to recover damages from defendants for paying over to plaintiff's client money in settlement of an action against defendant in alleged violation of plaintiff's rights. *Reversed.*

Statement by Phillips, Ch. J.:

Appellee filed his bill against the appellant, alleging that in 1891 Mrs. Mary Butler was injured while alighting from a cable car of the defendant, by reason of the negligence of the gripman; that she employed the complainant as her attorney, upon a contingent fee, by a contract in writing, whereby he agreed to take exclusive charge of the matter, and prosecute such parties as he might deem liable for such injuries, and begin and prosecute diligently to final settlement such suits or legal proceedings as he might deem necessary; that he was to receive a sum equal to one half the gross amount recovered or received on account of such injuries, and to secure the payment of such fees. Mrs. Butler assigned to the complainant and his assigns one half of such right of action, and

by Rice v. Stone, 1 Allen, 566, although in that case the court referred to the doctrine of survivorship, but did not discuss it. It seems that the weight of authority is against this decision.

I. Summary.

In the absence of statutory provisions as to the survival or assignment of a cause of action for a personal injury, it is generally held to be nonassignable. *Francis v. Burnett*, 84 Ky. 23; *Renfro v. Prior*, 25 Mo. App. 406; *Hodgman v. Western R. Corp.* 7 How. Pr. 492; *Purple v. Hudson River R. Co.* 4 Duer, 74; *People, Stanton, v. Tloga Common Pleas*, 19 Wend. 73; *Lawrence v. Martin*, 22 Cal. 173; *Rand v. Fleishman*, 6 W. N. C. 497; *Stewart v. Houston & T. C. R. Co.* 62 Tex. 246; *Texas Mexican R. Co. v. Showalter*, 3 Tex. App. Civ. Cas. (Willson) 69; *Gulf, C. & S. F. R. Co. v. Wooten*, 10 Tex. Civ. App. 54; *Dillard v. Collins*, 25 Gratt. 343; *Kusterer v. Beaver Dam*, 56 Wis. 471, 43 Am. Rep. 725; *Milwaukee Mut. F. Ins. Co. v. Sentinel Co.* 81 Wis. 207, 15 L. R. A. 627; *Dowling v. Browne*, 4 Ir. C. L. Rep. 265; *Howard v. Crowther*, 8 Mees. & W. 601, 5 Jur. 91; *Benson v. Flower*, W. Jones, 215, Cro. Car. 166; *Ollwell v. Verdenhalven*, 17 N. Y. Civ. Proc. Rep. 362, 26 N. Y. S. R. 116; *Alexander v. Grand Ave. R. Co.* 54 Mo. App. 66; *Quincey v. Francis*, 5 Abb. N. C. 286; *Cahill v. Cahill*, 9 N. Y. Civ. Proc. Rep. 241; *Pulver v. Harris*, 52 N. Y. 73, Aff'g 62 Barb. 500.

And the same is held even if the assignment is made after verdict. *Gamble v. Central R. & Bkg. Co.* 80 Ga. 595; *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* 87 Ga. 386; *McGlinchy v. Hall*, 58 Me. 152; *Averill v. Longfellow*, 68 Me. 237; *Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833; *Wade v. Orton*, 12 Abb. Fr. N. S. 444.

In *Rice v. Stone*, 1 Allen, 566; *Linton v. Hurley*, 104 Mass. 353; and *Stone v. Boston & M. R. Co.* 7 Gray, 530,—it is held that an assignment of a cause of action for a personal injury if made before judgment was invalid. In that state such causes of action were made to survive by statute prior to these decisions. But this statute was only referred to in the case of

NOTE.—Assignability of cause of action for personal injury.

- I. Summary.
- II. Classification by causes of action.
- III. In cases of insolvency and bankruptcy.
- IV. Test of assignability.
- V. Classification by states.

The general principle of law is that a cause of action for a personal injury is not assignable because it does not survive to the personal representative, but is assignable where it survives by statute. There are some cases which sustain an equitable assignment of such a cause of action to secure attorney's fees, and in some states an assignment after verdict is sustained. But upon this question there is some conflict.

In *NORTH CHICAGO STREET R. CO. v. ACKLEY* it is held by a majority of the court that actions for a personal injury are not assignable, and that a contract assigning to the attorney one half of such right of action to secure the fees is not valid in equity as against a settlement made with notice of the assignment. This decision in effect overrules *Hawk v. Ament*, 28 Ill. App. 390. The court construes Ill. Rev. Stat. chap. 3, § 123, providing that actions to recover damages for an injury to the person shall survive, and chap. 70, providing that when an injury results in death, whenever the injury is such that if the injured party had lived he would have been entitled to maintain an action, the cause of action shall survive and the action shall be brought for the benefit of the widow and next of kin, as merely saving the right of action from abatement without affecting the assignability, and holds that such a right of action is nonassignable on grounds of public policy. In this case the injury did not result in death, and the rule is well established by the former decisions of that court that in such a case on the question of survivorship chapter 3 is applicable and chapter 70 is not. *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; *Holton v. Daly*, 106 Ill. 131.

This case therefore holds that although such a cause of action survives by statute it is nonassignable in equity. This in effect is supported 44 L. R. A.

agreed to assign, in proper legal form, in writing, upon request, one half of any verdict or judgment which might be had or recovered by reason of such accident and injury; that Mrs. Butler further agreed to pay the costs, and not to settle or compromise such claim, or have any dealings with any person in reference thereto other than such attorney; but, if the matter were settled before the suit was placed on the trial call, the fees were to be less than one half in proportion to the work done up to the date of such settlement. This contract was signed and sealed by the parties September 2, 1891. The bill then recites a collateral verbal agreement made at the same time, whereby the complainant agreed to employ associate counsel, and states that this written contract conveyed to the complainant the ownership of one half of Mrs. Butler's right of action; alleges that, relying on such assignment and covenants, the complainant hunted up witnesses, took their written statements

and addresses, began a suit in September, 1891, engaged associate counsel, prepared the pleadings, watched the case when it was reached upon the first call in April, 1894, had it then marked for trial, and watched it eight days on the trial call; that on May 15, 1894, while it was on the trial call, the defendant, by one of its attorneys, called on Mrs. Butler, and assured her that, notwithstanding her previous assignment of such cause of action (of which notice to the defendant is charged), she had full power herself to release and discharge the defendant from all liability by reason of such injuries; that she owed complainant only a small amount for his services; that she might personally collect the whole amount which the company would pay; and that the company's attorneys would defend her from any suit Ackley might bring. That thereupon the company's attorneys paid her \$3,750, and obtained from her a full release, together with a letter to the complainant informing him of

Rice v. Stone, incidentally, as not materially affecting an assignment to a "stranger." The other cases do not discuss the question of survivorship.

The case of *NORTH CHICAGO STREET R. Co. v. ACKLEY* holds that a cause of action for a personal injury, although surviving by statute, is nonassignable.

But where the cause of action survives by statute it is assignable. *Hawk v. Ament*, 28 Ill. App. 390 (overruled in effect by *NORTH CHICAGO STREET R. Co. v. ACKLEY*); *Gray v. McCallister*, 50 Iowa, 497; *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 513, 69 Iowa, 296; *Hawley v. Chicago, B. & Q. R. Co.* 71 Iowa, 717; *Quin v. Moore*, 15 N. Y. 432; *Lehmann v. Farwell*, 95 Wis. 185, 33 L. R. A. 333.

And where by statute it is made to survive after verdict the claim for personal injuries is assignable. *Kent v. Chapel*, 67 Minn. 420 (overruling *Hunt v. Conrad*, 47 Minn. 557, 14 L. R. A. 512); *Mackey v. Mackey*, 43 Barb. 58.

And a claim is assignable where the statute so provides. *Bonner v. Green*, 6 Tex. Civ. App. 96; *Putnam v. Capps*, 6 Tex. Civ. App. 610.

And some cases uphold an equitable assignment of a verdict as against a set-off. *Zogbaum v. Parker*, 55 N. Y. 120. *Aff'd* 66 Barb. 341; *Nash v. Hamilton*, 3 Abb. Pr. 35; *Countryman v. Boyer*, 3 How. Pr. 386.

And some cases uphold an equitable assignment of a verdict as against an attaching creditor. *Hutchinson v. Brown*, 8 App. D. C. 157; *Williams v. Ingersoll*, 89 N. Y. 508.

And some cases uphold an assignment before a verdict as against an attaching creditor. *Schubert v. Herzberg*, 65 Mo. App. 578; *Patten v. Wilson*, 34 Pa. 209.

Since 1879 an assignment of a verdict to secure the attorney is held good in New York under the Code of Civil Procedure, § 66.

Some cases sustain an equitable assignment to the attorneys of a cause of action for personal injuries, as against a settlement. *Weeks v. Wayne Circuit Judges*, 73 Mich. 256.

And in such a case an assignment was sustained to the extent of the attorney's costs. *Rooney v. Second Ave. R. Co.* 18 N. Y. 368.

And an assignment of a cause of action for personal injuries is valid as against the assignor who settles the case. *Stanton v. Thomas*, 24 Wend. 70, 35 Am. Dec. 595.

And a cause of action under the civil damage 44 L. R. A.

act is assignable. *Ludwig v. Glaessel*, 34 Hun, 321. But the converse was held in *McGee v. McCann*, 69 Me. 79.

And an assignment of a claim for personal injuries based on a contract of a common carrier is valid. *Blakeley v. Le Duc*, 22 Minn. 476.

And an assignment by the King is said to be valid. 3 Vin. Abr. pp. 157, 158.

II. Classification by causes of action.

Generally.

A cause of action for personal injuries is nonassignable. *Rice v. Stone*, 1 Allen, 566; *Linton v. Hurley*, 104 Mass. 353; *Hutchinson v. Brown*, 8 App. D. C. 157; *Ollivell v. Verdenhalven*, 17 N. Y. Civ. Proc. Rep. 362.

And the same was said to be the rule in the following cases: *Chicago & A. R. Co. v. Maher*, 91 Ill. 312; *Hoyt v. Thompson*, 5 N. Y. 347; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Byxble v. Wood*, 24 N. Y. 607; *Jones v. Matthews*, 75 Tex. 1; *Galveston, H. & S. A. R. Co. v. Freeman*, 57 Tex. 156; *Hegerich v. Keddie*, 90 N. Y. 258, 52 Am. Rep. 25; *St. Joseph Mfg. Co. v. Miller*, 69 Wis. 389; *Grant v. Ludlow*, 8 Ohio St. 1; *Hancock v. Caffyn*, 8 Bing. 358, 1 Moore & S. 521; *Beckham v. Drake*, 8 Mees. & W. 846.

Injuries from railroads and common carriers.

A cause of action for personal injuries caused by a railroad or common carrier is nonassignable. *Alexander v. Grand Ave. R. Co.* 54 Mo. App. 66; *Rand v. Fleishman*, 6 W. N. C. 497; *Gulf, C. & S. F. R. Co. v. Wooten*, 10 Tex. Civ. App. 54; *Gamble v. Central R. & Bkg. Co.* 80 Ga. 595; *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* 87 Ga. 386; *Stone v. Boston & M. R. Co.* 7 Gray, 539; *Hodgman v. Western R. Corp.* 7 How. Pr. 492; *Purple v. Hudson River R. Co.* 4 Duer, 74; *Coughlin v. New York C. & H. R. R. Co.* 71 N. Y. 448, 27 Am. Rep. 75; *Stewart v. Houston & T. C. R. Co.* 62 Tex. 246; *Texas Mexican R. Co. v. Showalter*, 3 Tex. App. Civ. Cas. (Willson) 69; *NORTH CHICAGO STREET R. Co. v. ACKLEY*.

And the same was said to be the rule in *Lamont v. Washington & G. R. Co.* 2 Mackey, 502.

But some cases hold that such a claim is assignable, where by statute it survives to the personal representatives. *Hawk v. Ament*, 28 Ill. App. 390; *Vimont v. Chicago & N. W. R. Co.*

the settlement, and directing him to sign a stipulation of the settlement; that on the day following, without notice to the complainant, the case was called up out of its order in the court in which it was on the trial call, and a judgment entered for \$3,750, which was satisfied in open court; that the complainant has never received anything for his services; that Mrs. Butler and the railroad company refuse to pay him anything; and that she is insolvent, as he is informed and believes; that, by reason of these facts, Mrs. Butler had no legal right to receive more than one half of the money paid as compensation for such injury; and that the defendant was bound, after notice, to pay one half of whatever amount was agreed upon in settlement of such claim to the complainant, and that such right of the complainant could not be taken from him without his consent; and that there was due to the complainant from the defendant the sum of \$1,875, being one half of the amount for

which such settlement was made, with legal interest from May 15, 1894. The bill then prays that the defendant be decreed to pay to the complainant the amount alleged to be due, and for general relief. On June 5, 1894, the appearance of the defendant was entered; and on June 30 a default was taken against it. On September 11 the court rendered a decree that the bill be taken as confessed, and that all matters and things therein stated were true; that the equities were with the complainant; that the court had jurisdiction of and over all the parties thereto, and the subject-matter therein; and that there was due and owing from the defendant to the complainant the sum of \$1,875, being one half of the sum of \$3,750, which was paid to Mary Butler by the defendant, as alleged in the bill; and, on motion of the complainant, it was ordered and decreed that the complainant have and recover from the defendant the sum of \$1,875, together with costs of suit. A motion was

64 Iowa, 513; Hawley v. Chicago, B. & Q. R. Co. 71 Iowa, 717; Lehmann v. Farwell, 95 Wis. 185, 37 L. R. A. 333; Putnam v. Capps, 6 Tex. Civ. App. 610. But see Stone v. Boston & M. R. Co. 7 Gray, 539.

And where it is assignable by statute. Bonner v. Green, 6 Tex. Civ. App. 96.

And where the suit is on a contract of carriage. Blakeley v. Le Duc, 22 Minn. 478.

But in Rand v. Fleishman, 6 W. N. C. 497, the bankrupt act of Congress was held not to give the right of action to an assignee.

And it is held assignable in equity to the extent of costs. Rooney v. Second Ave. R. Co. 18 N. Y. 368.

Malicious prosecution and false imprisonment.

A cause of action for malicious prosecution or false imprisonment is nonassignable. Francis v. Burnett, 84 Ky. 23; Hunt v. Conrad, 47 Minn. 557, 14 L. R. A. 512 (overruled in Kent v. Chapel, 67 Minn. 420); Lawrence v. Martin, 22 Cal. 173.

And the same was said to be the rule in the following cases: Hudson v. Piets, 11 Paige, 180; Norfolk & W. R. Co. v. Read, 87 Va. 185; Butler v. New York & E. R. Co. 22 Barb. 110; Lamphere v. Hall, 26 How. Pr. 509; Wright v. First Nat. Bank, 18 Nat. Bankr. Reg. 87; Dayton v. Fargo, 45 Mich. 153.

But an assignment of such a claim is held to be valid where it survives by statute. Gray v. McCallister, 50 Iowa, 497.

And so where it survives by statute after verdict. Mackey v. Mackey, 43 Barb. 58.

And an equitable assignment is valid where by statute an attachment is subject to claims. Patten v. Wilson, 34 Pa. 299.

And an equitable assignment to secure an attorney's claim was held valid. Williams v. Ingersoll, 89 N. Y. 508; Zogbaum v. Parker, 55 N. Y. 120, Affirming, 66 Barb. 341. (Assignment after verdict.)

Libel and slander.

A cause of action for libel and slander is not assignable. Renfro v. Pryor, 25 Mo. App. 402; Hillard v. Collins, 25 Gratt. 349; Milwaukee Mut. F. Ins. Co. v. Sentinel Co. 81 Wis. 207, 15 L. R. A. 627 (libel of a corporation); Benson v. Flower, W. Jones, 215, Cro. Car. 166, 176; Quincey v. Francis, 5 Abb. N. C. 286; Wade v. Orton, 12 Abb. Pr. N. S. 444.

And the same was said to be the rule in the 44 L. R. A.

following cases: North v. Turner, 9 Serg. & R. 244; Norfolk & W. R. Co. v. Read, 87 Va. 185; Butler v. New York & E. R. Co. 22 Barb. 110; Lamphere v. Hall, 26 How. Pr. 509; Howard v. Crowther, 8 Mees. & W. 601, 5 Jur. 91; Hudson v. Piets, 11 Paige, 180; Drake v. Beckham, 11 Mees. & W. 315, 12 L. J. Exch. N. S. 486, 7 Jur. 204; Gibson v. Gibson, 43 Wis. 23, 28 Am. Rep. 527; Dahms v. Sears, 13 Or. 47; Wright v. First Nat. Bank, 18 Nat. Bankr. Reg. 87.

But an equitable assignment to secure the attorney's claim was held valid in Nash v. Hamilton, 3 Abb. Pr. 85; Weeks v. Wayne Circuit Judges, 73 Mich. 256.

Assault and battery.

A cause of action for an assault is nonassignable. McGilinchy v. Hall, 58 Me. 152; Averill v. Longfellow, 66 Me. 237; Cahill v. Cahill, 9 N. Y. Civ. Proc. Rep. 241; Pulver v. Harris, 52 N. Y. 73.

And the same was said to be the rule in the following cases: Lamphere v. Hall, 26 How. Pr. 509; Gardner v. Adams, 12 Wend. 297; Brewer v. Dew, 11 Mees. & W. 625, 1 Dowl. & L. 383, 12 L. J. Exch. N. S. 448, 7 Jur. 953; Hudson v. Piets, 11 Paige, 180; Drake v. Beckham, 11 Mees. & W. 315, 12 L. J. Exch. N. S. 486, 7 Jur. 204; Dahms v. Sears, 13 Or. 47; Wright v. First Nat. Bank, 18 Nat. Bankr. Reg. 87; Dayton v. Fargo, 45 Mich. 153; North v. Turner, 9 Serg. & R. 244; Norfolk & W. R. Co. v. Read, 87 Va. 185; Butler v. New York & E. R. Co. 22 Barb. 110.

But such a claim was held to be assignable where it survives by statute. Kent v. Chapel, 67 Minn. 420.

And an equitable assignment was held valid. Schubert v. Herzberg, 65 Mo. App. 578.

And the same was held as against a set-off. Countryman v. Boyer, 3 How. Pr. 386.

Seduction.

A cause of action for seduction does not pass by an assignment. Howard v. Crowther, 8 Mees. & W. 601, 5 Jur. 91; People, Stanton, v. Tioga Common Pleas, 19 Wend. 73.

But is good against assignor. Stanton v. Thomas, 24 Wend. 70, 35 Am. Dec. 595.

And the same was said to be the rule in the following cases: Brewer v. Dew, 11 Mees. & W. 625, 1 Dowl. & L. 383, 12 L. J. Exch. N. S. 448, 7 Jur. 953; Drake v. Beckham, 11 Mees. & W.

made by the defendant to set aside the decree, and for leave to file an answer at its cost, which was supported by affidavit, to the effect that the defendant had a defense to the bill upon the merits to the whole of the complainant's demand, which motion was denied by the court. The defendant (appellant here) appealed to the appellate court of the first district, where the decree of the trial court was affirmed, and it prosecutes this appeal.

Messrs. Egbert Jamieson and John A. Rose, for appellant:

A right of action for personal injuries is not assignable.

Chicago & A. R. Co. v. Maher, 91 Ill. 314; *Norton v. Tuttle*, 60 Ill. 134; *Prosser v. Edmonds*, 1 Younge & C. Exch. 481; *Illinois Land & Loan Co. v. Speyer*, 138 Ill. 145; *Rice v. Stone*, 1 Allen, 568; *Linton v. Hurley*, 104 Mass. 353; *Coughlin v. New York C. & H. R. Co.* 71 N. Y. 446, 27 Am. Rep.

315, 12 L. J. Exch. N. S. 486, 7 Jur. 204; *Butler v. New York & E. R. Co.* 22 Barb. 110.

But a grant by the King of a cause of action for ravishment of ward is valid. 8 Vin. Abr. 157.

Causing death.

A cause of action for death caused by negligence surviving by statute is assignable. *Quin v. Moore*, 15 N. Y. 432.

So, in case of action under civil damage laws for death of an intoxicated person. *Ludwig v. Glaessel*, 84 Hun. 312.

Highway.

A cause of action for injuries from a defective highway is not assignable. *Kusterer v. Beaver Dam*, 56 Wis. 471, 43 Am. Rep. 725.

Civil damage act.

A cause of action under the civil damage act is not assignable. *McGee v. McCann*, 69 Me. 79.

But in *Ludwig v. Glaessel*, 84 Hun. 312, the converse was held.

Breach of promise to marry.

In *Drake v. Beckham*, 11 Mees. & W. 315, 12 L. J. Exch. N. S. 486, 7 Jur. 204; *Lattimore v. Simmons*, 13 Serg. & R. 183; and *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551,—a cause of action for breach of promise is said to be nonassignable.

For the particular facts in the above cases, see subd. V. *Classification by states.*

III. In cases of insolvency and bankruptcy.

A cause of action for a personal injury does not pass to an assignee for the benefit of creditors. *Francis v. Burnett*, 84 Ky. 23; *Dowling v. Browne*, 4 Ir. C. L. Rep. 265; *Stone v. Boston & M. R. Co.* 7 Gray, 539.

See also *Anoka Lumber Co. v. Fidellity & C. Co.* 63 Minn. 286, 30 L. R. A. 689, *infra*, v. among Minnesota cases.

And the same was said to be the rule in the following cases: *Lattimore v. Simmons*, 13 Serg. & R. 183; *North v. Turner*, 9 Serg. & R. 244.

And it does not pass to a receiver. *Milwaukee Mut. F. Ins. Co. v. Sentinel Co.* 81 Wis. 207, 15 L. R. A. 627.

And the same was said to be the rule in *Hudson v. Plets*, 11 Paige, 180, 44 L. R. A.

75; *Oliwell v. Verdenhalven*, 26 N. Y. S. R. 116, 17 N. Y. Civ. Proc. Rep. 362; *Averill v. Longfellow*, 66 Me. 237; *Sloanston v. Morning Star Min. Co.* 13 Fed. Rep. 216; *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* 87 Ga. 388; *Hunt v. Conrad*, 47 Minn. 557, 14 L. R. A. 512; *Greenhood*, Pub. Pol. p. 474; *Lewis v. Lewis*, 15 Ohio, 715; *Boardman v. Thompson*, 25 Iowa, 487; *Ellwood v. Wilson*, 21 Iowa, 523.

The agreement sought to be enforced is maintainous and champertous.

Thompson v. Reynolds, 73 Ill. 13; *Phillips v. South Park Comrs.* 119 Ill. 636; *Norton v. Tuttle*, 60 Ill. 134; *De Hoghton v. Money*, L. R. 2 Ch. 169; *Key v. Vatter*, 1 Ohio, 138; *Goodrich v. Tenney*, 44 Ill. App. 331; *Gillett v. Logan County Supers.* 67 Ill. 261; *Sprye v. Porter*, 7 El. & Bl. 58; *Powell v. Knowler*, 2 Atk. 224.

The agreement in question is not an assignment of any portion of the fund expected to be recovered, but is a mere promise to pay

And it does not pass to an assignee in bankruptcy. *Rand v. Fleishman*. 6 W. N. C. 497; *Dillard v. Collins*, 25 Gratt. 343; *Howard v. Crowther*, 8 Mees. & W. 601, 5 Jur. 91; *Benson v. Flower*, W. Jones, 215, Cro. Car. 166; *Noonan v. Orton*, 84 Wis. 259, 17 Am. Rep. 441.

And the same was said to be the rule in the following cases: *Hancock v. Caffyn*, 8 Bing. 358, 1 Moore & S. 521; *Beckham v. Drake*, 8 Mees. & W. 846; *Brewer v. Dew*, 11 Mees. & W. 625, 1 Dowl. & L. 383, 7 Jur. 953, 12 L. J. Exch. N. S. 448; *Drake v. Beckham*, 11 Mees. & W. 815, 12 L. J. Exch. N. S. 486, 7 Jur. 204; *Wright v. First Nat. Bank*, 18 Nat. Bankr. Reg. 87; *North v. Turner*, 9 Serg. & R. 244.

IV. Test of assignability.

In the following cases the rule is laid down that such causes of action only are assignable as survive to the personal representative: *Dayton v. Fargo*, 45 Mich. 153; *Final v. Backus*, 18 Mich. 218; *Grant v. Ludlow*, 8 Ohio St. 1; *North v. Turner*, 9 Serg. & R. 244; *Galveston, H. & S. A. R. Co. v. Freeman*, 57 Tex. 156; *Norfolk & W. R. Co. v. Read*, 87 Va. 185; *Comegys v. Vasse*, 1 Pet. 193, 7 L. ed. 108; *Hoyt v. Thompson*, 5 N. Y. 847; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Byxble v. Wood*, 24 N. Y. 607; *Hegerich v. Keddie*, 99 N. Y. 258, 62 Am. Rep. 25; *Butler v. New York & E. R. Co.* 22 Barb. 110; *Hutchinson v. Brown*, 8 App. D. C. 157; *Gray v. McCallister*, 50 Iowa, 407; *Hawley v. Chicago, B. & Q. R. Co.* 71 Iowa, 717; *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 513; *Kent v. Chapel*, 67 Minn. 420; *Alexander v. Grand Ave. R. Co.* 54 Mo. App. 66; *Purple v. Hudson River R. Co.* 4 Duer, 74; *Mackey v. Mackey*, 43 Barb. 58; *Quin v. Moore*, 15 N. Y. 432; *Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833; *Stewart v. Houston & T. C. R. Co.* 62 Tex. 246; *Texas Mexican R. Co. v. Showalter*, 3 Tex. App. Civ. Cas. (Willson) 69; *Putnam v. Capps*, 6 Tex. Civ. App. 610; *Milwaukee Mut. F. Ins. Co. v. Sentinel Co.* 81 Wis. 207, 15 L. R. A. 627; *Lehmann v. Farwell*, 95 Wis. 185, 37 L. R. A. 333; *Dinianny v. Fay*, 38 Barb. 18; *Roblason v. Weeks*, 6 How. Pr. 161; *Meech v. Stoner*, 19 N. Y. 29; *Fried v. New York C. R. Co.* 25 How. Pr. 285; *Tyson v. McGuineas*, 25 Wis. 656.

But in *NORTH CHICAGO STREET R. Co. v. ACKLEY* the court refuses to consider the survivability of a cause of action as the sole test of its assignability.

"a sum equal to one half of the gross amount recovered or received"; a promise which gives no lien in equity upon the fund.

Bromwell v. Turner, 37 Ill. App. 563; *Story v. Hull*, 143 Ill. 506; *Trist v. Child*, 21 Wall. 441, 22 L. ed. 623; *Lamont v. Washington & G. R. Co.* 2 Mackey, 507, 47 Am. Rep. 268; *Christmas v. Russell*, 14 Wall. 70, 20 L. ed. 762; *Kustercr v. Beaver Dam*, 56 Wis. 475, 43 Am. Rep. 725; *Rogers v. Hosack*, 18 Wend. 319; *Hoyt v. Story*, 3 Barb. 262; *Christmas v. Griswold*, 8 Ohio St. 558; *Ford v. Garner*, 15 Ind. 298; *Coughlin v. New York C. & H. R. Co.* 71 N. Y. 447, 27 Am. Rep. 75; *Humphrey v. Browning*, 46 Ill. 485, 95 Am. Dec. 446.

Mr. L. M. Ackley, in propria persona:

All causes of action which, by statute or common law, survive, are assignable by act of the law, and therefore, by act of the party, subject, of course, to the requirements of public policy.

North v. Turner, 9 Serg. & R. 244; *Final*

In the cases of *Rice v. Stone*, 1 Allen, 566, *Linton v. Hurley*, 104 Mass. 353, and *Stone v. Boston & M. R. Co.* 7 Gray. 539, which deny the assignability, a statute existed which provided that causes of action for personal injuries shall survive. This statute was only referred to in the case of *Rice v. Stone*, the court saying that "we do not consider this as materially affecting the question whether such rights of action may be assigned to a stranger."

V. Classification by states.

California.

An assignment of a cause of action for malicious prosecution before trial is invalid as against the defendant's right of set-off of execution against plaintiff. *Lawrence v. Martin*, 22 Cal. 173.

District of Columbia.

An assignment of the judgment in a suit for personal injuries is superior to an attachment subsequently levied. *Hutchinson v. Brown*, 8 App. D. C. 157. This was on the ground that the claim for damages ripened into a judgment on the rendition of the verdict, although the judgment was prematurely entered, and this result was reached by giving effect in equity to an assignment of a possibility capable of enforcement as a charge upon a subsequent judgment.

It was held here that the test of assignability is the right of survivorship.

In *Lamont v. Washington & G. R. Co.* 2 Mackey, 502, 47 Am. Rep. 268, it was said that a claim for personal injuries received in being ejected from the cars is incapable of being assigned in whole or in part to the attorney.

Georgia.

Georgia Code, § 2244, providing that all choses in action arising upon contract may be assigned so as to vest the title in the assignee, excludes by implication the assignability of other choses in action for personal injuries. *Central R. & Bkg. Co. v. Brunswick & W. R. Co.* 87 Ga. 386; *Gamble v. Central R. & Bkg. Co.* 80 Ga. 595.

And in the latter case the cause of action is held not assignable even after verdict before entry of judgment.

Illinois.

A cause of action for personal injuries is not assignable. *NORTH CHICAGO STREET R. CO. v. ACKLEY*.

In this case the defendant, having notice of 44 L. R. A.

v. Backus, 18 Mich. 218; *Brady v. Whitney*, 24 Mich. 154; *Grant v. Smith*, 26 Mich. 201; *Jackson v. Daggett*, 24 Hun, 204.

This proposition has been held good as applied to causes of action to recover damages for personal injuries in at least five states where, by statute, such causes of action are made to survive.

Lehmann v. Farwell, 95 Wis. 185, 37 L. R. A. 333; *Purple v. Hudson River R. Co.* 4 Duer, 74; *Finul v. Backus*, 18 Mich. 218; *Stewart v. Houston & T. C. R. Co.* 62 Tex. 246; *Hawk v. Ament*, 23 Ill. App. 390; *Ivomevell v. Turner*, 37 Ill. App. 561; *Zogbaum v. Parker*, 66 Barb. 341, Affirmed in 55 N. Y. 120; *Ludwig v. Glaessel*, 34 Hun, 312; *Patten v. Wilson*, 34 Pa. 299; *Omaha & R. Valley R. Co. v. Brady*, 39 Neb. 27; *Whittaker v. New York & H. R. Co.* 3 N. Y. S. R. 537; *Winslow v. Central Iowa R. Co.* 71 Iowa, 197; *Hawley v. Chicago, B. & Q. R. Co.* 71 Iowa, 717; *Rooney v. Second Ave. R. Co.* 18 N. Y. 368; *Dunne v. Herrick*, 37 Ill.

the attorney's claim under an assignment of "one half of the right of action" to secure a fee equal to one half of the amount to be recovered, was held not liable to the attorney in a suit in equity where he settled with the plaintiff.

But in *Hawk v. Ament*, 23 Ill. App. 390, it was held that an agreement that attorneys should have one half of the judgment to be recovered in an action for personal injuries caused by a railroad company amounts to an equitable assignment, and an assignment of the judgment to another person before the cause is affirmed on appeal is subject to the attorney's claim.

This decision is in effect overruled by *NORTH CHICAGO STREET R. CO. v. ACKLEY*, although not referred to in the prevailing opinion.

In *Chicago & A. R. Co. v. Maher*, 91 Ill. 312, it was said that a cause of action for an injury to the person of another is not assignable, so as to pass the right of action to the assignee.

Iowa.

Iowa Code, § 2525, provides that all causes of action shall survive, and may be brought notwithstanding the death of the person entitled or liable to the same.

Under this statute a cause of action for malicious prosecution is assignable. *Gray v. McCallister*, 50 Iowa, 497.

So, a cause of action for personal injuries received from a railroad is assignable. *Hawley v. Chicago, B. & Q. R. Co.* 71 Iowa, 717; *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 513.

In the latter case the assignment was executed in another state where the common law was in force, but was held assignable because such a claim constituted a part of the assignor's estate and at his death would have descended to his representatives, under Iowa Code, §§ 2525-2527.

Kentucky.

Kentucky Gen. Stat. chap. 10, provides that no right of action for personal injuries to real or personal estate shall cease or die with the person injuring or the person injured, except actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury.

Under this statute the right of a debtor to sue for the malicious prosecution of an attachment does not pass to an assignee for the benefit of creditors, as such cause of action does not survive to the personal representative. *Francis v. Burnett*, 84 Ky. 23.

App. 180; *Weeks v. Wayne Circuit Judges*, 73 Mich. 256; *Guliano v. Whitenack*, 9 Misc. 562; *Rasquin v. Knickerbocker Stage Co.* 21 How. Pr. 293.

It is not against public policy for the client to assign part or all of the subject-matter of the litigation, or of the cause of action, to the attorney to secure payment of his fees for enforcing it, as in the case at bar.

Anderson v. Radcliffe, El. Bl. & El. 806; *Wood v. Downes*, 18 Ves. Jr. 120; *Patten v. Wilson*, 34 Pa. 299; *Hauck v. Ament*, 28 Ill. App. 390; *Phillips v. Edsall*, 127 Ill. 535; *Schubert v. Herzberg*, 65 Mo. App. 578; *Smith v. Young*, 62 Ill. 210; *West Chicago Park Comrs. v. Coleman*, 108 Ill. 591; *Torrence v. Shedd*, 112 Ill. 466; *Dunne v. Herriek*, 37 Ill. App. 180; *Winslow v. Central Iowa R. Co.* 71 Iowa, 197; 11 Am. & Eng. Enc. Law, 2d ed. p. 1020, note 1; *Huber v. Johnson*, 68 Minn. 74; *Anderson v. Friend*, 71 Ill. 477.

The appellant cannot defend against this

claim on the ground that the contract between Mrs. Butler and her attorney was champertous, because a defense of champerty can be made only by the client when sued by the attorney.

Torrence v. Shedd, 112 Ill. 466; *Omaha & R. Valley R. Co. v. Brady*, 39 Neb. 27; *Patten v. Wilson*, 34 Pa. 299; *Pennsylvania Co. v. Lombardo Co.* 49 Ohio, 1, 14 L. R. A. 785; *Purdy v. Nova Scotia Midland R. & Iron Co.* 8 Misc. 510; *Noble v. Thompson Oil Co.* 79 Pa. 354, 21 Am. Rep. 66.

Appellant's payment of the entire judgment to Mrs. Butler after notice of the assignment, in equity, of half of it to appellee, with the fraudulent intent (which is admitted on this record) of depriving the assignee of his fee, clearly establishes its liability.

Winslow v. Central Iowa R. Co. 71 Iowa, 197; *Bower v. Hadden Blue Stone Co.* 30 N. J. Eq. 171; *Bartlett v. Woodbine Sav. Bank*, 57 Ill. App. 429; *Rolfe v. Gregory*, 11 Jur.

Maine.

The application of the doctrine of survivorship does not appear to have been noticed in this state, and no statute is referred to on that question in the decisions.

An assignment of a cause of action for a personal assault cannot be made before final judgment. *McGlinchy v. Hall*, 58 Me. 152; *Averill v. Longfellow*, 66 Me. 237.

In the latter case the plaintiffs made a verbal assignment before suit to secure counsel fees, and after a verdict notice was given to the defendant.

Under Me. Stat. 1872, chap. 63, § 4, providing that an action may be maintained against any person who shall by selling or giving any intoxicating liquor, or otherwise, have caused or contributed to the intoxication of such person, a cause of action for selling liquor to plaintiff's minor son, who was run over by a train while he was intoxicated, is not only a tort but a personal wrong and injury, as much so as that of an assault and battery, and is not assignable. *McGee v. McCann*, 69 Me. 79.

Massachusetts.

In this state by an early statute an action for a personal injury survives; but notwithstanding this such a claim is not assignable before judgment. The only case which appears to refer to this statute is *Rice v. Stone*, 1 Allen, 566, which says: "There cannot be the same objection to the transmission of such a claim to executors and administrators as to its assignment to strangers; and by our recent legislation, actions for damage to the person survive; but we do not consider this as materially affecting the question whether such rights of action may be assigned to a stranger."

A claim for damages for a personal injury is not assignable before judgment. *Linton v. Hurley*, 104 Mass. 353; *Rice v. Stone*, 1 Allen, 566.

In the latter case the court said one reason why such assignments are invalid at common law is to avoid maintenance, and another reason is that they are void unless the assignee has actually or potentially the thing which he attempts to assign, and the character of such claims is not changed by a verdict before judgment. And the court said: "It is said in *Langford v. Ellis*, 14 East, 203, note, that the moment the verdict comes the damages are liquidated. This was an action of slander. But the principal case of *Ex parte Charles*, 14 East, 17, 1 44 L. R. A.

Rose, Bankr. 372, 16 Ves. Jr. 256, in which the other was cited, is regarded as overturning it. *Buss v. Gilbert*, 2 Maule & S. 70. And these cases hold that neither an action for a breach of promise of marriage nor for seduction passes to an assignee in bankruptcy before judgment."

A cause of action for injuries sustained by a passenger against a common carrier does not pass by an assignment made before judgment, under Mass. Stat. 1838, chap. 163, § 5, providing that such an assignment for creditors vests in the assignees all the property of the debtor both real and personal, and all debts due to the debtor or to any person for his use, and all liens and securities therefor, and all his rights of action for any goods or estates, real or personal. *Stone v. Boston & M. R. Co.* 7 Gray, 539.

In this case it was said that an action for damages to the person is not property, nor a right of property, nor a debt until it is reduced to a judgment.

Michigan.

An agreement between attorneys and client that they were to be paid from the proceeds of the judgment which should be obtained in an action for libel operated as an assignment of the judgment to be obtained, and prevented a discharge of the judgment by the plaintiff. *Weeks v. Wayne Circuit Judges*, 73 Mich. 256.

The court does not discuss the question, but says that the equitable right of all parties, including attorneys, must be respected in settling cases.

In *Dayton v. Fargo*, 45 Mich. 153, it was said that Mich. Comp. Laws, § 5828, provides that in addition to the actions which survive by the common law, the following also survive, that is to say actions of replevin and trover, actions for assault and battery or false imprisonment, or for goods taken and carried away, and actions for damages done to real or personal estate. And the court said that only such actions for torts as survive to the personal representative of the injured party can be sued for by an assignee.

In *Final v. Backus*, 18 Mich. 218, it was said that the general rule is that a right of action for a tort is not the subject of assignment; but this rule applies only to those torts which are merely personal, and which on the death of the person wronged die with him; that generally all such rights of action for tort that would survive to the personal representative

N. S. 98; Story, Eq. Jur. § 126, note 1, b; 1 Pom. Eq. Jur. §§ 169, 219; *Phillips v. Edsall*, 127 Ill. 547; *Warren v. First Nat. Bank*, 149 Ill. 9, 25 L. R. A. 746; *Whittaker v. New York & H. R. Co.* 3 N. Y. S. R. 537; *Christie v. Sawyer*, 44 N. H. 298; *Guliano v. Whittenack*, 9 Misc. 562; *Rooney v. Second Ave. R. Co.* 18 N. Y. 368.

Public policy requires the utmost freedom of contract; this is especially true in a republic, where the public safety urgently demands that each individual citizen shall be trained in the school of experience and made competent to manage his own affairs; that being the best guaranty that he will be able to perform his duty as a citizen.

Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853; *Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 462.

It has always been the law of Illinois, and in full accord with its public policy, that an

attorney and client might contract for the prosecution of any claim on such contingent fee as might be agreed upon between them.

Newkirk v. Cone, 18 Ill. 453; *West Chicago Park Comrs. v. Coleman*, 108 Ill. 601; *Phillips v. South Park Comrs.* 119 Ill. 635; *Savage v. Gregg*, 150 Ill. 161; *Dunne v. Herrick*, 37 Ill. App. 180; *Hawk v. Ament*, 28 Ill. App. 390; *Smith v. Young*, 62 Ill. 210; *Phillips v. Edsall*, 127 Ill. 535; *Badger v. Gallaher*, 113 Ill. 662; *Walsh v. Shumway*, 65 Ill. 471; *Hughes v. Zeigler*, 69 Ill. 39; *Torrence v. Shedd*, 112 Ill. 466; *Neal v. Franklin County*, 43 Ill. App. 267.

It is overwhelmingly settled by authority outside of Illinois that contingent fees are legal, necessary, and proper.

Aultman v. Waddle, 40 Kan. 195; *Fowler v. Callan*, 102 N. Y. 397; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 320; *Omaha & R. Valley R. Co. v. Brady*, 39 Neb. 27; *Allard v. Lamirande*, 29 Wis. 502; *Blaisdell v. Ahern*, 144 Mass. 393, 59 Am. Rep. 99; *Taylor v.*

may, it seems, be assigned, so as to pass an interest to the assignee which he can enforce by suit at law.

Minnesota.

After verdict a cause of action for a personal injury is assignable and a cause of action for injuries where the action is on a contract of common carrier is assignable.

Minnesota Stat. 1878, chap. 66, § 41, provides that after the verdict of a jury, decision or finding of a court or report of a referee, in an action for a wrong, such action shall not abate by the death of any party.

Under this statute a cause of action for personal injuries from an assault is assignable after verdict. *Kent v. Chapel*, 67 Minn. 420.

In this case it was said that the decision in *Hunt v. Conrad*, 47 Minn. 557, 14 L. R. A. 512, seems to have been based upon what was considered by the court to be principles of the common law, and its attention evidently was not called to this statute, to which the common law is unannounced in that case is inapplicable.

In *Hunt v. Conrad*, 47 Minn. 557, 14 L. R. A. 512, it was held that a cause of action for false imprisonment is not assignable after verdict before judgment.

A cause of action against a ferry company for negligence resulting in the death of a passenger on the defendant's stagecoach, based on contract, was held to be assignable before judgment, as the right of action accrued when the defendant broke his contract, and was personal property. *Blakeley v. Le Duc*, 22 Minn. 476.

An assignment by a corporation under the insolvent law did not pass to the assignee any right under a casualty insurance policy for injuries suffered by an employee who had not at that time brought suit for his injuries. *Anoka Lumber Co. v. Fidelity & C. Co.* 63 Minn. 286, 30 L. R. A. 689.

In this case judgment was rendered in favor of the employee against the employer for the personal injury, and in an action on the judgment by the employer against the insurance company the employee garnished the insurance company and then intervened in the suit.

Missouri.

There appears to be some conflict of authority in this state on the question of an equitable assignment of a cause of action for a personal injury, the latest case sustaining such an assignment as against an attachment.

Where an assignment of a cause of action 44 L. R. A.

based on an assault and battery, and of the judgment thereon to be obtained, was made to secure the attorneys their fees, it was held that the assignment of the cause of action was of no validity, but it was valid as to the judgment thereafter entered. It was further held that under a contract for compensation that the attorneys should have 40 per cent of the judgment which the plaintiff might obtain, the attorneys were to be treated as equitable assignees of so much of that judgment, and entitled to a preference over a garnishment subsequently attached. *Schubert v. Herzberg*, 65 Mo. App. 578.

But a written contract with attorneys for one half of a judgment to be obtained for injuries received by a passenger on a street railroad was held invalid as an assignment. *Alexander v. Grand Ave. R. Co.* 54 Mo. App. 66.

This was on the ground that there can be no assignment of a part of a chose in action without the consent of the debtor, and because such a cause of action does not survive.

In this case it was held that a contract for a portion of the judgment to be recovered in a personal injury case was not an equitable assignment of a portion of the claim, where the claim was an unliquidated one.

It was also said that Mo. Rev. Stat. 1889, § 4426, allows such actions to survive the death of the "plaintiff"; but that in this case it is not necessary to say whether such a right of survivorship would make the cause of action assignable, as in this state there can be no assignment of a part of a claim without the consent of the debtor.

And where a judgment in an action for slander was assigned and then reversed on appeal, and judgment given for the original plaintiff on a new trial, it was held that the recovery, being for the assignee's benefit, was "a recovery by an assignee of an unassignable cause of action, and it cannot stand." *Renfro v. Prior*, 25 Mo. App. 402.

It was also held that Mo. Rev. Stat. § 3671, providing for the continuance of a cause of action in the name of the original party if the transferee indemnified him against costs and damages, adds nothing to the rights of the assignee, but is merely permissive. The effect of this decision is that a void assignment confers no right on the assignee, and yet deprives the assignor of all his rights of action, a conclusion which appears illogical.

These cases are in effect overruled, though

Bemiss, 110 U. S. 42, 28 L. ed. 64; *Sedgwick v. Stanton*, 14 N. Y. 289; *Dockery v. McLellan*, 93 Wis. 381; *Eberhardt v. Schuster*, 10 Abb. N. C. 374; *Wylie v. Coxe*, 15 How. 415, 14 L. ed. 753; *Frink v. McComb*, 60 Fed. Rep. 486; *Whittaker v. New York & H. R. Co.* 3 N. Y. S. R. 537; *Vimont v. Chicago & N. W. R. Co.* 69 Iowa, 296; *Winslow v. Central Iowa R. Co.* 71 Iowa, 197; *Hawley v. Chicago, B. & Q. R. Co.* 71 Iowa, 717; *Zogbaum v. Parker*, 55 N. Y. 123; *Rooney v. Second Ave. R. Co.* 18 N. Y. 368.

All causes of action which survive are assignable and without the consent of the debtor, obligor, or tortfeasor.

Masters v. Miller, 4 T. R. 320; *Parker v. Kennedy*, 1 Bay, 398; *Carr v. Waugh*, 28 Ill. 418; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Savage v. Gregg*, 150 Ill. 161; *North v. Turner*, 9 Serg. & R. 244; *Slauson v. Schwabacher Bros.* 4 Wash. 783; *Jackson v. Daggett*, 24 Hun, 204; *Quin v. Moore*, 15 N. Y. 432; *Merrill v. Grinnell*, 30 N. Y. 594;

Grant v. Ludlow, 8 Ohio St. 1; *Hall v. Cincinnati R. Co.* 1 Disney (Ohio) 58; *More v. Massini*, 32 Cal. 590; *Lazurd v. Wheeler*, 22 Cal. 142; *East Tennessee, V. & G. R. Co. v. Henderson*, 1 Lea, 1; *Weire v. Davenport*, 11 Iowa, 49, 77 Am. Dec. 132; *Tyson v. McGuineas*, 25 Wis. 656; *Jordan v. Gillen*, 44 N. H. 424; *National Exch. Bank v. McLoon*, 73 Me. 498; *Fried v. New York C. R. Co.* 25 How. Pr. 285; *Purple v. Hudson River R. Co.* 4 Duer, 79; *Hoyt v. Thompson*, 5 N. Y. 320; *Coughlin v. New York C. & H. R. R. Co.* 71 N. Y. 444, 27 Am. Rep. 75; *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 513, 69 Iowa, 296; *Hawley v. Chicago, B. & Q. R. Co.* 71 Iowa, 717; *Rogers v. Windoes*, 48 Mich. 628; *Final v. Backus*, 18 Mich. 218; *Bruckett v. Griswold*, 103 N. Y. 425; *Whitney v. Roberts*, 22 Ill. 381; *Smith v. Wright*, 49 Ill. 403; *Ludwig v. Glaessel*, 34 Hun, 312; *Savage v. Gregg*, 150 Ill. 167; *Cohen v. Smith*, 33 Ill. App. 344.

not referred to, in *Schubert v. Hersberg*, 65 Mo. App. 578.
New York.

The assignment of a cause of action for personal injuries will not authorize an action by the assignee, and such an assignment is defeated by a settlement before verdict, and in some cases by a settlement after verdict. But some cases sustain an equitable assignment of such a cause of action, as securing the attorney's costs, and as defeating an attachment or set-off. Some cases sustain an assignment of the verdict. The assignment is valid if the cause of action survives by statute. It seems that a claim under the civil damage act may be assigned. Since 1879, under the Code of Civil Procedure, § 66, an attorney has a lien for his fee on the cause of action, which lien attaches to the verdict, and it seems may be protected by an assignment.

An assignee of a cause of action for personal injuries caused to a passenger on a railroad train cannot maintain an action in his own name. *Hodgman v. Western R. Corp.* 7 How. Pr. 492; *Purple v. Hudson River R. Co.* 4 Duer, 74.

In the first case this was based upon the ground that such a right of action does not survive upon death. The complaint alleged a contract for reward to carry safely, and that the party was injured, and she assigned to plaintiff the cause of action.

In the latter case the court said that the test of assignability is the right of survivorship, and that the personal injuries were the gravamen of the suit, and that the contract was stated merely by way of inducement as aggravating the negligence.

And a settlement of a case before verdict defeats a prior assignment to the plaintiff's attorney of such a cause of action for a personal injury. *Coughlin v. New York C. & H. R. Co.* 71 N. Y. 443, 27 Am. Rep. 75 (injuries on a railroad); *Quincey v. Francis*, 5 Abb. N. C. 286 (libel); *Cahill v. Cahill*, 9 N. Y. Civ. Proc. Rep. 241 (assault and battery); *Pulver v. Harris*, 52 N. Y. 73, affirming 62 Barb. 500 (assault and battery); *Ollwell v. Verdenhalven*, 17 N. Y. Civ. Proc. Rep. 362, 26 N. Y. S. R. 116 (injuries caused by tenement house).

And some cases hold that a settlement of a case after verdict before judgment defeats a prior assignment. *People, Stanton, v. Tioga Common Pleas*, 19 Wend. 73 (debauching female 44 L. R. A.

servant); *Wade v. Orton*, 12 Abb. Pr. N. S. 444 (slander).

In *Williams v. Ingersoll*, 89 N. Y. 508, it was said that in *People, Stanton, v. Tioga Common Pleas*, 19 Wend. 73, it was decided that a chose in action for a tort merely personal is not assignable, so that a court of law will protect the assignee against a subsequent fraudulent discharge of the damages recovered in a suit prosecuted for such tort, although the tortfeasor accepted the discharge with full knowledge of the assignment; but that the remedy of the assignee is by action against the assignor for breach of his express or implied undertaking not to do anything in the matter to prejudice the assignee, and that the adjudication was that the assignment was invalid in law, although Judge Cowen remarked that "neither law nor equity recognizes such a transfer." The court says that if the learned judge meant that equity would not recognize such a transfer as attaching to the judgment recovered, it was error, for there the court held that the assignor was liable to the assignee for a breach of the assignment. The court further said that it would seem to be reasonably clear that if such an assignment would be so far binding upon the assignor as to make him liable for defeating its operation, it should be binding upon the debtor after he has notice of it and after the recovery of the judgment.

It will be noticed that all the cases above that were settled after verdict occurred before 1879. Since 1879 under the Code of Civil Procedure, § 66, providing that the compensation of an attorney or counselor for his services is governed by an agreement, express or implied, which is not restrained by law, and that from the commencement of an action the attorney has a lien upon his client's cause of action which attaches to a verdict, report, decision, or judgment in his client's favor, and cannot be affected by any settlement between the parties before or after judgment, an attorney has a lien for his services which may be regulated by an agreement and which cannot be defeated after verdict by any settlement between the parties without his consent.

It was held that a settlement should be vacated to secure costs of attorneys having an equitable assignment of a cause of action for personal injuries. *Rooney v. Second Ave. R. Co.* 18 N. Y. 368 (injury from a street car).

And some cases hold that an equitable assign-

An assignment of part or all of a cause of action or the fund to be realized therefrom to the attorney who is employed to enforce it, made by way of security for the payment of his fees as such, is not against public policy, and such assignments are approved and enforced by the courts.

Patten v. Wilson, 34 Pa. 299; *Hawk v. Ament*, 28 Ill. App. 390; *Anderson v. Radcliffe*, El. Bl. & El. 806; *Wood v. Downes*, 18 Ves. Jr. 120; *Phillips v. Edsall*, 127 Ill. 535; *Schubert v. Herzberg*, 65 Mo. App. 578; *Smith v. Young*, 62 Ill. 210; *West Chicago Park Comrs. v. Coleman*, 108 Ill. 591; *Torrence v. Shedd*, 112 Ill. 466; *Phillips v. South Park Comrs.* 119 Ill. 626; *Dunne v. Herrick*, 37 Ill. App. 180; 2 Beach, Modern Law of Contracts, § 1541; *Blaisdell v. Ahern*, 144 Mass. 393, 59 Am. Rep. 99; *Omaha & R. Valley R. Co. v. Brady*, 39 Neb. 27; 2 Am. & Eng. Enc. Law, 2d ed. p. 1020, note 1; *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill.

401; *Oreighton v. Hyde Park*, 6 Ill. App. 272.

The consent of appellant was not necessary to make an assignment of the claim against it, or a part thereof, valid in equity.

Knight v. Griffey, 161 Ill. 85, Affirming 57 Ill. App. 583; *Whittaker v. New York & H. R. Co.* 3 N. Y. S. R. 537; *Weeks v. Wayne Circuit Judges*, 73 Mich. 256; *Zogbaum v. Parker*, 66 Barb. 341; *Williams v. Ingersoll*, 89 N. Y. 508; *Winslow v. Central Iowa R. Co.* 71 Iowa, 197; *Bradley & O. Co. v. Berns*, 51 N. J. Eq. 437; *Fairbanks v. Sargent*, 117 N. Y. 320, 6 L. R. A. 475; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Bower v. Hadden Blue Stone Co.* 30 N. J. 171; *Phillips v. Edsall*, 127 Ill. 535; *Chicago & N. W. R. Co. v. Nichols*, 57 Ill. 464; *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 401; *Warren v. First Nat. Bank*, 149 Ill. 9, 25 L. R. A. 746; 1 Pom. Eq. Jur. § 169.

Appellant's payment of the whole judg-

ment during suit of a cause of action for personal injuries is superior to an attachment. *Williams v. Ingersoll*, 89 N. Y. 508 (malicious prosecution).

And an equitable assignment of a verdict has been held to be superior to the defendant's right to set off a judgment or execution. *Zogbaum v. Parker*, 55 N. Y. 120, Affirming 66 Barb. 341 (false imprisonment); *Nash v. Hamilton*, 3 Abb. Pr. 35 (slander); *Countryman v. Boyer*, 3 How. Pr. 38; (assault and battery): *Mackey v. Mackey*, 43 Barb. 58 (false imprisonment).

Under 2 N. Y. Laws 1857, 552, 553, § 121, providing that after the recovery of a "verdict" in actions for personal injuries, the action may proceed after the death of the party in the same manner as where the cause of action previously survived by law, an assignment to an attorney of a verdict for false imprisonment together with the judgment to be entered, is valid and superior to the defendant's right to set off another judgment acquired by him before verdict. *Mackey v. Mackey*, 43 Barb. 58, Overruling *Brooks v. Hanford*, 15 Abb. Pr. 342, which held that an assignment after verdict to secure the attorney's fees could not defeat the right of the defendant to use a judgment as a set-off.

This appears to be the only decision applying this statute to an assignment of a cause of action for personal injuries. Prior to 1881 this statute was limited to cases where the verdict was upheld. In matters of survivorship the present Code of Civil Procedure, § 704, makes provision where the verdict is reversed, and now after verdict a cause of action for personal injuries survives in New York.

And an assignee may recover of his assignor who settled a case thereby defeating his claim. *Stanton v. Thomas*, 24 Wend. 70, 35 Am. Dec. 395 (debauching servant).

And an assignment of a cause of action surviving by statute is valid. *Quin v. Moore*, 15 N. Y. 432. In this case it was held that under N. Y. Laws 1847, 575, providing that the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death, and that the action shall be brought in the name of the personal representative, and the amount recovered shall be distributed to the widow and next of kin, the mother who is the sole heir of her infant child may assign her interest in damages causing death of her infant by selling morphine instead of quinine. This action was brought by the administrator and the mother assigned her interest in the suit so as to qualify as a witness, 44 L. R. A.

And an assignment of a cause of action under the civil damage act is valid. *Ludwig v. Glaeser*, 34 Hun, 312. In this case the assignment was to the mother on whom the duty of supporting the children had devolved by the father's death. The court said that it would not decide whether an assignment may be made to a stranger.

The case of *Morlarty v. Bartlett*, 34 Hun, 272, on the authority of which this assignment was sustained, held that an action did not abate on the death of the defendant, on the ground that by statute it seems the injured party has a certain ownership in the "means of support."

A cause of action on an undertaking on arrest is assignable. But the undertaking must be presumed to have been made to depend upon the recovery of a judgment, and a complaint alleging a discontinuance of the action does not state a cause of action on a bond given under N. Y. Code, § 182, as a cause of action founded exclusively upon false imprisonment is not assignable. *Moses v. Waterbury Button Co.* 5 Jones & S. 893.

In *Birch v. Metropolitan Elev. R. Co.* 15 Daly, 453, defining "personal injury," it was said that "an injury to the person of the plaintiff must . . . consist of some direct attack upon his body, or upon his mind, as by threats or intimidation, or upon his reputation, under N. Y. Code Civ. Proc. § 3433, subsec. 9, and § 1910, defining what claims may be assigned. Ohio.

In *Grant v. Ludlow*, 8 Ohio St. 1, it was said that actions for personal torts are not assignable because not transmissible to the personal representative. Oregon.

In *Bahms v. Sears*, 13 Or. 47, it was said that any claim which affects the estate of the party may be assigned, but that the rule is otherwise where it arises out of an injury to the person, such as slander, assault and battery, and kindred cases. Pennsylvania.

An equitable assignment to an attorney of a cause of action for a personal injury is superior to an attachment; but such a claim does not pass to an assignee in bankruptcy.

An agreement between attorney and client that the former should have \$100 for his services out of a verdict in an action for false imprisonment operates as an equitable assignment, and is superior to an attachment, under Pa. act

ment to Mrs. Butler after notice of appellee's title to half of it, which is admitted, and with the fraudulent intent to deprive appellee of his fee, which is also admitted, establishes its liability.

Winslow v. Central Iowa R. Co. 71 Iowa, 197; *Bower v. Hadden Blue Stone Co.* 30 N. J. Eq. 171; *Bartlett v. Woodbine Sav. Bank*, 57 Ill. App. 429; *Rolfe v. Gregory*, 11 Jur. N. S. 98; *Story*, Eq. Jur. § 126, note 1, b; 1 Pom. Eq. Jur. §§ 169, 219; *Phillips v. Edsall*, 127 Ill. 547; *Warren v. First Nat. Bank*, 149 Ill. 9, 25 L. R. A. 746; *Whittaker v. New York & H. R. Co.* 3 N. Y. S. R. 537; *Christie v. Sawyer*, 44 N. H. 298.

Phillips, Ch. J., delivered the opinion of the court:

Where the defendant to a bill in chancery has been defaulted, and a decree *pro confesso* entered, that decree concludes the party only as to the averments of the bill, and the sufficiency of the bill itself and the averments

contained in it may be attacked as not justifying the decree. *Gault v. Hoagland*, 25 Ill. 266. The material inquiry therefore is: First, whether a right of action for personal injuries is assignable; and, second, whether a contract by which the control of the party in interest over litigation carried on in his name or behalf is prevented is void. By the common law, actions arising out of torts did not in general survive. The statute of this state has materially changed the rule with reference to actions which survive; and it is now the general rule in this country that causes of action arising from torts to property, real or personal, or injuries to the decedent's estate, by which its value is diminished, survive and go to the executor, and are assets in his hands, and such causes of action are assignable. But it is usually held that torts to the person or character, when the injury or damage is confined to the body or the feelings, and those contracts the breach of which produce direct injury and

June 16, 1886, § 22, providing that debts attached in execution shall be subject, nevertheless, to all lawful claims thereupon. *Patten v. Wilson*, 34 Pa. 299. In this case the court said that, strictly speaking, unliquidated damages in an action sounding in tort are not capable of assignment before verdict. "But it is true only in respect to the rights of third parties."

A claim for damages for personal injuries sustained through the negligence of the company in carrying a passenger does not pass to an assignee in bankruptcy, whether the action be in form for tort or on contract, under U. S. Rev. Stat. § 546, providing that all rights in equity, choses in action, patent rights, rights of action for property or estate real or personal arising from contract, or from the unlawful taking or detention or injury to the property of the bankrupt, shall pass to the assignee, as the words "right of action for property, real or personal, arising from contract" limit the more general words "choses in action." *Rand v. Fleishman*, 6 W. N. C. 497.

In *North v. Turner*, 9 Serg. & R. 244, it was said that there are some injuries to a person, such as slander, assault and battery, crim. con. with the party's wife, which cannot be assigned so as to make the party a witness, as these do not pass by bankruptcy or an assignment under the insolvent acts, nor can they be transmitted to the executors or administrators.

In *Lattimore v. Simmons*, 13 Serg. & R. 183, it was said that a right of action for a breach of promise of marriage would not pass under a general assignment for creditors.

South Carolina.
An assignment by parol of one half of a verdict in an action of slander while the appeal is pending is invalid, and a chose in action on a tort of a personal character cannot be assigned where no judgment has been entered when the alleged assignment is made. A judgment could not be entered while an appeal was pending. *Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833.

In this case the plaintiff and defendant compromised the case and defeated the attorney's claim, and the attorney sought to set aside the satisfaction. This decision was also on the ground that such a cause of action does not survive.

Texas.
A cause of action for a personal injury is nonassignable. But under the statute of 1889, after suit is filed such a cause of action is held assignable.
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Where attorneys sought to prosecute a suit for personal injuries by reason of a written agreement to give them one third of the amount recovered, and the defendant having notice of the agreement had settled the case with their client, it was held that the claim was nonassignable, as it would not pass to the personal representative, and the claim of the attorneys was held unavailable as a security by an assignment of an interest therein or otherwise. *Stewart v. Houston & T. C. R. Co.* 62 Tex. 246.

A claim for damages for loss of a child alleged to have been killed through negligence is not assignable. The court said that the test of assignability is survivorship to the personal representative. *Texas Mexican R. Co. v. Showalter*, 3 Tex. App. Civ. Cas. (Willson) 69.

A contract in writing, before suit for personal injuries was filed to secure attorney's fees, "this being merely the assignment of his [the party's] one-half interest in the amount finally to be recovered or collected from said company and not an assignment of the cause of action," is not saved by Tex. Rev. Stat. (Sayles's Supp.) art. 2464a, providing that the sale of a judgment or any part thereof, or the sale of any cause of action or interest therein after suit has been filed, shall be evidenced in writing acknowledged and filed, and shall apply to any and all judgments, suits, claims, and causes of action, whether assignable in law or equity or not, where no judgment has been rendered. Neither is it a sale of an interest in a cause of action, because by express terms it disclaims it to be such, and if it is it is of no avail, as it was made before the suit was filed, and such a claim is nonassignable. *Gulf, C. & S. F. R. Co. v. Wooten*, 10 Tex. Civ. App. 54.

But under Tex. Stat. § 2464a, an assignment of a two-thirds interest to attorneys after suit is brought for a cause of action for sounding a railroad whistle, causing a team to run away and injure plaintiff, is valid. *Bonner v. Green*, 6 Tex. Civ. App. 96.

A judgment recovered against a railroad company for damages for personal injuries is assignable by oral assignment, as it is such a claim as survives to the executor. *Putnam v. Capps*, 6 Tex. Civ. App. 160. The court said that the right to transfer this judgment existed independent of § 2464a.

In *Gulf, C. & S. F. R. Co. v. Wooten*, 10 Tex. Civ. App. 54, it was said that the cases of *Putnam v. Capps*, 6 Tex. Civ. App. 610, and *Bonner v. Green*, 6 Tex. Civ. App. 96, "do not inveigh

damage both mentally and to the person, are, so long as they are executory, not assignable. The controversy here is whether an action for personal injuries is assignable. Appellee contends it is.

Numerous authorities are referred to by counsel for appellee, which lay down the rule that, in many cases of torts to property, causes of action may be assigned, and of those cases we cite: *Jackson v. Daggett*, 24 Hun, 204,—an action against a sheriff for failure to return an execution was assignable. *Dinny v. Fay*, 38 Barb. 18, was an action against a sheriff for neglecting to arrest a debtor upon an execution against his person, and this cause of action was held assignable. *Grant v. Ludlow*, 8 Ohio St. 51, was a bill of review to set aside a decree based on a commercial transaction. The case was relative to a mortgage, and the point made was that the transaction was in the nature of a tort, and not transferable to executors or administrators, and died with

against the rule here announced, as those decisions are predicated upon statements of facts different from the facts of this case. In the first case there was an assignment of the judgment after its rendition, and the fight was between two parties claiming the proceeds of same. There was also a claim to the proceeds by virtue of a transfer alleged to have been made before judgment. In speaking of this last claim the court says: "It is probable that as this cause of action before judgment could not be assigned independent of the statute, its terms should have been complied with in making the transfer before judgment, in order to constitute an effectual conveyance to one claiming thereunder. In the second case there was the sale of an interest in the cause of action made after the suit was filed."

In *Jones v. Matthews*, 75 Tex. 1, it was said that a claim for damages to the person from a tort cannot be assigned.

In *Galveston, H. & S. A. R. Co. v. Freeman*, 57 Tex. 156, it was said that injuries to the person which die with the party and do not survive to his personal representative are not assignable. *Virginia*.

A right of action, such as slander, which is merely personal and dies with the party, is not transferable to the assignee in bankruptcy under act of Congress 1841. *Dillard v. Collins*, 25 Gratt. 343.

In *Norfolk & W. R. Co. v. Read*, 87 Va. 185, it was said that a right of action for mere personal torts, such as assault and battery, false imprisonment, malicious prosecution, defamation, and deceit, which die with the party and do not survive to the personal representative, cannot be assigned. *Wisconsin*.

An action for libel of a corporation does not pass to its receiver, and prior to 1887 a cause of action for personal injuries was not assignable: but by a statute passed in 1887, providing for survival of actions for injury to the person, such causes of action are now assignable.

A right of action for libel of an insurance company is not assignable, and does not pass to the receiver of the corporation, as a right of action for a mere personal injury which does not survive is not assignable. *Milwaukee Mut. F. Ins. Co. v. Sentinel Co.* (1892) 81 Wis. 207, 13 L. R. A. 627.

A cause of action for a malicious abuse of process is one for a personal injury and does 44 L. R. A.

the person. The court held that it survived; that the mortgage was assignable. *Robinson v. Weeks*, 6 How. Pr. 161, was an action for taking and converting personal property brought by an assignee, and it was held that the assignment was good. *Hall v. Cincinnati, H. & D. R. Co.* 1 Disney (Ohio) 58, was a case that decides that, under the Ohio Code, an assignee of a claim for damages resulting from injuries to personal or real estate may bring an action in his own name. *More v. Massini*, 32 Cal. 590, was a case wherein it was held that a claim for damages caused by a trespass on land is assignable. *Weire v. Davenport*, 11 Iowa, 49, 77 Am. Dec. 132, was a case wherein it was held that a damage to realty is assignable. *National Exch. Bank v. McLoon*, 73 Me. 499, was a case which held good an assignment, by an heir of the owner of a ship destroyed by the Alabama, of his claim against the United States for such destruction. *Fried v. New York C. R. Co.* 25 How. Pr.

not pass to an assignee in bankruptcy. *Noonan v. Orton* (1874) 34 Wis. 259, 17 Am. Rep. 441.

Under Wis. Rev. Stat. § 4235, Amended Laws 1887, chap. 280, providing that in addition to actions which survive at common law, actions for assault and battery or false imprisonment, or other damage to the person, shall also survive, an action for personal injuries from a street-railway car is assignable before judgment so as to defeat a garnishment. *Lehmann v. Farwell*, 95 Wis. 185, 37 L. R. A. 333.

Prior to this statute it was held that a cause of action for personal injuries from a defective sidewalk is not assignable, and an agreement to give the attorneys one half of the damages recovered, and not to settle the case without their consent, did not prevent a settlement that deprives the attorneys of their claim for compensation from the defendant, although the defendant had notice of such agreement. *Kusterer v. Beaver Dam*, 56 Wis. 471, 43 Am. Rep. 725.

In *Gibson v. Gibson* (1877) 43 Wis. 23, 28 Am. Rep. 527, it was said that a cause of action for slander is not assignable.

In *St. Joseph Mfg. Co. v. Miller* (1887) 60 Wis. 389, it was said that a claim for personal injuries is not assignable. *Federal Cases*.

In *Comegys v. Vasse*, 1 Pet. 193, 7 L. ed. 108, it was said that mere personal torts which die with the party, and do not survive to his personal representative, are not capable of passing by assignment in bankruptcy.

In *Wright v. First Nat. Bank*, 18 Nat. Bankr. Reg. 87, it was said that a right of action for torts to the debtor's person, such as assault and battery, false imprisonment, malicious prosecution, libel, and slander, do not pass to the assignee in bankruptcy. *English and Irish cases*.

A cause of action for a personal injury does not pass to an assignee in bankruptcy. But it seems that the King may authorize a suit for ravishment of ward.

A right of action for seduction of a servant does not pass to the master's assignee on his bankruptcy. *Howard v. Crowther*, 8 Mees. & W. 601, 5 Jur. 91.

Where after the appointment of an assignee in insolvency the assignor brought an action and recovered damages for libel, and the assignee applied for an order for the payment of the damages into the court of Queen's bench, or in-

285, holds that the right of action for carelessly and negligently setting fire to, and burning up, grass, fences, and hay upon a farm, is assignable. *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 513, was a case in which there was an assignment of the right of action for personal injuries to a resident of Iowa, by a nonresident; and the question arose as to the validity of the assignment, on a motion to transfer the case to the United States court; and the court held such assignment was good, on the strength of *Gray v. McCallister*, 50 Iowa, 497. *Zogbaum v. Parker*, 66 Barb. 341, was a case of false imprisonment, where there was an agreement to secure services by the assignment of a verdict, and the agreement was held good. This is under the New York Code, under which champerty and maintenance do not exist. *Brady v. Whitney*, 24 Mich. 154, was an action in trover, brought by a purchaser of a melodeon after the conversion, and the question was whether this sale constituted an assignment of the right to sue, and the court held that a right of action in trover is assignable. *Grant v. Smith*, 26 Mich. 201, was a case holding that an action in trover for converting timber is assignable. *Finn v. Corbitt*, 36 Mich. 318, was a case holding that a right of action for trespass to property is assignable. *Final v. Backus*, 18 Mich. 218, was a case in which the court holds that a right of action for conversion of logs is assignable. In *Brackett v. Griswold*, 103 N. Y. 425, the question involved was whether a cause of action growing out of a false annual report by a trustee, affecting a creditor, and giving him an action under the statute, died with the creditor; and it was held that it did. This question was joined with a charge of conspiracy to cheat and defraud, and it was held this affected a property right, and survived. *Stewart v. Houston & T. C. R. Co.* 62 Tex. 246, was a case in which it was held that an unliquidated claim for personal injury cannot be assigned by the party injured in Texas. The court approves *Galveston, H. & S. A. R. Co.*

vs. the insolvent court for the benefit of the insolvent, the motion was refused as the assignee was not a party to the record. *Dowling v. Browne*, 4 Ir. C. L. Rep. 265.

In an action by husband and wife on the case for words spoken of the wife, the damages recovered and levied by the sheriff cannot be assigned by the commissioner in bankruptcy before the return of the writ and after the money is levied. *Benson v. Flower*, W. Jones, 215, Cro. Car. 166 and 176. The court said that the money is not due to the plaintiff until it be paid to him and none may discharge the record but the plaintiff, and it ought to be delivered to him who may acknowledge satisfaction upon the record.

In *Hancock v. Caffyn*, 8 Bing. 358, 1 Moore & S. 521. it was said that a right of action for an injury to the person does not pass to an assignee in bankruptcy.

In *Beckham v. Drake*, 8 Mees. & W. 846, it was said that a right of action for damages for torts committed towards the bankrupt's person or reputation clearly does not pass to the assignee.

In *Brewer v. Dew*, 11 Mees. & W. 625, 1 Dowl. 44 L. R. A.

v. Freeman, 57 Tex. 156, and holds, as there was no survival, there could be no assignment of the action for personal injuries. In *Galveston, H. & S. A. R. Co. v. Freeman*, 57 Tex. 156, the question involved was whether a claim against a railroad company for killing and injuring live stock could be assigned in equity, so as to enable the assignee to bring suit in his own name, and the court held that personal torts are not assignable, but that claims growing out of and adhering to property may be assigned. In *Chouteau v. Boughton*, 100 Mo. 406, the question involved was whether a right of action for trespass to realty was assignable, and the court held that it was, and followed the case of *Snyder v. Wabash, St. L. & P. R. Co.* 85 Mo. 613. This latter case was an action brought against the railroad company for killing a hog, which had strayed through a defective fence; and it was held that such a right of action might be assigned, as it would survive the death of the owner under the Code.

All these cases—and many others might be cited—sustain the principle that causes of action for injuries to property, real or personal, by which an estate is diminished, are generally assignable. On grounds of public policy, the sale or assignment of actions for injuries to the person are void. The law will not consider the injuries of a citizen whereby he is injured in his person to be, as a cause of action, a commodity of sale. On other grounds, assignability is not legal. In the discussion of the question of assignability of causes of action for torts, courts have usually based the decisions on the theory that, where a cause of action survived, it was assignable. Is that the sole test? *Bispham*, Eq. pp. 218, 219, state: "So, too, equity will not recognize assignments of certain species of property which it would be against the policy of the law to allow the owners to part with. These are pensions given as rewards for extraordinary services, pay or half-pay in the army, the salaries of judges, . . . and other revenues and emoluments of a kindred charac-

& L. 383, 12 L. J. Exch. N. S. 448, 7 Jur. 953. It was said by Abinger, C. B., that an action for assault or for seduction did not pass to the assignee of a bankrupt.

In *Drake v. Beckham*, 11 Mees. & W. 315, 12 L. J. Exch. N. S. 486, 7 Jur. 204, it was said that a right of action for assault and battery, or for slander, or for the seduction of a child or servant, or personal injury arising out of breach of contract to marry, does not pass to the assignee of a bankrupt.

In *Howard v. Crowther*, 8 Mees. & W. 601, 5 Jur. 91, it was said that an assignee in bankruptcy can maintain no action for libel, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy.

"The grantee of the King brought writ of ravishment of ward where the ravishment and marriage were before the grant: and so it is agreed by the court, that the King may grant a chose in action, and that the grantee upon this may maintain action. Thel. Dig. 19. lib. 1, chap. 21. f. 12. cites 5 E. 4, 8." 3 Vin. Abr. pp. 157, 158.

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ter, which reasons of state require should remain always for the benefit of the person to whom they were originally given." Yet in all those cases any balance unpaid at the time of death would survive to the personal representative, but the right of assignment is precluded on principles of public policy. Pomeroy, in his work on Equity Jurisprudence, says (vol. 3, § 1275): "It becomes important, then, in fixing the scope of the equity jurisdiction, to determine what things in action may thus be legally assigned. The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor as assets, or continue as liabilities against the representatives of a decedent debtor, are, in general thus assignable. All which do not thus survive, but which die with the person of the creditor or of the debtor, are not assignable. The first of these classes, according to the doctrine prevailing throughout the United States, includes all claims arising from contract, express or implied, with certain well-defined exceptions, and those arising from torts to real or personal property, and from frauds, deceits, and other wrongs, whereby an estate, real or personal, is injured, diminished, or damaged. The second class embraces all torts to the person or character where the injury and damage are confined to the body and the feelings; and also those contracts, often implied, the breach of which produces only direct injury and damage, bodily or mentally, to the person, such as promises to marry, injuries done by the want of skill of a medical practitioner, contrary to his implied undertaking, and the like; and also those contracts, so long as they are executory, which stipulate solely for the special personal services, skill, or knowledge of a contracting party." Here is a distinction clearly drawn between injuries to property and injuries to the person. This distinction rests on a sound principle. If a person receives injury to his person through negligence of another, by our statute (§ 123, chap. 3), the action therefor survives. By chapter 70, where death results from such injuries caused by such negligence of another, the action still survives, but is brought for the exclusive benefit of the widow and the next of kin. The administrator cannot recover damages for the estate, and at the same time recover for the exclusive benefit of the widow. Statutes like chapter 70 are in force in most of the states. May a person injured assign the cause of action immediately after his injury, and thus, in case of his death from that injury, legally bar a recovery by the administrator for the exclusive benefit of the widow and next of kin? The purpose of chapter 70 is to benefit the widow and next of kin. If an assignment on the basis of the survival of the action were the sole test, then, in the case mentioned, the assignment would be valid. But the very purpose of the survival, as created by the statute is for the benefit of the widow and next of kin, which purpose the law would not permit to be defeated. Whether the action be for assault and battery or for injuries caused by the negli-

gence of another, still the same rule obtains and the action is included in the term "actions for injuries to the person." The possible result of the assignment of such an action would be that the purpose of the law might be defeated. Courts have, with one exception, steadily held that an action for injuries to the body is not assignable. These actions did not survive at common law, but statutes providing for such survival have had their birth since the passage of Lord Campbell's act, in 1846, which, by chapter 70 of our Revised Statutes, is substantially adopted. If such actions are held assignable, on the sole ground of survival, then an assignee in bankruptcy or for the benefit of creditors would take the cause of action.

This principle, that actions for personal injuries are not assignable, is well sustained by authority. In *Rice v. Stone*, 1 Allen, 566, it was held that an assignment of a claim for personal injuries is void, although made after verdict, but before judgment, in an action to recover damages for such injury. The court says: "Such claims were not assignable at common law. On the contrary, a possibility, right of entry, thing of action, cause of suit, or title for condition broken, could not be granted or assigned over at common law. . . . But this ancient doctrine has been greatly relaxed. Commercial paper was first made assignable to meet the necessities of commerce and trade. Courts of equity also interfered to protect assignments of various choses in action; and, after a while, courts of law recognized the validity of such assignments, and protected them, by allowing the assignee to use the name of the assignor for enforcing the claim assigned. And, at the present day, claims for property and for torts done to property are generally to be regarded as assignable, especially in bankruptcy and insolvency. There may be some exceptions to this doctrine, but they need not be discussed here. But, in respect to all claims for personal injuries, the questions put by Lord Abinger in *Howard v. Orowther*, 8 Mees. & W. 603, are applicable: 'Has it ever been contended that the assignees of a bankrupt can recover for his wife's adultery, or for an assault? How can they represent his aggravated feelings?' And we may add the broader inquiry—Has any court of law or equity ever sanctioned a claim by an assignee to compensation for wounded feelings, injured reputation, or bodily pain, suffered by an assignor? There were two principal reasons why the assignments above mentioned were held to be invalid at common law. One was to avoid maintenance. In early times, maintenance was regarded as an evil, principally because it would enable the rich and powerful to oppress the poor. This reason has in modern times lost much, but not the whole, of its force. It would still be in the power of litigious persons, whether rich or poor, to harass and annoy others if they were allowed to purchase claims for pain and suffering, and prosecute them in courts as assignees. And as there are no counterbalancing reasons in favor of such purchases, growing out of the convenience of business, there is

no good ground for a change of the law in respect to such claims. The other reason is a principle of law applicable to all assignments,—that they are void unless the assignor has either actually or potentially the thing which he attempts to assign. A man cannot grant or charge that which he has not. . . . Most of the cases in which the right to assign this class of claims has been discussed have been assignments, under the statutes of bankruptcy or insolvency. Much of the discussion has therefore related to the construction of these statutes, but the nature of the claims has also been regarded as an objection to their being assignable. In some cases the question has been discussed without reference to such statutes. In *Prosser v. Edmonds*, 1 Younge & C. Exch. 481, it was held that a bare right to file a bill in equity for fraud was not assignable. Lord Chief Baron Lyndhurst remarked that courts of equity had relaxed the ancient rule as to the assignment of choses in action, but only in the cases where something more than a mere right to litigate has been assigned. This constitutes a very important limitation." This case was followed in *Linton v. Hurley*, 104 Mass. 353; in *Coughlin v. New York C. & H. R. R. Co.* 71 N. Y. 446, 27 Am. Rep. 75, one having a claim against a railroad company for personal injuries accepted an offer from certain attorneys to take the claim for collection, and divide the recovery. Afterwards the railroad company, with notice of the attorneys' interest in the cause of action, settled with the claimant, and secured a release. In holding that the release was a bar to the action for negligence, and that the attorneys could not demand that the action proceed so that they might have the benefit of their agreement, the court says: "So, if the cause of action before judgment be in its nature assignable, the owner of it may assign, and, by agreement, create, legal and equitable interests therein; and such agreements may now be made with his attorneys, as well as with other persons; and when such interests have been created, and notice given of them, they must be respected. But . . . when the cause of action is like this, such as by its nature is not assignable, the party owning it cannot, by any agreement, give his attorney or other person any interest therein,"—citing *People, Stanton, v. Tioga Common Pleas*, 19 Wend. 73, and *Pulver v. Harris*, 62 Barb. 500, 52 N. Y. 73. To the same effect is *Chicago & A. R. Co. v. Maher*, 91 Ill. 314. The only exception to this rule is the case of *Vimont v. Chicago & N. W. R. Co.* 69 Iowa, 296, which has been followed by other cases in that state. We do not think the reasoning on which these decisions are based is sound, and we decline to follow them.

The second proposition to be determined is: Is a contract by which the person in whose name the action is brought, and to whom it belongs, restricted from compromising or settling such claim because of a contract to that effect? In other words, is such a contract valid and binding? The law does not discourage settlements in cases for personal injuries. Whether a cause of action ex-
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ists, and if so its nature and amount are facts always involved in uncertainty, and a defendant has a right to buy his peace. The plaintiff has a right to compromise and avoid the anxiety, resulting from a cause pending to which he is a party. Any contract whereby a client is prevented from settling or discontinuing his suit is void, as such agreement would foster and encourage litigation. *Lewis v. Lewis*, 15 Ohio, 715; *Ellwood v. Wilson*, 21 Iowa, 523; *Foster v. Jack*, 4 Watts, 334; *Boardman v. Thompson*, 25 Iowa, 487; *Greenhood*, Pub. Pol. p. 474; *Huber v. Johnson* (Minn.) 70 N. W. 805.

We will not extend this opinion by a discussion of other questions raised.

The decree of the Superior Court of Cook County, and the judgment of the Appellate Court of the First District, are each reversed, and the cause is remanded, with directions to dismiss the bill.

Craig, J., dissenting:

As I do not agree with a majority of the court in the opinion. I have concluded to state my views of the case.

When a decree *pro confesso* has been entered against a party, he cannot, on error, allege the want of testimony or the insufficiency of the evidence the court may have heard; but the party has the right to contest the sufficiency of the allegations of the bill, and insist that the averments of the bill do not justify the decree. *Gault v. Hoagland*, 25 Ill. 268. By a demurrer all material allegations well pleaded are admitted. The same rule may be applied when there is a default. The question then presented by this record is whether, conceding the averments of the bill to be true, they are sufficient to authorize the decree rendered by the court. It is alleged in the bill that the complainant was an attorney at law; that Mary Butler had received certain personal injuries through the negligence of the defendant, while she was exercising due care, the nature and character of which injuries were fully stated; that Mary Butler had a cause of action against said railroad company, and desired the services of the complainant as an attorney to prosecute her case against the railroad company; that thereupon a written contract was entered into, as follows: "Whereas, on or about the 7th day of July, A. D. 1891, Mrs. Mary Butler received certain personal injuries through an accident caused by the negligence of certain employees of the North Chicago Street-Railroad Company, and desires to enforce payment of damages for said injury, without advancing attorney's fees therefor: It is agreed by and between said Mrs. Mary Butler and L. M. Ackley, attorney at law, that said Ackley shall take exclusive charge of said matter, and prosecute such parties as he may deem liable for said injuries, and begin and prosecute diligently to final settlement such suits or legal proceedings as he may deem necessary, and shall receive for his services, under this contract, a sum equal to one half of the gross amount recovered or received on account of said injuries; and, to secure payment of said fee, the said Mrs.

Mary Butler hereby assigns to said Ackley and his assigns one half of said right of action, and agrees to assign in proper legal form, in writing, upon request, one half of any verdict or judgment which may be had or recovered by reason of said accident and injury, court costs and actual necessary expenses to be advanced by Mrs. Mary Butler, who also agrees not to compromise or settle said claim, or to have any dealings with any person in reference thereto other than said attorney. In the event of a settlement of said claim before the aforesaid case is on trial call, the charge for services shall be less than one half, in proportion to the work done up to the date of such settlement,"—signed and sealed by the parties, September 2, 1891. It is then alleged that on the 3d day of September, 1891, Ackley commenced a suit in the circuit court of Cook county against the railroad company, to recover damages for the injuries sustained, and for a period of two and one half years complainant spent much time and rendered much service in preparing said cause for trial (setting out the services in detail); that finally the cause was reached on the calendar, and complainant caused the same to be set down for trial; that, while on the trial docket, the railroad company, without the knowledge or consent of complainant, settled the cause with Mary Butler, procured the cause to be called up out of its order, and had a judgment entered therein in favor of Mrs. Butler, against the railroad company, for \$3,750 and costs, which sum was paid to Mrs. Butler, and she satisfied the judgment of record. That prior to the making of said settlement and payment of \$3,750, to said Mary Butler, said North Chicago Street-Railroad Company had full knowledge and notice of said contract in writing of the employment of associate counsel, and of the services rendered as aforesaid, and of complainant's rights under said contract, and that the said settlement was made for the fraudulent purpose of preventing complainant from obtaining compensation for his work in behalf of said Mary Butler: that said North Chicago Street-Railroad Company and said Mary Butler have each refused to pay complainant the amount so due him for services, and said Mary Butler has informed complainant that she has none of the money so paid in settlement; that Mary Butler is, as complainant believes, wholly insolvent.

The rule seems to be quite well established by the authorities, leaving out of view questions of public policy, that all causes of action which, under the law, survive, are assignable. The test, therefore, by which to determine whether things in action are assignable, seems to be to ascertain whether the claim or demand survives upon the death of the party, or dies with him. In *North v. Turner*, 9 Serg. & R. 244, which was an action of trespass for carrying away goods, the plaintiff was offered as a witness. The objection was interposed that he was interested and incompetent, to which it was replied that he had assigned his claim; and the court held that as the right of action, under the statute, passed to the personal

representatives, it was assignable. In the decision of the case the court said: "There are undoubtedly some injuries which so peculiarly adhere to the person of him who has suffered them as to preclude an assignment of his claim to compensation for them so as to make him a witness; such, for instance, as slander, assault and battery, criminal conversation with the party's wife, and many others that might be mentioned. The right to compensation for any of these would not pass by a statute of bankruptcy or an assignment under the insolvent acts, nor could it be transmitted to executors or administrators. But this does not hold with respect to a trespass committed against the party's goods, the remedy for which survives to the personal representative by the statute 4 Edw. III. chap. 7, which clearly shows that such cause of action is separable from the person of the owner. . . . The subject-matter of the demand, therefore, being clearly assignable, the objection on that ground cannot be sustained." *Bunker v. Green*, 48 Ill. 243, was an action of trespass *de bonis asportatis*, pending which plaintiff died; and it was held that the cause of action survived under the statute 4 Edw. III. chap. 7, and that the personal representative might be substituted as plaintiff. Moreover, actions for personal injuries survive under paragraph 122 of our statute, entitled "Administration of Estates," which declares: "In addition to the actions which survive by the common law, the following shall also survive: Actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property, or for the detention or conversion of personal property, and actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, and all actions for fraud or deceit." See also *Hurd's Rev. Stat.* p. 812, chap. 70. In *Tyson v. McGuiness*, 25 Wis. 656, which was an action of trespass, it was held that all actions of tort which survive may be assigned. The same rule is announced in *Jordan v. Gillen*, 44 N. H. 424. *Pomeroy on Remedies and Remedial Rights* (§ 146) says: "Whatever things in action will survive and pass to the personal representatives of a decedent as assets of or liabilities against an estate are assignable by the direct act of the parties; while those things in action which will not thus survive and pass to the personal representatives of a decedent are not assignable." And in § 147: "The criterion, therefore, by which to judge of the assignability of things in action, is to ascertain whether the demand survives upon the decease of the party, or dies with him."

Under the authorities cited, it seems plain that a right of action for personal injuries is assignable. *Hawk v. Ament*, 28 Ill. App. 392, is a case in point. There, as appears, Hawk had been injured on a railroad, and claimed damages for his injury; and, being anxious to institute an action against the railroad company, he entered into a contract with one Ament, a lawyer, to give him one half of whatever amount might be recovered

for his services in commencing and prosecuting the action. Ament commenced a suit against the railroad company, and recovered a judgment in the circuit court for \$1,900. The railroad company appealed to the appellate court, where the judgment was affirmed. The company appealed from the judgment of the appellate court to this court, where the judgment was ultimately affirmed. While the cause was pending in this court, Hawk sold and assigned the judgment, in writing, to one O'Connor; and, after the judgment was affirmed in this court, the judgment was paid to the clerk of the circuit court, where it was rendered. O'Connor claimed the money, and the attorney claimed one half of the judgment under the agreement he had with Hawk. The appellate court sustained the agreement Ament made with Hawk, and held that the agreement amounted to an equitable assignment. In *Vimont v. Chicago & N. W. R. Co.* 69 Iowa, 296, the supreme court of Iowa held that a cause of action for a personal injury was assignable, and the assignee might maintain an action in his own name. It is there said: "It may be conceded for the purposes of this case, we think, that a claim for damages arising out of a personal tort, and having its origin where the common law is in force, is not assignable before being reduced to judgment. The ground upon which it is held that such claim is not assignable is that it is a mere personal claim in favor of the injured party, and that it does not become a part of his estate, or descend to his representatives, but terminates at his death; and consequently it has no value which can be so estimated as to form a consideration for a sale, and there is in it no element of property to make it the subject of a grant or assignment. See *Rice v. Stone*, 1 Allen, 566; *People, Stanton, v. Tioga Common Pleas*, 19 Wend. 73. The contract of assignment of such claims between parties otherwise competent to contract is void at common law, then, not because of any incapacity of the parties to enter into the contract, but because the claim itself is not the subject of contract. Under the statutes of Iowa, however, such claims are given a character entirely different from that sustained by them when arising under the common law. They are not merely personal claims in favor of the parties sustaining the injuries, and they do not terminate with their death, but become a part of their estates and descend to their representatives, and actions thereon may be maintained by the representatives." See also *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 518. In *Final v. Backus*, 18 Mich. 218, where trover was brought to recover for logs which the defendant had obtained by trespass, the court, in deciding the case, said: "The position is that the right of action for a tort is not the subject of assignment; and this we understand to be the general rule. [Citing authorities.] But this rule applies only to those torts which are merely personal, and which, on the death of the person wronged, die with him; while torts for taking and converting personal property, or for an injury to one's estate, and generally all such rights of action for

tort as would survive to the personal representatives, may, it seems, be assigned, so as to pass an interest to the assignee which he can enforce by suit at law. [Citing *North v. Turner*, 9 Serg. & R. 244; *Butler v. New York & E. R. Co.* 22 Barb. 110; and *Purple v. Hudson River R. Co.* 4 Duer, 79.]"

Numerous cases have been cited by counsel for the railroad company which they claim hold a different view,—that a right of action for personal injuries is not assignable. The first case cited is *Chicago & A. R. Co. v. Maher*, 91 Ill. 314. In that case one Maher owned certain property on the Chicago river, and, while so owning the property, the railroad company erected a pier in the river opposite his property, upon which a bridge was constructed. Some time after the erection of the pier, Maher sold the property to his wife, and, after she obtained title, she sued to recover damages caused by the erection of the pier. It was held that, as Maher owned the land when the pier was erected which caused the alleged damage, the right of action was in him, and the right to sue for damages was not transferred to his wife by the subsequent conveyance to her. Expressions may be found in the opinion in that case which might seem to sustain the view of the appellant, but the decision in that case has no bearing on the question involved in this. The theory of that case is that the owner, at the time of the damage, is entitled to recover, not only for the present, but all future damages; and a recovery by the owner is a bar to any future action. *Norton v. Tuttle*, 60 Ill. 130, has also been cited. In that case it was held that the bare right to file a bill in equity, growing out of the perpetration of a fraud on a party, is not assignable. *Prosser v. Edmonds*, 1 Young & C. Exch. 481, and *Illinois Land & Loan Co. v. Speyer*, 138 Ill. 145, lay down the same doctrine. *Rice v. Stone*, 1 Allen, 566, has also been cited, and is much relied upon. In that case the supreme court of Massachusetts did hold that at common law a claim for injuries to the person is not assignable. *Coughlin v. New York O. & H. R. R. Co.* 71 N. Y. 444, 27 Am. Rep. 75, has also been cited; but in New York, at the time the case was decided, a right of action to recover damages for personal injuries did not survive. A few other cases have been cited, but it will not be necessary to refer to them here. It may be conceded that there are cases, as *Rice v. Stone*, 1 Allen, 566, and *People, Stanton, v. Tioga Common Pleas*, 19 Wend. 73, which held that a cause of action for personal injuries is not assignable; but I regard the decided weight of authority the other way. If the cause of action in the case under consideration was merely personal,—one which could not survive the party injured, but would die with him,—I would have no hesitation in holding, as was done in *Rice v. Stone*, 1 Allen, 566, and *People, Stanton, v. Tioga Common Pleas*, 19 Wend. 73, that the cause of action could not be assigned to a third party. But such is not the case. Under our statute, as has been seen, an action to recover damages for personal injuries survives; and, being possessed of that import-

ant element, no reason is perceived why an action of that character may not be assigned in the same way and with like effect as an action of debt, composed of various items, or as an action to recover damages for breach of contract. I do not wish to be understood as saying that an assignee of a cause of action for personal injuries, or any other tort, may maintain an action in his own name; but I do say that the cause of action may be transferred by assignment, so that the assignee may be the equitable owner of the cause of action, with power to prosecute to final judgment in the name of the assignor, and collect and receipt for the judgment when rendered.

It is also claimed that the agreement sought to be enforced violates the rule against maintenance and is champertous. It will be observed that, by the terms of the contract, the attorney, Ackley, was to receive for his services one half of the amount to be recovered; but, by the express terms of the agreement, court costs and necessary expenses were to be advanced by Mary Butler. To make out a case of champerty, it is not sufficient to show that a part of the thing recovered was paid or agreed to be paid as an attorney's fee. It must also be shown that the costs and expenses of the suit, or some

part of them, are paid or agreed to be paid by the attorney. *West Chicago Park Comrs. v. Coleman*, 108 Ill. 601. This is the rule established in the case cited, and also in *Thompson v. Reynolds*, 73 Ill. 12, and *Phillips v. South Park Comrs.* 119 Ill. 637. Under the law as declared in these cases, the objection to the contract is, in my opinion, not well taken.

It is said in the argument that the agreement is not an assignment of any part of the fund to be recovered, but is a mere promise to pay a sum equal to one half of the amount recovered. I do not so regard the contract. The contract is one, as I understand it, by which an equitable assignment is made of one half of whatever amount may be recovered. When the judgment was rendered, the railroad company had notice of appellee's rights in the judgment; and having paid over the money to Mary Butler, with notice of appellee's rights, it was, in my opinion, liable to appellee for the amount of his interest in the judgment.

Magruder, J.: I concur in the views expressed by Mr. Justice Craig.

Rehearing denied February 3, 1898.

ARKANSAS SUPREME COURT.

F. C. DANEHOWER, Appt.,

v.

Jack DAWSON.

(65 Ark. 129.)

1. The right of possession of property sold under foreclosure of a mortgage, during the year allowed by statute for redemption, is in the purchaser, where the mortgage transfers the title leaving only an equity of redemption in the mortgagor, and the statute is silent as to the right of possession after sale.
2. The right of redemption from a sale under foreclosure of a mortgage is given by the Arkansas statute in every case, and is not limited to sales at a second offering required by the statute because a bid of two thirds the appraised value of the property was not received at the first offering.

(*Battle, J., and Bunn, Ch. J., dissent.*)

(March 12, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Lee County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

Statement by Riddick, J.:

This action was brought in the Lee circuit court by appellee, Jack Dawson, against the appellant, F. C. Danehower, to recover

possession of 5 acres of land in Lee county. Danehower filed an answer alleging that he was the owner of said land, and denying the right of Dawson to recover possession thereof. The evidence at the trial showed that the land in controversy was in 1888 owned by F. Trunkey, who sold the tract of land, of which that in controversy was a part, to Dawson and certain other parties, and executed a deed conveying the land to them. Dawson and the other vendees agreed to pay \$1,361.85 for the land. To secure the payment of this sum, they executed and delivered to R. D. Griffis, as trustee, a deed of trust conveying said land to him, with power of sale, providing that, if default was made in the payment of the debt, the trustee should take immediate possession, and, after advertisement, sell the same to the highest bidder, and execute and deliver to the purchaser proper deeds conveying the land to him. Dawson took possession of the land under his purchase, but paid no portion of the purchase price. F. Trunkey died, and, the purchase money not having been paid, the trustee, on the 16th of April, 1895, sold the land under the power contained in the deed; and at the sale it was purchased by the heirs of Trunkey for the sum of \$900, leaving a balance of the purchase price amounting to over \$600 unpaid. Shortly after the sale the trustee executed his deed conveying said land to the heirs who had purchased; and they sold the land to appellant, Danehower, for the sum of \$650, one half of which he paid in cash. They executed a written

NOTE.—This case should be considered in connection with *Fields v. Danehower* (Ark.) 43 L. R. A. 519.

agreement to convey the land to him upon the payment of the remainder of the purchase money, and authorized him to take possession of the land, and Danehower took possession before the expiration of the year allowed to redeem. There is a conflict in the evidence as to whether he obtained the same peaceably, by consent of Dawson, or forcibly took possession. The court, in effect, instructed the jury that, during the period allowed for redemption, appellee, the grantor in the deed of trust, was entitled to the possession of the mortgaged premises. The finding and judgment were in favor of plaintiff.

Messrs. McCulloch & McCulloch, for appellant:

This is an action of ejectment, and the plaintiff must recover, if at all, on the strength of his own title and right of possession.

Apel v. Kelsey, 47 Ark. 413.

A mortgage conveys the fee, the legal title vesting in the mortgagee (or trustee) while the equity of redemption remains in the grantor.

Fitzgerald v. Beebe, 7 Ark. 310; *Kannady v. McCarron*, 18 Ark. 166; *Reynolds v. New Orleans Canal & Bkg. Co.* 30 Ark. 520; *Terry v. Rosell*, 32 Ark. 478; *Coldcleugh v. Johnson*, 34 Ark. 312; *Ringo v. Woodruff*, 43 Ark. 469; *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *Jones, Mortg.* §§ 19, 667, 668, 702, 703; *Pingrey, Chat. Mortg.* § 826; *Watford v. Oates*, 57 Ala. 290.

The statutes allowing redemption do not change the relations of the parties toward the property or each other, save in the one particular that the mortgagor has the privilege of redemption.

This right cannot be likened to the statutory redemption from an execution sale or a tax sale, for in both of these cases the statutes expressly provide that there shall be no conveyance to the purchaser until the expiration of the period for redemption, and the legal title does not pass until there is a conveyance.

It is analogous—nearer so than any other kind of redemption—to the right of an infant to redeem from tax sale.

The minor's right to redeem is not an estate in the lands, but only a statutory privilege to defeat the purchaser's title within a limited time.

Bender v. Bean, 52 Ark. 132; *Craig v. Flanagan*, 21 Ark. 319.

The grantors waived the right of redemption after sale by the stipulation in the face of the deed.

Jones, Mortg. §§ 1542 *et seq.*

Mr. James P. Brown, for appellee:

Purchasers at foreclosure sales have no right to possession of the land until the redemption year expires.

Wood v. Holland, 57 Ark. 198.

The object of the statute is to aid, not the man of wealth, who has various means of raising money for redemption and all other purposes, but the ordinary farmer debtor, who regards his mortgaged premises as his means of a livelihood, and which he would

redeem as a continued means for that purpose.

See *Dembitz*, Land Titles, bottom p. 769, footnotes 247, 248.

The legal title does not vest in the purchasers until the period allowed for redemption has expired.

Jones, Mortg. 5th ed. § 1051b; *Buchanan v. Reid*, 43 Minn. 172; *Meeker County Bank v. Young*, 51 Minn. 254; *Standish v. Vosberg*, 27 Minn. 175.

A mortgagor cannot waive the equity of redemption by stipulation in the mortgage itself.

Jones, Mortg. § 251; 3 Pom. Eq. Jur. 171; *Locke v. Palmer*, 26 Ala. 312; *Brown v. Gaffney*, 28 Ill. 149; *Baughner v. Merryman*, 32 Md. 185.

Messrs. Norton & Pewett, amici curiæ.

The statute is as follows: "§ 5111. At all sales of personal or real property under mortgages or deeds of trust in this state, such property shall not sell for less than two thirds of the appraised value thereof. Provided, if the property shall not sell at first offering for two thirds of the amount of the appraisement, then, in case of personal property, another offering may be made sixty days thereafter, and in case of real property, another offering may be made in twelve months thereafter, at which offering the sale shall be to the highest bidder without reference to the appraisement; and, provided, real property sold thereunder may be redeemed by the mortgagor at any time within one year from the sale thereof by payment of the amount for which said property is sold, together with 10 per cent interest thereon and cost of sale."

The language of the enactment furnishes no warrant for putting upon it a construction which would authorize a redemption when the sale was made at the first offering for two thirds.

No word can be found which evinces in the slightest a legislative intent that the purchaser at such a sale should not at once receive his deed, and thereby be vested with title and right of possession.

The right of redemption (from the sale as distinguished from redeeming from mortgage) is a privilege, not an estate.

Powers v. Andrews, 84 Ala. 289; *Bender v. Bean*, 52 Ark. 132.

Riddick, J., delivered the opinion of the court:

This is an action of ejectment brought by a grantor in a deed of trust against one holding under the purchaser of the premises at a sale made by virtue of the power contained in the deed. The land was purchased at the sale by the heirs of the beneficiary in the trust deed. The trustee executed a deed conveying the land to them, and they sold to the defendant in this case. The grantor has not offered to redeem, and the question presented for our consideration is whether, as against the purchaser under the power contained in the deed, the grantor is entitled to the possession of the mortgaged premises

during the statutory period allowed for redemption.

This deed of trust being executed to secure a debt, was, in legal effect, only a mortgage. *Turner v. Watkins*, 31 Ark. 429. But in this state the legal title passes by the mortgage to the mortgagee, subject to be defeated by the performance of the conditions of the mortgage. *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *Ringo v. Woodruff*, 43 Ark. 469; *Fitzgerald v. Beebe*, 7 Ark. 310, 46 Am. Dec. 285. As the debt secured by the deed in this case was past due and unpaid, if the mortgagee had taken possession of the mortgaged premises without a sale it is plain from the cases just cited that the mortgagor could not maintain ejectment against him, or those holding under him, without first paying or offering to pay the debt secured by the mortgage. And certainly it cannot be said that the sale of the premises made under the power contained in the deed revested the title in the grantor, so as to empower him to bring ejectment, and recover possession of the mortgaged premises, without offering to redeem or pay any portion of the mortgage debt. The purpose of this sale was to cut off the equity of redemption possessed by the grantor, and, but for the statute giving the right of redemption after sale, the grantor after such sale would have had no further interest of any kind in said land. The statute confers upon the grantor the right to redeem at any time within one year after the sale under the mortgage or deed of trust, but upon the question of possession it is silent. It does not confer or attempt to confer upon the grantor any right to the possession of the premises during the period allowed for redemption. *Sandels & H. Dig.* § 5111. Who, then, had the right to the possession of the premises during the statutory period allowed for redemption? The mortgagee has, after the sale, no lien upon the land by virtue of the mortgage, and no right to take possession for any unpaid balance of the debt; for the mortgage is discharged by the sale, and the rights of the mortgagee, as to the land, pass to the purchaser. After the sale, and during the period allowed for redemption, "the purchaser at the sale takes the place of the mortgagee." *Dailey v. Abbott*, 40 Ark. 276. But there is this difference between the position of the mortgagee in possession and that of a purchaser: The possession of the purchaser is after the sale, when the foreclosure has already taken place, and when only the statutory right of redemption remains to the mortgagor. In the case of *Ruckman v. Astor*, 9 Paige, 517, Chancellor Walworth, speaking of the rights of a purchaser at a foreclosure sale when the statute permitted the mortgagor to redeem, said that the purchaser "was in the same situation as a mortgagee in possession after a decree for a strict foreclosure, previous to the expiration of the time allowed by such decree for the redemption of the premises. There in case the mortgage money mentioned in the decree, with the interest thereon, is not paid within the time limited for that purpose, the equity of redemption is for-

ever barred, and the mortgage will be permitted to retain the rents and profits which he has received subsequent to such decree. But if the redemption takes place, as authorized by the decree, the mortgagee must relinquish the possession to the owner of the equity of redemption, and must account to him for the rents and profits, of the premises while he held the possession." Now, without stopping to consider whether this extract from the opinion of the learned chancellor gives a correct view of the law concerning strict foreclosures, we think it illustrates the position of a purchaser holding under a mortgage sale during the year allowed by our statute for redemption. Such a purchaser occupies a double character and may come to be treated either as a mortgagee in possession or as the holder of an absolute title, depending upon whether there has been a redemption or not. To speak more accurately, he holds as purchaser, but if there be a redemption, his rights will be determined by treating him as a mortgagee to the extent of the price paid by him. If the mortgagor redeems, the defeasible title of the purchaser is abrogated. The purchaser will then, for the purpose of redemption, be treated as a mortgagee in possession, and will be entitled to the price paid by him, with interest, and must account for the rents and profits. But, if no redemption is made, then at the end of the period allowed for redemption the title of the purchaser becomes absolute; and when the conveyance is made it relates back to the time of the sale, and he can retain the rents and profits received by him subsequent to the sale. So it seems to us that in order to recover possession, and call the purchaser to account for the rents and profits, the mortgagor must redeem. *Ruckman v. Astor*, 9 Paige, 517; *Lathrop v. Nelson*, 4 Dill. 194; *Dailey v. Abbott*, 40 Ark. 276; *Burk v. Bank of Tennessee*, 3 Head, 686; *Champion v. Hinkle*, 45 N. J. Eq. 162; *Childress v. Monette*, 54 Ala. 317; *Powers v. Andrews*, 84 Ala. 289.

We do not find any decision of this court in conflict with the conclusion at which we have arrived; but there are expressions in *Wood v. Holland*, 57 Ark. 198, and in *Dailey v. Abbott*, 40 Ark. 276, which are cited as sustaining the opposite view. But it must be remembered that those were cases in which redemptions were made. Taking those cases in connection with the facts upon which they were based, and the questions determined, we find very little in either of them from which we should wish to dissent. But we do not feel called upon to discuss those cases, because in each of them a redemption has been made, and the question whether the mortgagor was entitled to the possession when no redemption was made was not before the court. In this case the mortgaged property did not sell for enough to satisfy the mortgage debt, by several hundred dollars. It was purchased by the creditor or beneficiary in the deed of trust, who received a deed from the trustee, and then, in turn, sold to the appellant. If we should hold that the mortgagee, and not the purchaser, had the right to the possession dur-

ing the period allowed to redeem, the result, so far as this case is concerned, would be the same; for the appellant holds under the mortgagee or trustee. We do not know of any decision by this court in which it is said or intimated, in a case such as we have here, where the mortgaged premises have sold for less than the mortgage debt, and where the mortgagor is not offering to redeem, that he may still take from the mortgagee, or the purchaser from him, the possession of such premises, during the period allowed for redemption, and apply the rents and profits to his own use, and allow his debt to go unpaid. There is nothing in the deed of trust under which the premises were sold in this case that prevents the creditor from subjecting the use of the premises during the year following the sale to the payment of his debt. On the contrary, it grants to the trustee, in the fullest terms, the power to take possession upon default, and to sell and execute a deed conveying the title to the purchaser. Nor do we find in the statute which gives the right to redeem anything that would justify such a ruling. Our statute which defines the rights of a purchaser of land at a sale under execution expressly provides that no conveyance shall be made to the purchaser, or possession delivered, until the time for redemption has expired, but there is no such provision in this statute regulating sales under mortgages and deeds of trust. The bare right to redeem is given, and nothing more. To hold that this statute gives the mortgagor the right to take possession of the premises, and appropriate the rents and profits, during the year allowed to redeem, without redeeming or paying any portion of his debt, would, it seems to us, be putting something in the statute not authorized by its language. Before this statute was passed, a sale and conveyance under the power in a deed such as we have here vested an absolute title in the purchaser; and this effect should still be given to the sale, so far as is consistent with the purpose of the statute to allow a right of redemption. If the sale carries the right to the rents and profits, the purchase price will be enhanced to that extent, and the result will be a benefit to the mortgagee, and no great harm to the mortgagor, as the increased price goes to the payment of his debt, and, if there be an excess, it belongs to him.

It is said that it would put a cloud upon the title of the mortgagor, to have a deed executed to the purchaser before the period of redemption expires. If this were true, the redemption would annul such a deed, and the mortgagor has his remedy to remove the cloud. But we do not see that there is any necessity that a deed should be executed before such period has elapsed. By virtue of the legal title in the mortgagee, the purchaser can, under him, take and hold possession against the mortgagor until the year for redemption has expired. When a deed is executed, it can, we think, by the doctrine of relation, properly be held to take effect from the day of sale. *Wagner v. Cohen*, 6 Gill. 97, 46 Am. Dec. 660; *Lathrop v. Nelson*, 44 Dill. 194.

44 L. R. A.

As to the contention of counsel who appear as *amici curiæ*, that the right of redemption is not given when the property sells at the first offering, but only to a sale at the second offering, when, on account of a failure to bring two thirds of its value at the first offering, the sale has been postponed, we are of the opinion that it cannot be sustained. There may be some ambiguity, but, taking the whole act together, we feel convinced that the right to redeem applies to all sales under mortgages or deeds of trust. If the object of allowing the right to redeem was to prevent an absolute sale of property at less than two thirds of its value, it seems strange that the legislature, when the property fails to bring that amount at the first offering, should postpone the sale for a year, and then, at the sale on the second offering, allow another year in which to redeem, without regard to whether the property at the last sale brought more than two thirds of its value or not. If the legislature did not intend to allow the right to redeem from a sale at the first offering because the land sells for two thirds of its value, we feel certain that it would not have allowed the right to redeem from a sale at the second offering, when the land was sold for two thirds of its value, or over. As no distinction in this respect in regard to the right to redeem from sales at the second offering is made, we conclude that the right to redeem was intended to apply to all sales.

Having concluded that the plaintiff in this case had no right to recover the possession of the mortgaged premises from the defendant without redemption, it follows that the judgment of the Circuit Court must be reversed, and the cause remanded for a new trial, and it is so ordered.

Battle, J., dissenting:

A statute of this state provides that real property sold under a power of sale in deeds of trust and mortgages "may be redeemed by the mortgagor at any time within one year from the sale thereof by payment of the amount for which said property is sold, together with 10 per cent interest thereon and cost of sale." Under this statute, is the purchaser entitled to the possession of the property sold, before the expiration of the time for redemption? I think not. In his bid for the property at the sale, he agrees to pay what he is willing to give for it, provided it is not redeemed, and he gets it at the end of the time allowed for redemption. As a full and complete compensation to him for the money he has paid for the land, the law allows the amount paid, and 10 per cent interest, in the event he fails to acquire title by reason of redemption. Until the time to redeem expires, the land stands as security to him for this amount and interest, in default of the payment of which within the year after the sale he becomes the owner of the land. Until then he has only an inchoate title, and his right to the possession does not accrue until it becomes complete. He is consequently not entitled to the possession within the one year allowed to redeem.

The purchaser does not become subrogated to the rights of the mortgagee against the mortgagor. He is entitled to the land, or the return of his money with interest, and no more. The mortgagee is entitled to recover of the mortgagor the remainder of the mortgage debt left unpaid after the amount received on account of the sale of the lands has been deducted. By reason of this unpaid balance the purchaser acquires no rights. All the rights existing by virtue thereof belong to the mortgagee or his assigns. What those rights are is not necessary for us to determine in this case; for appellant had no right to the land, except that acquired by the sale under the power contained in the deed of trust, and, in taking possession of it, he was not acting in the name of or for the trustee or beneficiaries

in the deed of trust, for the purpose of enforcing the collection of the balance due on the mortgage debt, or by virtue thereof, but in his own behalf. This debt had never been assigned to him, and he therefore had no authority by virtue thereof to assert a right to the possession of the land for the purpose of appropriating the rents and profits accruing therefrom to the payment of the debt. He had no more right to do so than a purchaser at a sale under an execution would have, by virtue of such purchase, to collect the balance due on the judgment on which the execution was issued. The appellee was, therefore, during the time allowed for redemption, entitled to the possession of the land, as against appellant.

Bunn, Ch. J., concurs with me.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut, *ex rel.* Alfred G. SOUTHEY,
v.
Benjamin F. LASHAR.

(71 Conn. 540.)

A vote of a city board over which it is the mayor's duty to preside, on a motion which the mayor has declared out of order and declined to put, but which is thereupon put by a member of the board and declared by him to be carried, without the mayor's request or any appeal from the mayor's decision, or any request by him to put the motion, is wholly void, although four of the five members entitled to vote have cast their votes in the affirmative.

(Hamersley, J., dissents.)

(March 9, 1899.)

RESERVATION by the Superior court for Fairfield County for the opinion of the Supreme Court of Errors of an information in the nature of a quo warranto to test the validity of defendant's claim to act as street commissioner under an alleged appointment by the board of public works. *Judgment of ouster.*

Statement by Andrews, Ch. J.:

This was an information in the nature of a writ of quo warranto. It sets forth that the relator was on the 10th day of June, 1898, duly and regularly elected and appointed by the board of public works of the city of Bridgeport to the office of street commissioner of said city; that he accepted said appointment, and on the 18th day of July, 1898, duly qualified, and entered upon the duties of said office; that the defendant on said 15th day of July, 1898, and thence con-

tinually hitherto, without legal warrant, claim, or right, has used and exercised, and still does use and exercise, the several powers, duties, and privileges belonging to said office of street commissioner, concerning which said powers, duties, and privileges the defendant has usurped, and still does usurp, at said Bridgeport, to the great damage and prejudice of the rights of the said city of Bridgeport and of the relator. The defendant, not denying the averments of the information, alleged that he had not at any time usurped said office; on the contrary, that he was on the 20th day of May, 1898, duly and regularly elected and appointed by the said board of public works of the said city of Bridgeport to the office of street commissioner for the period of one year from said date, and until his successor should be duly chosen and qualified; that he accepted said election, duly qualified, and entered upon the duties of said office; and that by virtue of the said election and qualification he has from said day continued, and still continues, to act as such street commissioner. And he prayed that, therefore, the said office and its privileges be adjudged to him. There was a hearing. The court made a finding of the facts, and reserved the case for the consideration and advice of this court. The facts necessary to be considered in giving advice in this case (condensed from the finding) are these: The charter of the city of Bridgeport has, since its earliest organization, provided for the existence of several boards, to be appointed by the mayor. One of these was a board of public works, to consist of six members. At the 1805 session of the general assembly the charter was wholly revised. This revised charter went into effect on the 1st day of July, 1895. It provided in its nineteenth section that "there shall continue to be a board of public works, and of charities, each of which shall consist of six members." The members held office for three years. The appointments were so arranged that two members went out of office, and two new ones were appointed, each year. Other

NOTE.—The above decision determined a novel question of parliamentary law. As to the relation of a presiding officer to the body over which he presides, see also *State, Childs, v. Kilchill* (Minn.) 19 L. R. A. 779.
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boards were also provided for in the charter. The members of all such boards were to be appointed by the mayor. Another section provided that "the mayor shall *ex officio* be a member of said respective boards, but shall have no vote in any of their proceedings except in case of a tie vote. He shall preside at all meetings of said respective boards at which he may be present. The common council of said city had, pursuant to authority given by the charter, passed an ordinance, "that the board of public works shall keep or cause to be kept an accurate and correct record of all their official proceedings," etc., and that "they shall have power to make needful rules and regulations for the conduct of the business and affairs of said department, and for the control and regulation of the employees thereof." Acting under this ordinance, the board of public works, at a meeting held in May, 1896, adopted a body of rules, one of which was that "the board shall during the month of May in each year elect a president, a clerk, a street commissioner, and other officers; and each of said officers shall hold office for the term of one year from the date of such election, and until his successor is elected." On the 21st day of September, 1897, the board repealed the rules of May, 1896, and adopted a new body of rules, namely:

Sec. 1. The board of public works shall during the month of June in each year elect the following officers, to wit, a president, a clerk, a street commissioner, a superintendent of bridges; and each of said officers shall hold office for the term of one year from the date of his election, and until his successor shall be elected.

"Sec. 2. The clerk of said board shall keep an accurate and correct record of all the official proceedings, orders, contracts," etc., "of said board," etc.

Sections 6 and 7 prescribed the duties of the president of said board, viz., that he shall preside at all meetings, when the mayor is not present. It was his duty, under the rules of the board, to make all appointments of committees of members of said board, to which standing committees was referred the business coming before said board for appropriate action. He was also empowered, under the rules, to call meetings of the board whenever he deemed it necessary.

"Sec. 9. No motion to repeal or amend the foregoing rules shall be entertained by the president or presiding officer of the board of public works, unless notice of such repeal or amendment has been given at the last preceding meeting, unless by unanimous consent of all members present."

For the year following the 1st of June, 1897, the members of said board were Mr. Downer, Mr. Pierce, Mr. Somers, Mr. Ferguson, Mr. Waterhouse, and Mr. Thorne. On the 4th day of June, 1897, Mr. Somers was elected by said board to be its president. He has ever since continued to hold said office. At a meeting of said board duly called and held on the 10th day of May, 1898,—all the members being present,—Mr. Waterhouse gave notice that "at the next meeting of this board he would move to repeal or

amend the rules of this board in accordance with such rules." At the next meeting of the board, duly called and held on the 20th day of May, 1898,—all the members being present, and the mayor being present and presiding,—action was taken as follows: "Mr. Waterhouse presented the following: 'According to my notice to this board at the last meeting, I hereby offer the following resolution. Resolved, that the last rules adopted by this board be, and the same are hereby, repealed.' Mayor Taylor ruled that the resolution was not in order, that such action was illegal, and declined to put the motion. Mr. Downer raised the point of order, that the notice given by Mr. Waterhouse at the last meeting was not a legal notice, under the rules, as it was not definite. The mayor sustained this point of order, and declined to put the motion. Mr. Pierce then declared that, as the mayor declined to put the motion, he would do so himself; and he called for a rising vote on the adoption of the motion, which resulted as follows: In the affirmative, Messrs. Pierce, Ferguson, Thorne, and Waterhouse. Mr. Pierce then declared the motion carried. Mr. Downer objected to this action, claiming that it was illegal. Mayor Taylor instructed the clerk not to make any record of this action, as it was illegal. Mr. Ferguson moved that the clerk be directed to record the proceedings. Mr. Pierce called for a rising vote on the motion, which resulted as follows: In the affirmative, Messrs. Pierce, Ferguson, Thorne, and Waterhouse. Mr. Pierce declared the motion carried. The board then, on the motion of Mr. Thorne, proceeded to an informal ballot for street commissioner, by a rising vote, called for by Mr. Pierce, which resulted as follows: Affirmative, Messrs. Pierce, Ferguson, Thorne, and Waterhouse. The clerk was by the same vote directed to count the ballots. Result of ballot, Benjamin F. Lashar, 5. The board then voted, by a rising vote,—the motion being put by Mr. Pierce,—to proceed to a vote by a formal ballot for street commissioner, and it resulted as follows: Affirmative, Messrs. Pierce, Ferguson, Thorne, and Waterhouse. Result of ballot, Benjamin F. Lashar, 3; James Hughes, 1. Mr. Pierce declared that there was no choice, and another ballot was taken, which resulted as follows. Benjamin F. Lashar, 4. Mr. Pierce declared Mr. Lashar elected street commissioner. . . . Mr. Taylor the mayor, desired the clerk to enter on the record his formal protest against all the proceedings in which Mr. Pierce acted as chairman, claiming that all such proceedings were illegal. Mr. Downer also protested on the same ground." It is found that at said meeting Mr. Somers, the president of the said board, was not requested by Mr. Pierce or either member of the board to put said motion, and that said Pierce was not requested by Mr. Somers to put said motions to vote, or to declare said vote, or act in the premises at all.

Messrs. Canfield & Judson, for relator:
The election of respondent in May, 1896,

under the rules adopted for that purpose was illegal and void.

If the term contemplated by the charter had not ended in May, 1890, the election of a street commissioner for the incoming board would be illegal.

State, Bowens, v. Meehan, 45 N. J. L. 189; *State, Haight, v. Love*, 30 N. J. L. 14; *People, Williams, v. Reid*, 11 Colo. 138.

On May 20, 1898, a meeting of the board was held, and the mayor was present and presiding.

Mr. Waterhouse moved that the whole body of rules be repealed.

Mr. Downer objected, and raised the point of order, that the motion was not in order. Thus, there was, under parliamentary rules, a question pending that required the ruling and decision of the presiding officer. To decide the question pending was a charter duty, as incident to his power and right to preside.

His decision was, that the motion was not in order. No appeal was taken from this ruling, and, until appealed from and reversed by the votes of the board, it was the law for the board.

Cushing, Law & Practice of Legislative Assemblies, § 570.

It was not for Mr. Pierce to arbitrarily decide whether the mayor's ruling was correct, and he had no legal right to assume the functions of the presiding officer.

State, Harty, v. Kirk, 46 Conn. 399; 1 Beach, Pub. Corp. § 286; 1 Dill. Mun. Corp. § 272; Mechem, Pub. Off. § 183; Paine, Elections, § 395.

It was the clearest and baldest kind of usurpation of a charter right for Mr. Pierce to assume that office.

Cushing, Law & Practice of Legislative Assemblies, § 124.

Mr. Pierce was not the *de facto* presiding officer. He was an intruder, and his acts as such are void.

Fitchburg R. Co. v. Grand Junction R. & Depot Co. 1 Allen, 552; *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335; Paine, Elections, § 691.

Messrs. DeForest & Klein and Phelan & Phelan, for respondent:

The city charter of Bridgeport provides that the board of public works shall have power to appoint a street commissioner for the period of "one year and until another is appointed and qualified in his stead."

In no place does it appear in the charter when such appointment is to be made, such appointment may therefore be made at any time in the direction of the board, immemorial custom or usage of preceding boards to the contrary notwithstanding.

15 Am. & Eng. Enc. Law, p. 1048; *Scott v. Rogers*, 31 N. Y. 676; *Scribner v. Hollis*, 48 N. H. 35; 27 Am. & Eng. Enc. Law, p. 798.

The mayor, who was *ex officio* presiding officer, under § 17 of the charter, failed in his duty, as such, in refusing to place the Waterhouse resolution of repeal before the meeting; he was the servant of the meeting, not its master. His position did not empower him to arbitrarily cast aside any resolutions germane to the powers and duties of 44 L. R. A.

the board. His duty to the board was to be patient and obedient; to be the instrument through which its desires were to be manifested, and to give utterance to its will.

Cushing, Law & Practice of Legislative Assemblies, §§ 294-319; *Dingwall v. Detroit*, 82 Mich. 568.

There is no rule of law forbidding the majority, in parliamentary bodies, to impliedly suspend or repeal any or all rules of their own making, or of parliamentary usage, by taking action either inconsistent with or forbidden by such rules or usage. Every public body has a right to disregard its own rules when no vested interests are affected thereby.

Hough v. Bridgeport, 57 Conn. 290; Cushing, Law & Practice of Legislative Assemblies, §§ 794, 1478; *State, Cole, v. Chapman*, 44 Conn. 601; *People, Locke, v. Rochester*, 5 Lans. 15; *State, Rylands, v. Pinkerman*, 63 Conn. 191, 22 L. R. A. 653; *Com. v. Lanooster*, 5 Watts, 156; 1 Beach, Pub. Corp. §§ 296-300; *Bennett v. New Bedford*, 110 Mass. 437.

Mr. Pierce not only had the active consent of a majority of the members of the board to act as chairman repealing the rules, but the passive consent of Mr. Somers, the president of the board, who by his silence throughout the proceedings fully assented to the acts of the majority.

Somers v. Bridgeport, 60 Conn. 527.

Andrews, Ch. J., delivered the opinion of the court:

The information charges that the defendant has usurped, and that he still does usurp, the office of street commissioner of and for the city of Bridgeport. The defendant admits that he holds and occupies the said office, but he denies that he has at any time usurped the same. On the contrary, he insists that he was duly and legally elected to that office, and that, therefore, he may rightfully have, use, and enjoy the powers, privileges, and duties pertaining to the same. In substance, the question upon which the advice of this court is asked is this: Was the defendant lawfully elected to the office of street commissioner of the city of Bridgeport at the time and by the proceedings which are set forth in the finding? In answering this question, some subsidiary questions must be considered.

"An important feature of the law governing quo warranto informations, and one which most distinguishes this remedy from ordinary civil actions at law, is that the prosecutor is not obliged to show title in himself, to sustain the action, or to put the respondent upon the necessity of proving his title and the principle is well established that the burden rests upon the respondent of showing a good title to the office whose functions he claims to exercise, the state being only obliged to answer the particular claim of title asserted. . . . In proceedings in the nature of a quo warranto, the object being to test the actual right to the office, and not merely a use under color of right, it is incumbent upon the respondent to show a good legal title, and not merely

a colorable one, since he must rely wholly on the strength of his own title. If he fails in this requirement, judgment of ouster will be given." High, Extr. Legal Rem. § 629: *State, Rciley, v. Chatfield*, 71 Conn. 104; *People, Judson, v. Thatcher*, 55 N. Y. 525, 14 Am. Rep. 312; *People, Smith, v. Pease*, 30 Barb. 501. The city of Bridgeport is a municipal corporation created by its charter. Its charter is its enabling act, and indicates the full measure of its powers. *Farrell v. Winchester Ave. R. Co.* 61 Conn. 127. It can exert its powers only in the manner authorized by its charter. *Head v. Providence Ins. Co.* 2 Cranch, 127, 2 L. ed. 229. The city can do no act nor elect any officer, except it is authorized to do so by its charter. If the charter points out a particular way in which any act is to be done, or in which an officer is to be elected, then, unless these forms are pursued in the doing of any act, or in the electing of any officer, the act or the election is not lawful. In all such cases the form of the appointment is essential to its validity. *Forma dat esse rei. Farrell v. Bridgeport*, 45 Conn. 191; *Johnston v. Allis*, 71 Conn. 217; *New Haven v. Whitney*, 36 Conn. 373; *District of Columbia v. Bailey*, 171 U. S. 178, 43 L. ed. 126.

The charter of the city of Bridgeport provides for certain administrative boards. One of these is the board of public works, to consist of six members named by the mayor. And the charter prescribes that the mayor shall, *ex officio*, be a member of said board, but shall have no vote, except in case of a tie, and that "he shall preside at all its meetings at which he is present." These provisions of the charter make the mayor an essential constituent of the board, and assign to him by express command, the duty to preside at all its meetings at which he is present. If, being present at any meeting, he does not preside, then the board is not organized in the manner pointed out by the charter: and, although all the members should be present, if the mayor, being present, does not preside, it would be but an irregular assemblage of persons, unknown to the charter, and whose act, however formally gone through with or however carefully written out, would have no validity to bind the city, or to give title to any appointee. That this is the law is made clear by the authorities we have cited. The ordinances and rules made pursuant to the authority given in the charter provide for the office of a street commissioner, to be elected by the board of public works. The proceedings of that board by which the defendant claims to have been elected to the office he holds are set forth at some length in the finding. They show a meeting of the members of the board at which the mayor was present and willing to preside,—indeed, at which he sought to preside,—but that certain members of the board acted irregularly, in open and persistent disobedience to the authority and rights of the mayor as the presiding officer of the meeting, and, against his protest, pretended to pass and to announce the result of certain votes. It was one of the votes of these members while so acting irregularly that was given to the de-

fendant, and by which alone he can claim to be elected. As to these votes, the proceedings recited show that the mayor did not act as presiding officer at all. He did not put the question. He did not declare the result. As to these votes, the persons who took part in them were not acting according to the forms nor within the powers conferred by the charter on the board of public works. In the case of *Farrell v. Bridgeport*, 45 Conn. 191, this court decided that in the appointment of a policeman, where the forms and steps prescribed by the charter had not been observed, there was no valid appointment. The office of street commissioner is not of less importance than that of policeman. In either case it is a question of charter power. What the charter commands must be obeyed, or the appointment is void. In the claimed election of the defendant the provisions of the charter were not obeyed. It seems to this court that the defendant was not appointed to the office of street commissioner of the city of Bridgeport according to the provisions of the charter of that city.

Counsel for the defendant, in their argument in this court, pass over the charter powers of the board of public works entirely. They treat the case as one depending alone on parliamentary law or parliamentary usage. They say that because the mayor, as the presiding officer of the board, declined to entertain the motion made by Mr. Waterhouse, any member might put the motion and declare the result, and that the action so taken is lawful and binding on the board, to the same extent as if the motion had been put by the presiding officer. They make a somewhat high-sounding talk to the effect that the presiding officer of any deliberative board or assembly is the servant of the body over which he presides, and not its master, and that, if a presiding officer attempts to dominate the assembly or to thwart its will, then any member may act in the place of the president. As an abstract proposition, perhaps no one would care to question it. So far as the facts in this case appear, there is no occasion to admit it or deny it. If such right exists, it is analogous to the right of revolution,—a right to be exercised only when all peaceful and regular methods have been tried and exhausted. Every presumption must be in favor of regular action, and against irregularity. Action which violates the regular rules of law can never be said strictly to be lawful. Such action is acquiesced in when a case of overmastering necessity is shown, or when fundamental rights are endangered. Nothing of that kind appears in the present case. Nothing is shown to indicate that the mayor, as presiding officer, intended or desired to do anything contrary to the will of the board. In declining to entertain the motion made by Mr. Waterhouse, and in sustaining the point of order made by Mr. Downer, he was acting very clearly within the lines of his duty and powers as the presiding officer. His good faith is to be presumed. In every assembly, small or large, which is governed by parliamentary law, there will be questions of order. These must be, in the first in-

stance, decided by the presiding officer. In every such assembly, when a motion is made, it is the duty of the presiding officer to decide whether or not it is in order. If he deems it to be in order, he entertains it, and proceeds to lay it before the assembly in a proper way. If he deems it to be not in order, he declines to entertain it. This is just what the mayor did. He decided the question of order raised by Mr. Downer. Such a decision must be made by the presiding officer, subject to the right of appeal therefrom by any member. "When a question of order is raised, as it may be by any one member, it is not stated from the chair and decided by the assembly, like other questions, but is decided in the first instance by the presiding officer, without any previous debate or discussion by the assembly. If the decision of the presiding officer is not satisfactory, any one member may object to it, and have the question decided by the assembly. This is called 'appealing from the decision of the chair.' The question is then stated by the presiding officer on the appeal, namely, 'Shall the decision of the chair stand as the decision of the assembly?' and it is thereupon debated and decided by the assembly in the same manner as any other question, except that the presiding officer is allowed to take part in the debate, which on ordinary occasions he is prohibited from doing." Cushing, Parl. Law, § 154. In Mr. Cushing's larger work this same parliamentary law is stated in this way: "If the opinion [of the presiding officer] is acquiesced in, it stands as the judgment of the assembly, and is to be enforced or executed accordingly; but any member who obtains the floor for that purpose may appeal from it, and if the appeal is seconded, as it must generally be, and allowed, it then entirely abrogates the decision of the presiding officer, and refers the point of order to the decision of the assembly itself whose decision thereof furnishes the rule to be pursued afterwards." Cushing, Law & Practice of Legislative Assemblies, § 1464. The whole topic is treated in that work (part 6, chap. 6, art. 2, subtitle *Questions of Order*, §§ 1457-1471). At the meeting of the board of public works of the city of Bridgeport held on the 20th day of May, 1898, the mayor was present and willing to preside. If he did not preside, then the board was not organized as the charter commands. When, at that meeting, the mayor, as the presiding officer, ruled that the motion made by Mr. Waterhouse was not in order, and sustained the point of order raised by Mr. Downer, it was the privilege of Mr. Pierce, if he objected to that ruling, to appeal from it to the assembly. If, as is now contended, a majority of the board was of the same mind as Mr. Pierce, then on an appeal the decision of the presiding officer would have been reversed. Had that been done, it would have become the duty of the presiding officer to put the motion made by Mr. Waterhouse. To ap-

peal would have been regular and lawful. Not to appeal, but to take another course, was irregular and in violation of parliamentary law. It is the duty of the presiding officer of any assembly "to put to vote all questions which are regularly moved or necessarily arise in the course of the proceedings, and to announce the result." Cushing, Parl. Law, § 27. It is this duty which the charter of the city of Bridgeport commands its mayor to perform at every meeting of the board of public works at which he is present. If he does not do this, he does not preside in the manner which the charter prescribes. It is the opinion of this court that all the votes alleged to have been taken at the said meeting of the said board which were not put by the mayor, and the result of which he did not announce, are wholly void. They are void because they violate parliamentary law, and because they violate the commands of the charter of the city. And as the defendant offers no evidence of his election to the office of street commissioner, other than one of the votes so taken, we think he does not show a good title to that office. He is not entitled to exercise its powers or to receive its salary. *Farrell v. Bridgeport*, 45 Conn. 191.

The Superior Court is advised to render judgment of ouster against the defendant.

The other Judges concur, except **Hammersley, J.**, who dissents.

Hammersley, J., dissenting:

The charter authorized the board of public works to appoint a street commissioner. This appointment could be made at any time after the expiration of one year from the commencement of the term of the last appointee. The rules limiting an appointment to the month of June could not prevent a valid appointment in May. The charter puts no restriction on the mode of appointment, except that it shall be made at a meeting of the board where four members, exclusive of the mayor, are present, and shall receive the active, concurrent vote of four members. It appears by the record that the respondent was appointed street commissioner at a meeting when all the members were present, the mayor presiding, by the active, concurrent vote of four members. This record is not attacked, and is conclusive. It is immaterial, as affecting the validity of this appointment, what improprieties were committed by the presiding officer or other members prior to the action taken. The departure from or suspension of written or unwritten parliamentary rules, by the majority of an executive board, cannot affect its action, otherwise valid, duly ascertained and recorded. I totally dissent from the construction of the charter which gives the mayor power to prevent any action by the board of public works, by attending its meetings, and then refusing to put to vote all motions that may be made. Such power cannot be found in the charter.

KENTUCKY COURT OF APPEALS

City of OWENSBORO, Appt.,
v.

COMMONWEALTH of Kentucky, *ex rel.*
Samuel H. STONE, State Auditor, etc.

(.....Ky.....)

Public parks maintained at public expense, and buildings and appliances necessary to meet the demands of the fire department of a city, are within the terms of a constitutional provision exempting from taxation public property used for public purposes.

(*Guffy and White, JJ., dissent.*)

(January 18, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Daviess County in favor of plaintiff in a proceeding under Kentucky Statutes, § 4241, to have certain property of the defendant assessed for taxation. *Reversed.*

The facts are stated in the opinion.

Mr. J. A. Dean, for appellant:

Neither prior to nor since the adoption of the present Constitution was any of the property subject to taxation.

When the decision in the Duvall case was made the legislature had not spoken on the subject, and the decision in that case was based upon the general rule against taxing the instrumentalities of government as a matter of public policy. The rule of construction announced in that case was even then too narrow, and has been criticised by many of the leading courts and law writers of the country.

See Dill. Mun. Corp. §§ 773-775, and authorities cited; Cooley, Taxn. pp. 128, 129, 137, 172-174.

The legislature of the state then in session immediately took steps to abrogate the rule announced in that case.

The rule announced in *Louisville v. Com.* 1 Duv. 295, 85 Am. Dec. 624, is disregarded and in effect overruled by this court in *Greenwood v. Louisville*, 13 Bush, 226, 26 Am. Rep. 263; and *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260.

This doctrine is approved in Shearm. & Redf. Neg. § 265, and 2 Thomp. Neg. p. 735.

The enactment of the present Constitution and the tax laws under it do not change the rule, except, perhaps, to make it broader.

Covington v. Com. 19 Ky. L. Rep. 105.

Public parks were never taxed or any decision or authority holding them subject to taxation. In all decisions and authorities on the subject they are treated as necessary governmental functions for the promotion and protection of the public health and as worthy of encouragement rather than discouragement.

See Dill. Mun. Corp. § 598; Cooley, Taxn. pp. 128, 129, 137, 172-174; 17 Am. & Eng. Enc. Law, p. 412; *St. Louis v. Gorman*, 29 Mo. 593, 27 Am. Rep. 586.

NOTE.—As to what purposes are public for which public moneys may be used, see note to *Daggett v. Colgan* (Cal.) 14 L. R. A. 474.
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Messrs. W. S. Morrison and T. L. Karna
for appellee.

Paynter, J., delivered the opinion of the court:

This appeal involves the question as to the right of the commonwealth to compel the city of Owensboro to pay taxes upon property as follows, to wit: (1) The fire department property, including engine houses and grounds on which situated, fire engines, hose reels, hook and ladder wagons, hose, and necessary horses. (2) A public park of the city.

At the time the case of *Louisville v. Com.* 1 Duv. 295, 85 Am. Dec. 624, was decided, there was no statute defining what part of the property belonging to municipalities should pay tax, or what part should be exempt from taxation. The language of the statute then in force was so comprehensive as to embrace all property as taxable which belonged to municipalities. The court held that the law constructively applied to persons only, and not at all to public bodies exercising, in different degrees, the sovereignty of the state; and that "the city of Louisville, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized legislation and local administration of law are legislation and administration by Kentucky through the agency of that municipality." The court was of the opinion that the exception specified in the statute did not imply that municipal property, "used for public purposes of local government," was to be taxed, and adjudged that the property of the city of Louisville, "used for carrying on its municipal government," was exempt from taxation. In determining what property was constructively subject to, and what was exempt from, taxation under the statute, it said: "Whatever property, such as courthouse, prison, and the like, which became necessary or useful to the administration of the municipal government, and is devoted to that use, is exempt from state taxation; but whatever is not so used, but is owned and used by Louisville in its social or commercial capacity as a private corporation, and for its own profit, such as vacant lots, market houses, fire engines, and the like, is subject to taxation. If, however, as just indicated, the property owned by the city as a private corporation is not used for profit to the city, but is dedicated to charity, it is not constructively subject to taxation under any existing law." The effect of the opinion is that, under the statute, the court could not adjudge any property belonging to the municipality exempt from taxation except such as was used for charity, or used or needed for a governmental purpose, and the court concluded that enginehouses were not used or needed for that purpose. The opinion of the court in 1 Duv. 295, 85 Am. Dec. 624, is criticised by Dillon on Municipal Corporations, § 774, note 1, wherein it is, in effect,

said the exemption by implication should have extended to all the property of the city sought to be taxed. Cooley, Taxn. pp. 173, 174, likewise criticises the opinion by saying it limits the implied exemption unreasonably.

We recognize as just in part the criticism made by the learned authors. The case was decided in February, 1864, and at a time when the general assembly was in session. That body evidently was of the opinion that the court did not give the construction to the statute which the legislative department of the government intended it to have; for on the 22d of February, 1864, an act was approved which provides "that all property belonging to any city or town of this commonwealth, and which is necessary to the carrying on the government of such city or town, viz., police courthouses, mayor's offices, including offices for the various city or town officers in said buildings, fire engine houses, engines and horses belonging thereto, work houses, alms houses, hospitals, pest houses, together with the grounds belonging thereto, be and the same is hereby exempt from all taxation." By the express declaration of the act, engines and engine houses were necessary to carrying on the government of cities. This statute remained in force until the enactment of the "Hewitt Law," in which there was a clause for the exemption of property belonging to counties, cities, and towns in the following language, to wit: "Property owned in its entirety by counties, cities, and towns, which is necessary to carry on the government of such county, city, or town." Gen. Stat. ed. 1888, p. 1036. This provision remained in force until the adoption of the present Constitution, § 170 of which reads as follows: "There shall be exempt from taxation public property used for public purposes." From this section it must be determined whether or not the municipality must pay taxes upon the property mentioned.

It is hardly necessary to observe that a municipality is an arm of the state, an "effluence" from its sovereignty, and is an instrumentality by which the state seeks to give to its citizens the best government possible. The police force of a city is for the protection of the lives and property of the citizens of the state, but especially within the limits of the municipality, and the cost of maintaining it is paid at public expense. The firemen of a municipality are paid out of taxes levied for that purpose, and they are maintained to protect the lives and property of citizens of the commonwealth. The firemen of a city are just as essential to its safety and proper government as is its police force. The fire department can only be effective by having engines, engine houses, and appliances which are usual in meeting the demands on the department. The property of a city used in connection with its fire department is, in our opinion, public property, used for public purposes, and is necessary to its government. Hickman Park is a public park, maintained at public expense, not for profit, but for the public good. It is open to the rich and poor alike, whether they live

in or outside the city. The municipal authorities are charged with the duty of maintaining the public health, and, in the judgment of scientific men, it is essential to the public health that cities have and maintain parks, where the people can breathe wholesome air. People of this enlightened age justify the levying of taxes to maintain them. They are just as much public property, used for public purposes, as are the streets, and trees planted therein, and it would be just as proper and reasonable to tax the one as the other. The public have access to and enjoy both. In our opinion, the public park is public property, used for public purposes, and necessary to the proper government of a city. Besides, why should an "effluence" from the sovereignty pay taxes to it on property which is essential to the proper discharge of the duty imposed of maintaining the public health?

The judgment is reversed for proceedings consistent with this opinion.

Guffy, J., dissenting (Filed January 27, 1899):

The object of this action was to require the appellant to list certain property for taxation, as set up in the statement and pleadings mentioned. The judgment of the court below held that engine house No. 1, situated on the north side of Fourth street, and fronting 50 feet thereon, and running back by parallel lines about 60 feet, and which lies between St. Ann and Allen streets, in said city, of the value of \$1,000 for the years 1893, 1894, 1895, 1896, and 1897; and one lot known as "Engine House Lot No. 2," in the city of Owensboro, of the value of \$2,500, for each of said years; and also a parcel of ground situated about 2 miles south of said city of Owensboro, known as "Hickman Park," describing the same, and containing 23.73 acres, for said years, at the value of \$2,200 for each of said years; and also five horses, of the value of \$75 each, and also four mules, of the value of \$50 each, for said years; and two hose reels, of the value of \$155, and also one hose, of the value of \$500, and also one hook and ladder wagon, of the value of \$100, and also one chemical engine, of the value of \$500, for each of said years, —were all liable for the taxes claimed; and it was further adjudged that, in addition to the taxes hereinbefore set out, the appellant is liable for 20 per cent on the total amount of said taxes due, and the costs of this proceeding. From the aforesaid judgment this appeal is prosecuted, and the question presented for decision is whether the aforesaid property is liable to taxation under the laws of this commonwealth.

The majority opinion of this court holds that the engine house and the fixtures, and the park property, aforesaid, are all exempt from taxation, and assumes that the same is public property, used for governmental purposes. I dissent entirely from the conclusion reached by the majority opinion. The engine, etc., is nothing more or less than private property, used for the exclusive benefit of the citizens of Owensboro, and is in no sense used for governmental purposes. From

the pleadings in this case, it is clear that the park is the exclusive property of the city of Owensboro, and used as a luxury and convenience for the people of Owensboro. It may be that the public have access to the same, but such access is manifestly subject to the will of the city of Owensboro, and, at most, can only be said to be a convenience or luxury to those enjoying the same, and is in no sense property used for public purposes. It seems to me that the majority opinion in this case is in conflict with all the former decisions of this court upon the question under consideration. In the case of *Covington v. Com.*, 19 Ky. L. Rep. 105, this court said: "The commonwealth of Kentucky brought this action to recover possession of a tract of land held and claimed by the city of Covington, upon which had been erected waterworks. The facts upon which the right of recovery is based are, as stated in the petition, that, the city of Covington having failed to pay the state and county taxes due on said property for 1895 at the assessed value, it was, in December, 1895, duly and legally offered for sale by the sheriff, who, no other person bidding, purchased it for the commonwealth at the price of \$2,189, sum of taxes unpaid. It is stated in the answer as defense that, for reasons set forth, said property was exempt from all taxation, and consequently the assessment and sale, under which the commonwealth now claims title and right of possession, were illegal and invalid. To that answer a demurrer was sustained, and judgment rendered in favor of the commonwealth for a writ of possession; but, as recited in the judgment, counsel agreed the only question they wished decided is whether the property in question is liable to state tax. The grounds upon which are based the claim of the city of Covington to exemption of the property from taxation are as follows: (1) That a provision is contained in 'An Act to Amend the Charter of the City of Covington,' approved May 1, 1886, in these words: 'Said reservoir or reservoirs, pumping house, machinery, pipes, mains, and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from state, county, and city taxes.' In *Louisville v. Com.* 1 Duv. 295, 85 Am. Dec. 624, where the question arose as to exemption from taxation of various articles of property owned by that city, a distinction was expressly recognized between property owned and used for public purposes of a local government, or used in carrying on a municipal government, and property used, not for that purpose, but only for the convenience or profit of its citizens, individually or collectively. And in *Com. v. Makibben*, 90 Ky. 384, where, the question being whether the waterworks property of the city of Newport was, in pursuance of a special act to that effect, exempt from taxation, it was held not to be so, because not necessary or used to carry on the municipal government as a political power, but held and used merely for convenience and profit of its citizens. Immediately following that case is the case of *Clark v. Louisville Water Co.* 90 Ky. 515, where the same question arose, 44 L. R. A.

and for the same reason it was held an act exempting from taxation the property of the Louisville Water Company was in violation of the Constitution, and, moreover, that the fact that the water company might incidentally protect public buildings of the state and city did not have the effect to validate the statute. (2) It is argued that as upon the faith and in pursuance of the special statute of May 1, 1886, the city of Covington, by taxation of the property of its citizens, purchased the land, and erected thereon the waterworks in question, at great expense, it has acquired a contract right to the exemption now claimed; but it seems to us, if the general assembly was, as we think, without constitutional authority to make the contract, assuming one was made, it is not nor could be valid or enforceable. Besides, by general statute enacted February 14, 1856, and continued in force to the present time, the special act under which the exemption is now claimed, and all others like it, were rendered subject to repeal at the will of the general assembly. And thus we come to consider the third ground upon which the exemption is claimed and that involves the inquiry whether § 170 of the present Constitution, and the statute passed in pursuance of it, operated to repeal or continue in force that part of the special act of May 1, 1886, which exempts said waterworks property from taxation. The subject of § 170 is 'Revenue and Taxation,' and so much of it as applies to this case is in these words: 'There shall be exempt from taxation public property used for public purposes.' It was followed by necessary statutory enactments, which, however, could neither curtail nor enlarge exemption from taxation as prescribed by the Constitution. And accordingly, in § 4026, Ky. Stat. adopted for the purpose of carrying out the provisions of § 170, is the identical language we have quoted. As it was manifestly intended, by both the Constitution and statute, to make subject to taxation all property not thereby, in express terms, exempted, it results that, unless the waterworks property of the city of Covington be, in language or meaning of § 170, 'public property used for public purposes,' it must be held, like similar property in other cities, subject to taxation, and the special act of May 1, 1886, stands repealed. Assuming, as a reasonable and beneficial rule of construction requires done, that the phrase 'for public purposes' was intended to be construed and understood according to previous judicial interpretation and usage, there can be no doubt of the proper meaning and application of it; for in the cases cited, and others where the question of subjecting particular property of cities to taxation arose, the words 'for public purposes' had been held by this court to mean, in that connection, the same as the words 'for governmental purposes'; and so property used by a city for public or governmental purposes was held to be exempt, while that adapted and used for profit or convenience of the citizens, individually or collectively, was held to be subject to taxation; and, recognizing and applying that distinction, waterworks property

of a city had been invariably treated by this court as belonging to the latter class, and, consequently, subject to state and county taxation."

It is perfectly manifest that the engine house and appurtenances are for the exclusive benefit of the citizens of Owensboro, and in no sense used for governmental purposes, any more than the appliances or conveniences, resorted to by an individual citizen of any county or neighborhood, which he might procure to protect his property from destruction by fire; and it would hardly be contended that an engine house, and the necessary appurtenances, which add to the value of a farm, were exempt from taxation.

So far as the park is concerned, it is exclusively for the social and personal convenience and enjoyment of the parties entitled thereto, and cannot, in any sense, be said to be for governmental purposes, and, so far as this record shows, is the absolute property of the municipality of Owensboro, subject to be sold for any purpose that the municipality may desire to sell it, and is no more entitled to exemption from taxation than a park or pleasure ground of any other citizen of the state. The fact that it may be said to be owned by several thousand people can no more exempt it from taxation than the property of a number of farmers, which in like manner is owned by them. The effect of the majority opinion is to require the citizens of the state at large to pay for a park to be enjoyed by the citizens of Owensboro and such other persons as may be allowed access thereto; because the exemption of that property from taxation necessarily requires an increase of taxation upon the other property of the state that is held liable for taxes. It seems to me that the majority opinion is in direct conflict with the decisions of this court in the following cases, to wit: *Louisville v. Com.* 1 Duv. 295, 85 Am. Dec. 624; *Com. v. Makibben*, 90 Ky. 384; *Clark v. Louisville Water Co.* 90 Ky. 515; *Cooley, Taxn.* p. 482; *Com. v. Masonic Temple Co.* 87 Ky. 349; *Louisville v. Louisville Bd. of Trade*, 90 Ky. 409, 9 L. R. A. 629; *Barbour v. Louisville Bd. of Trade*, 82 Ky. 645; *Covington v. Com.* 19 Ky. L. Rep. 105; *Roberts v. Louisville*, 92 Ky. 95, 13 L. R. A. 844.

The question of streets or sidewalks is not at all analogous to the property in question. Public streets and public passways are well known to be essential to governmental purposes, as affording means of ingress and egress to and from public places; and it has

ever been the law that a street or public highway is alike dedicated to public use, and beyond the power of any corporation or municipality to restrict the use of the same, or to deprive anyone from access to and from the same. But in the case at bar the engine house and the appurtenances and the park are the exclusive property of the municipality of Owensboro, and of necessity are under the exclusive control of the municipality, which is, in effect, a corporation. They are not used, and cannot be used, for the suppression of crime, nor the punishment for a violation of any statute law, nor the redress of any individual grievance, nor the enforcement of individual rights or remedies. "Governmental purposes" can only mean, in its most extensive sense, the punishment for crime, for prevention of wrong, the enforcement of a private right, or in some manner preventing wrong from being inflicted upon the public, or upon an individual, or redressing some grievance, or in some way enforcing a legal right, or redressing or preventing a public or individual injury. I am utterly unable to see that the engine house or the park is necessary to accomplish any of the foregoing objects. In fact, it is palpable that they do not contribute in any degree thereto. Section 170 of the Constitution only exempts "public property" from taxation, and, as I understand that term, has always been construed by this court to mean such property as is used necessarily "for governmental purposes." If we are to construe the word "public" to mean all property that the public have unrestricted access to, without charge, then every railroad depot must be exempt from taxation, because depots are used for public purposes, the public having free access to the same without any charge therefor; and the same may be said of various other articles of property that are owned by corporations, but are free to the public. The majority opinion makes no reference as to whether the mules involved in the action should be taxed or not, and I am unable to determine, from the opinion in this case, what is now the status of the mules in reference to taxation, and, inasmuch as they are "without pride of ancestry or hope of posterity," I will leave them as I find them; but I earnestly dissent from all that part of the majority opinion which holds the engine house and appurtenances thereto and the park property exempt from taxation.

White, J., concurring.

MARYLAND COURT OF APPEALS.

Arthur V. MILHOLLAND, Exr., etc., of
Elizabeth O'Neill, Deceased, Appt.,
v.

Mary WHALEN.

(.....Md.....)

A deposit in a savings bank in trust

NOTE.—As to the effect of depositing money in a bank in trust for third person, see *Cunningham v. Davenport* (N. Y.) 32 L. R. A. 373, and 44 L. R. A.

for the owner of the money and another person as joint owners, subject to the order of either, and the balance at the death of either to belong to the survivor, constitutes a valid declaration of trust, which transfers to the trustee the legal title for the benefit of the survivor as to the balance of the

note; also *Bath Sav. Inst. v. Hathorn* (Me.) 32 L. R. A. 377. See also *Whalen v. Milholland* (Md.) *post*. 208.

fund remaining in bank at the death of either, even though the settlor retains possession of the bank book.

(March 16, 1899.)

APPEAL by the executor of the donor from a decree of the Circuit Court of Baltimore City rendered upon an interpleader bill by a savings bank to determine the rights of claimants to a fund held by it which awarded the fund to an alleged donee. *Affirmed.*

The facts are stated in the opinion.

Messrs. James McColgan and Charles W. Milholland for appellant.

Messrs. Willis & Homer, for appellee:

To the creation of a trust in either the donor himself or in another it is unnecessary that there should be a delivery of the trust property to the donee.

Cox v. Hill, 6 Md. 274; 1 Lewin, Tr. *109.

The trust created in this case is in conformity with the requirements of law.

Maccubbin v. Cromwell, 7 Gill & J. 157.

No particular phrase or form is necessary to the creation of a trust.

Morry v. Michael, 18 Md. 227; *Baltimore Retort & Fire Brick Co. v. Mall*, 65 Md. 93, 57 Am. Rep. 304.

Metropolitan Sav. Bank v. Murphy, 82 Md. 314, 31 L. R. A. 454, is conclusive of this cause.

Lazear v. National Union Bank, 52 Md. 78, 36 Am. Rep. 355; *Warren Glass Works Co. v. Keystone Coal Co.* 65 Md. 547.

McSherry, Ch. J., delivered the opinion of the court:

This is another savings bank deposit case, but it is unlike any of the numerous ones that have preceded it. The facts are few and simple. Elizabeth O'Neill, on the 24th day of April, 1895, opened an account in the Metropolitan Savings Bank. In the pass-book which she then received, the following entry appears: "Metropolitan Savings Bank, in account with Miss Elizabeth O'Neill. In trust for herself and Mrs. Mary Whalen, widow, joint owners, subject to the order of either; the balance at the death of either to belong to the survivor." This entry was made at the instance and upon the request of Miss O'Neill, and the teller of the bank testified that "the entry as it appears in this book carried out . . . and embodies the instructions given . . . at the time the account was opened."

There is a by-law of the bank which provides that "every deposit made by one person for the benefit of another person shall be expressed to be 'in trust,' and no deposit shall be received, or to be expressed to be received, from one person 'by' another person, or by one person 'for' another person." The bank-book was retained by Miss O'Neill. The aggregate of the deposits foots up to \$2,323.40. There was drawn out by Miss O'Neill in varying amounts, during her life, the sum of \$520; and, after the death of Miss O'Neill, Mrs. Whalen withdrew \$125. There are two claimants of the balance now on deposit, viz.: Mrs. Whalen and Miss O'Neill's execu-

tor. Upon a bill filed by the bank they have been required to interplead. On this state of facts the law is well settled.

"Where a person intends to give property to another, and vests that property in trustees, and declares a trust upon it in favor of the subject of his bounty, by such acts the gift is perfected, and the author of the trust loses all dominion over it; and in such gifts of mere personal estate the declaration of trust may be made and proved by parol, without the aid of writing. And the cases go the length of maintaining that where the author of the gift retains the legal dominion over the subject of the gift in himself, but fully and completely declares himself to be trustee of the property for the purposes indicated, there he will be treated as trustee, and the object of his bounty will be given the benefit of the trust. In all such cases the declaration of trust is considered in a court of equity as equivalent to an actual transfer of the legal interest in a court of law; and if the transaction by which the trust is created be complete, it will not be treated as invalid for want of consideration." *Taylor v. Henry*, 48 Md. 559; *Kilpin v. Kilpin*, 1 Mvl. & K. 520; *M'Fadden v. Jenkins*, 1 Phil. Ch. 153; *Cox v. Hill*, 6 Md. 274; *Smith v. Darby*, 39 Md. 268.

In *Jones v. Lock*, L. R. 1 Ch. 25, Lord Cranworth observed: If a man chooses to give away anything which passes by delivery he may do so, and there is no doubt, in the absence of fraud, a parol declaration of trust may be perfectly good, even though it be voluntary. If I give any chattel that, of course, passes by delivery, and if I expressly or impliedly say I constitute myself trustee of such and such personal property for a person, that is a trust executed, and this court will enforce it, in the absence of fraud, even in favor of a volunteer. . . . The authorities all turn upon the question whether what took place was a declaration of trust or merely an imperfect attempt to make a legal transfer of the property. In the latter case the court will afford no assistance to volunteers; but when the court considers that there has been a declaration of trust, it is a trust executed, and the court will enforce it whether with or without consideration.

There are many cases to be found in the reports where these familiar principles have been applied to deposits in savings banks. We will allude to some of them, not because they make the principles any more obvious, but because they furnish illustrations of the application of those principles to just such contentions as this litigation presents.

It will be observed that the bank is not, by the terms of the deposit, made the trustee, and we have, therefore, no question confronting us as to the power of a co-operation to act in that capacity. The contract between Miss O'Neill and the bank as evidenced by the words of the entry and as understood by her, according to the testimony in the record, constituted Miss O'Neill the trustee; and, if effective at all, operated to divest the

title to the money out of her individually, and to vest it in her as trustee for the purposes expressed.

According to all the cases, if she intended to accomplish this result, it was perfectly competent to her to do it, and to do it in that way; and when done it constituted a complete change in the ownership of the money. Her intention to do precisely what was done is not left in doubt, for the testimony of the bank's teller is clear and emphatic that the entry represents exactly and literally what Miss O'Neill desired to consummate. Such a declaration of trust differs widely from a gift *inter vivos* and from a *donatio mortis causa*. These, to be effective at all, require a delivery of the thing itself, and must pass the whole title, so that the donor can have no further dominion or control over it; but a gift in trust withholds the legal title from the donee. The legal title may be transmitted to a third person, or it may be retained by the donor, but in either case the equitable title has gone from him, and unless the declaration of trust contains a power of revocation it leaves him powerless to extinguish the trust. *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 32 L. R. A. 377.

In the application of the principles we have just stated to deposits in savings banks there have been some divergence of views, but no dispute as to the principles themselves. There is one line of cases which holds that to perfect the trust knowledge of the deposit must be communicated to the beneficiary; whilst the opposite line holds the deposit to be sufficient of itself, as a declaration of trust, to vest the beneficial interest in the *cestui que trust*, if that was the intention of the depositor. But it can, upon principle, make no possible difference whether the depositor communicates the fact of the deposit to the beneficiary or not (except in so far as the communication may be evidence of the intention with which the deposit was made) for the validity of the trust does not depend on the assent of the *cestui que trust*, but wholly upon the intention of the depositor and apt declaration of the trust.

The distinction between these two lines of cases is not a difference of principle. The cases of the first group hold that notice of the fact of the deposit to the beneficiary is necessary evidence of the creation of the trust, as contradistinguished from an act necessary to be done to create the trust; whilst the other cases treat the entry itself, or any other competent evidence of the existence of the intention to establish a trust, as sufficient, even though the beneficiary be in total ignorance of it. It is, at most, a difference as to the quality of the evidence needed to prove the trust, not a difference as to the method by which such a trust may be created. In Maryland it is not requisite that the *cestui que trust* should be notified of the declaration or establishment of the trust. *Smith v. Darby*, 39 Md. 278. It is the donor's act which originates the trust, and it is the intention with which he does the act that is material. The entry unexplained is a sufficient declaration of trust, because

it indicates an intention to establish a trust; but this may be rebutted.

Possession by the depositor of the bank book in no way detracts from the force of the entry; because it is a possession by the trustee, and does not denote that no beneficial interest had been given to the *cestui que trust*. *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69. If the delivery of the money to a bank to be placed to the credit of the depositor in trust for another, and the declaration of the trust as evidenced by the entry made pursuant to the settlor's instructions, constitute and evidence a valid trust, then no act of the depositor in subsequently withdrawing the money can affect the rights of the *cestui que trust*, unless the power to withdraw be reserved.

In *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446, the account as opened was: "The Citizens' Savings Bank in account with Susan Boone, in trust for Tillie Willard." The account was opened in 1866 and the depositor retained possession of the bank-book until her death in 1875. The beneficiary was not informed of the existence of the account. It was held that such a transaction, unexplained, and followed by the death of the depositor with the account still open, created a valid trust. And so in *Willis v. Smyth*, 91 N. Y. 297. In *Savre v. Weil*, 94 Ala. 460, 15 L. R. A. 545, it was held that a trust is complete and irrevocable where a person makes a deposit of money in bank to the credit of himself as trustee for certain children named, and that nothing remained to him but a mere naked legal title.

In *Re Gaffney*, 146 Pa. 49, the facts were that Hugh Gaffney deposited \$560 in the Johnstown Savings Bank in his name in trust for Polly McKim, and the supreme court of Pennsylvania said: "We have, then, the case of a deposit on the books of the bank of a sum of money in the name of Hugh Gaffney, trustee for Polly McKim. This makes out at least a *prima facie* case for the appellant. Upon the face of the bank book the money belonged to Polly McKim and there is not sufficient upon the record to rebut this presumption." In *Gerrish v. New Bedford Inst. for Sav.* 128 Mass. 159, the facts were as follows: A, after depositing the maximum amount allowed by the bank, placed other sums in the name of himself, as trustee for his son and his granddaughter. He retained the pass books and during his life collected the interest.

The son and granddaughters offered to prove that A had said to them at various times "that he had put this money in the bank for them, but he wanted to draw the interest during his lifetime, and after he was gone they were to have the money." It was held that the evidence was admissible, and that upon all the evidence a jury would be justified in finding that A had fully constituted himself a trustee for the claimants. See the very full notes to *Cunningham v. Davenport*, 147 N. Y. 43, 32 L. R. A. 373; and 21 Am. & Eng. Enc. Law, 735; 27 Am. & Eng. Enc. Law, 61, and the numerous cases in note 2, 18 Am. Law Rev. 379.

Without multiplying illustrations, or overburdening this opinion with further references, those just given suffice to show that such a deposit as we are now dealing with constitutes a valid declaration of trust, in the absence of contravening proof; and that when a trust is thus created the rights of the beneficiary become fixed, even though the settlor retains the bank book in his possession. Nor does the circumstance that the depositor makes himself a beneficiary jointly with another prevent the trust from attaching to the fund. A trust is not rendered void by the appointment of a beneficiary as trustee. 1 Perry, Tr. § 297; *Woods v. Woods*, 1 Myl. & C. 401; *Crockett v. Crockett*, 1 Hare, 451, 2 Phill. Ch. 553; Hill, Trusts & Trustees, p. 65, note 1; *Story v. Palmer*, 46 N. J. Eq. 1; *Rogers v. Rogers*, 18 Hun, 409.

We have, then, a valid declaration of trust impressed upon the funds in bank, and the bank holding them, not as trustees, but for the trustee, with knowledge of the conditions of the trust. The trustee was seised of the money for the use of herself and her sister, as joint owners of the equitable interest; and both were authorized to draw the funds upon producing the bank book. This is not all. The declaration of trust transferred to the trustee the legal title for the benefit of the survivor of the two *cestui que trust*, as to the balance of the fund remaining in bank at the death of either. By the terms of the declaration of trust, upon the death of Miss O'Neill, the balance on deposit became Mrs. Whalen's property, not by a gift and delivery of the bank book, nor by the right of survivorship as one of two joint owners, nor by a gift of the funds, *inter vivos*; but purely and exclusively because the trust as declared in 1895, stripped Miss O'Neill of her individual ownership of the money, and vested the money in her in trust, as to this balance, for Mrs. Whalen, if the latter happened to outlive Miss O'Neill. The statute of uses, 27 Henry VIII., chap. 10, has no application to this case, and the title to the funds is unaffected by the operation of that enactment. "When a trust has been created in personality, and all the purposes of the trust have ceased, or are at an end, the absolute estate is in the person entitled to the last use." *Denton v. Denton*, 17 Md. 407.

What obligations or liabilities, if any, the bank, as custodian of the fund, assumed by accepting the deposit upon the trusts declared; or how far it would be accountable to the *cestui que trust*, if it knowingly participated in the disposition or waste of the trust funds, or an appropriation of them to a purpose foreign to the trust, are questions not now before us, and a discussion of them is not required in disposing of the conflicting claims of the parties to this controversy.

Miss O'Neill had the power to fasten a trust on her own property for the benefit of herself and another where the rights of creditors were not interfered with; and she could lawfully do this and retain in her own possession the evidence of her having done it. *Carson v. Phelps*, 40 Md. 73. That she knowingly, and with a full appreciation of 44 L. R. A.

what she was about, did create and declare this trust, is confessedly clear; and there is no rule of law which forbids its enforcement when thus satisfactorily established, and when no superior claims of creditors are invaded.

Our conclusion, founded on well-recognized legal principles and on carefully considered judicial precedents, is that Mary Whalen, as *cestui que trust*, is entitled to the fund on deposit in the Metropolitan Savings Bank; and as the decree appealed from awarded that fund to her, it will be affirmed.

Decree affirmed, with costs in this court and in the court below to be paid by the executor of Miss O'Neill out of her estate.

Mary WHALEN, Appt.,

v.

Arthur V. MILHOLLAND, Exr. etc., of Elizabeth O'Neill, Deceased.

(.....Md.....)

1. No perfected gift is made of a savings-bank deposit by depositing it in the names of donor and donee, making it payable to the order of either or to the survivor, and by the words "Joint owners" stamped on the pass book, where the donor continues in possession of the pass book, and therefore retains dominion over the funds, with the right at any moment to withdraw the whole of it.
2. A gift of savings-bank deposits is made by delivery of the pass book from the donor to the donee, describing them as joint owners, and making the money payable to the order of either, or the survivor, when it is done with the intention of donating the fund and preserving no control over it.
3. The evidence to establish a gift must be explicit and convincing in support of every element needed to constitute a valid donation.

(March 16, 1899.)

A PPEAL by the alleged donee from a decree of the Circuit Court of Baltimore City awarding to the executor of the donor a fund consisting of a savings-bank deposit alleged to have been given to the donee, which was rendered upon an interpleader bill by the bank to settle the respective rights of the claimants. *Affirmed*.

The facts are stated in the opinion.

Messrs. Willis & Homer, for appellant:

The money is deposited so as to give both to the decedent and to the appellant absolute power over the funds deposited, according as one or the other had actual possession of the book of deposit, and when, therefore, the depositor of the money, Elizabeth O'Neill, the decedent, transferred and delivered to the appellant the possession of said books, she completed beyond the power of recall the gift to her of the funds deposited.

Pennington v. Gittings, 2 Gill & J. 208; *Brantley's Notes on Gifts*; *Hitch v. Davis*, 3

NOTE.—See also *Milholland v. Whalen* (Md.) ante, 205, and footnote thereto.

Md. Ch. 266; *Nickerson v. Nickerson*, 28 Md. 327; *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; *Conser v. Snowden*, 64 Md. 175, 39 Am. Rep. 368; *Dougherty v. Moore*, 71 Md. 248; *Gorman v. Gorman*, 87 Md. 338.

The entry in the case at bar is, "Joint owners. Payable to the order of either or the survivor," and not as in *Taylor v. Henry*, "Joseph Henry and Mary Henry, his mother, and the survivor of them, subject to the order of either."

Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 486.

Messrs. James McColgan and Charles W. Milholland for appellee.

McSherry, Ch. J., delivered the opinion of the court:

The controversy in this case grows out of a savings bank deposit. There are two claimants of the fund. The savings bank filed a bill of interpleader making them parties. The contest is, consequently, confined to them.

It is undisputed that on and prior to May 6, 1891, Elizabeth O'Neill had on deposit to her own credit in the Savings Bank of Baltimore the sum of \$2,100.42. And it is equally beyond contention that this money belonged to her and to no one else. On that day she closed the account, and the same money was, at once, entered to the credit of Elizabeth O'Neill and her sister, Mary Whalen. Whether the money was really drawn and redeposited does not appear; but as such a course was wholly unnecessary to effect the change actually made, it is highly probable that it was not resorted to. The entry as it now stands in the deposit or pass book is in these words: "Elizabeth O'Neill and Mary Whalen. Joint owners. Payable to the order of either or the survivor." When this account was opened on May 6, it read: "Elizabeth O'Neill and Mary Whalen. Payable to the order of either or the survivor," but later on the words "Joint owners" were added, when that form was adopted by the bank.

Both of these entries were placed on the deposit or pass book by a stamp. There is nothing whatever in the record to show when the words "Joint owners" were stamped upon the pass book, and not the slightest suggestion that they were placed there with Miss O'Neill's knowledge or consent. She could not read and there is no evidence tending to show that she knew the words "Joint owners" were there. After the account was opened she added by deposits and accrued interest the sum of \$1,003.36 and she drew out amounts aggregating \$638.05. She retained possession of the pass book from the opening of the account up to the time of her decease, unless the contention of Mrs. Whalen that it was delivered to her a few hours before her sister's death, is well founded.

Miss O'Neill died in September, 1897, leaving a last will and testament. Mr. A. V. Milholland is named as the executor therein. Mary Whalen claims the funds in dispute, and she claims them under the terms of the deposit and by virtue of an alleged delivery

of the pass book, whilst, on the other hand, the executor of Miss O'Neill insists that they are payable as assets of her estate.

Starting with the concession, or if not with the concession with the indisputable fact, that prior to the deposit of May 6 the money in controversy was the property of Miss O'Neill, there is no escape from the conclusion that it continued to be hers, and now forms part of her estate if she did not act by which she parted with that ownership. There is no pretense that anything evidences a surrender by Miss O'Neill of her interest and estate in this money, other than the entry in the pass book and the alleged delivery of that book, or both combined.

This court has frequently had occasion to consider cases growing out of similar deposits. There ought not now to be, even if there ever was, any uncertainty about the legal principles which should control the decision of such a controversy. The money being the property of the depositor, the fundamental question always is: Has a valid and effective gift been made of it to another? To make a gift perfect and complete, there must be an actual transfer by the donor of all right and dominion over the thing given: and there must be an acceptance by the donee or by some competent person for him. In addition to this it is essential to the validity of such gift, that it should go into effect, or, in other words, transfer the property, at once and completely; for if it has reference to a future time when it is to operate as a transfer, it is nothing more than a promise without consideration, and cannot be enforced either in law or in equity. Until the gift is legally perfect and complete, a *locus penitentiae* remains, and the owner may make any other disposition of the property that he or she may think proper. *Taylor v. Henry*, 48 Md. 557, 30 Am. Rep. 486; *Gorman v. Gorman*, 87 Md. 338; *Pennington v. Gittings*, 2 Gill & J. 208; *Murray v. Cannon*, 41 Md. 476; *Dougherty v. Moore*, 71 Md. 249. "There is no case," said Gibbs, Ch. J., "which decides that the donor may resume the possession and the donation continue." *Bunn v. Markham*, 7 Taunt. 224.

It needs no discussion, especially since the decision of the cases of *Taylor v. Henry*, 48 Md. 557, 30 Am. Rep. 486, and *Dougherty v. Moore*, 71 Md. 249, to show that the entry as originally made, viz.: "Elizabeth O'Neill and Mary Whalen, payable to the order of either or the survivor," is wholly insufficient to effect a transfer and delivery of the funds to Mrs. Whalen, or to place them beyond the power of Miss O'Neill to reclaim. The deposit in the names of Miss O'Neill and Mrs. Whalen, was payable to the order of either or the survivor. Miss O'Neill having by this form of entry retained undoubted power to draw the money out of the bank whenever she pleased obviously did not divest herself of dominion over it. There was nothing to prevent her from checking out every cent of the fund immediately, or at any time, after the deposit in the two names had been made. If this be true—and it cannot be questioned—there was no perfected gift to Mrs. Whalen, and she consequently

acquired no interest in the fund by the form of the entry as it then stood.

The form of the entry in the *Taylor Case* was: "Joseph Henry, Margaret Taylor, and the survivor of them, subject to the order of either;" and in the *Moore Case* it was: "Lawrence McDonald, Sarah McDonald, and the survivor, subject to the order of either." These are identical in legal effect with the entry we are now dealing with (for we are excluding, for the present, the words "joint owners") and both were held to be insufficient to transfer the funds to the survivor.

But much stress was laid on the words "Joint owners" which were subsequently stamped on the pass book. Of themselves these two words, as we said in *Gorman v. Gorman*, 87 Md. 338, are not sufficient in a deposit made in a savings bank to transfer title to the fund—that is, they are not sufficient to convert the fund from being the property of the person to whom it belongs into the property of the original owner and another individual.

Whatever their technical import may be when employed in other instruments, they cannot operate to vest an ownership to the extent of one half of the fund in someone else, when, under the terms and according to the legal effect of the very paper in which they are used, the depositor retains such a dominion over the fund deposited that he may at any moment withdraw the whole of it. If these two words do not restrict the authority of the depositor to draw the money, they do not limit or curtail his control over it; and if his control over it is not limited or curtailed there is obviously left to him a *locus penitentie*, and there is, consequently, no perfected donation.

That the words "Joint owners" do not, and were not intended to, restrain the depositor from forthwith drawing out of bank the whole fund deposited, is apparent; because, in spite of their use, the other words of the entry expressly declare that the fund shall be payable to either of the parties named, and therefore to the one to whom it originally belonged and who caused the entry to be made in that particular form. Always bearing in mind that the fund belonged to only one of the parties named as joint owners, and that you are searching for evidence tending to show a gift of that fund, or a part of it, to a person who confessedly in the first instance owned none of it, the control retained over the whole of it by the original owner, under the very terms of the deposit which he makes, is of great significance in repelling any inference that he intended to part with his ownership in any way whatever. Particularly is this so when the original owner retains possession of the pass book, and when the deposit is made in a savings bank by the rules of which the book must be produced before the deposit can be withdrawn.

There is, however, another reason why the addition of the words "joint owners" cannot, in this case, enlarge or change in any way the original entry to the credit of Miss O'Neill and her sister. Those words were placed on the book, not because Miss O'Neill

requested the bank officers to do so, and not because she thought they would, or designed they should, vest an indefeasible interest in her sister, but merely because the bank had adopted that form, as testified by the assistant treasurer, "to make it uniform," though uniform with what he did not say. The words were put there, not as expressing Miss O'Neill's intentions or as limiting her control over the funds, but manifestly to carry out some policy or theory of the savings bank. They represent and stand for no voluntary, deliberate act of hers at all. In the face of these facts, whatever the import of the words might be had they been consciously and purposely used by Miss O'Neill, they certainly can be given no weight or potency.

Whilst it may be conceded that Miss O'Neill intended this fund to belong to her sister should the latter survive her,—and there are quite a number of her declarations in the record indicating that she did,—still, the method resorted to by her for the accomplishment of that end cannot, so far as the entry in the book is concerned, be treated as efficacious. The entry did not constitute a valid gift *inter vivos*, as we have already pointed out; and it cannot, for obvious reasons which need not even be suggested, operate as a testamentary disposition of the fund. The money, therefore, belonged to the original owner at the time of her death, unless the delivery of the book to Mrs. Whalen, or the entry and the delivery together, constituted a valid donation.

If we assume for the moment that the evidence satisfactorily establishes a delivery of the bank book to Mrs. Whalen by Miss O'Neill, the question is then presented as to whether the gift and delivery of a bank book containing the entry that this one embodies, including the words "Joint owners," amounts to, and is, in law, a delivery of the money credited in the book. In *Murray v. Cannon*, 41 Md. 470, where the entry was "James Cannon, subject to his order, or to the order of Mary E. Cannon," the possession of the book by the claimant, the alleged donee Mary E. Cannon, did not effect a transfer of the fund to her.

"Its delivery to her," said the court, "cannot be said to operate as a delivery to her of the money in question, or to deprive James Cannon of dominion and control over it. This branch of the case," the opinion goes on to declare, "is within the principle decided in *Ward v. Turner*, 2 Ves. Sr. 431. There the bill was to obtain a transfer of South Sea Annuities, upon the ground that the receipts for them had been delivered to the complainant's testator, the donor saying: 'I give you these papers, which are receipts for South Sea Annuities, and will serve you after I am dead.' This was held not to be perfected gift, because the delivery of the receipts was not a delivery of the annuities, as they could only be delivered by a transfer or something equivalent. So in this case the delivery of the book of deposit did not constitute a delivery of the money, which it is claimed was the thing intended

to be given, because its delivery could not be effected in that way."

To change the fund from the name of James Cannon to that of the alleged donee required a check drawn by the depositor, or by his agent, Mary Cannon, during his life; because upon his death her agency terminated. She was not named in the deposit book as a joint owner of the fund. The possession of the book may be a circumstance to be considered in determining the ownership of the fund, "but when the ownership is fixed beyond dispute by the entry, or in some other way, then the mere possession of the bank book is not to be taken as conclusive of the ownership of the person in whose possession it may be found." *Gorman v. Gorman*, 87 Md. 338.

In *Dougherty v. Moore*, 71 Md. 249, we said: "We shall not stop to consider whether an assignment in writing and delivery to a donee of a pass book of a savings bank by the donor, with the intention to give and vest in the donee the immediate right and interest in the money held on deposit, will constitute a valid gift of such deposits. In some states it has been held that such an assignment and delivery will vest in the donee a valid title to the money." We have cited these cases, the only ones in this state that we now recall, bearing on this precise question, to show, first, that in an instance where the terms of the deposit did not purport to create an interest as donee in the claimant, the delivery of the book did not transfer the ownership of the money on deposit; secondly, that mere possession of the book, worded precisely as is the one in this proceeding and issued by the same bank which gave to Miss O'Neill the book we are now considering, while a fact to be weighed in deciding the question as to who owns the funds, was held not to be conclusive evidence of ownership; and thirdly, that where the necessities of the particular case did not require a decision of the point we refrained from determining whether a written assignment and delivery of a deposit book would constitute a valid gift of the deposit. Possession is distinguishable from delivery.

There may be possession where there has been no delivery; but there can be no valid delivery unless possession, actual or constructive, accompanies it. Where, however, it appears that the original owner purposely deposited the fund to his and another's credit as joint owners, retaining the pass book so as to continue his dominion over the money; a distinct, unequivocal delivery of the book to the other person named as co-owner, with the intention to part with the ownership and to make an irrevocable gift of the fund and an acceptance of it by the donee, would pass the whole interest therein to the donee; because there would then be no inconsistency between the legal effect of the entry on the book and the right in which the donee of the book could claim the deposit, and there would no longer be a *locus penitentiae* in the original owner. Every element of a perfected gift would then be present. In Cannon's case the legal effect of the entry was simply to make Mary E. Cannon an agent

to draw the money for the owner, James Cannon, and the delivery of the book to her was a delivery to her in her capacity as agent. We are not discussing a gift *mortis causa* as in *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368. In that case there was no delivery of the book and the plaintiff failed to prove that the donor died of the disorder of which she was suffering when the gift was made and that there had been no intervening recovery. Apart from the circumstances that the gift is made with a view to death, and that it is upon condition, express or implied, that it shall take effect only on the death of the donor, by a disorder from which he is then suffering, a delivery that is sufficient to perfect a gift *mortis causa* will be equally good to constitute a valid gift *inter vivos*.

By the terms of the deposit Mary Whalen was authorized to draw the money upon presentation of the book. The delivery to and acceptance by her of this book as a gift—if in point of fact there was such a delivery and acceptance—clothed her with complete dominion over the money, even as against Miss O'Neill, and of course, therefore, as against the latter's personal representatives, and left nothing further to be done to consummate the donation. The entry in the book placed the fund to her credit jointly with her sister—though vesting no interest in her—but the ownership of the book by gift conferred upon her authority to draw the whole fund for her own use, thus differing radically from *Cannon's Case* and *Snowden's Case*. The great weight of authority supports the proposition that a gift of savings bank deposits by delivery of the pass book is a valid and complete gift of the money. *Ridden v. Thrall*, 125 N. Y. 572, 11 L. R. A. 684, and notes; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371; *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231; *Tillinghast v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126; *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39; *Penfield v. Thayer*, 2 E. D. Smith, 305; 8 Am. & Eng. Enc. Law, 1st ed. p. 1326, note 3, and the numerous cases there collected.

A savings bank book has a peculiar character. It is not a mere pass book, or the statement of an account; it is issued to the person in whose name the deposit is made, and with whom the bank has made its contract; it is his voucher, and the only security he has as evidence of his debt. The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank. "We can have no doubt," says the supreme judicial court of Massachusetts, "that a purchaser, to whom such a book is delivered without assignment obtains an equitable title to the fund it represents; and a title by gift, when the claims of creditors do not affect its validity, stands on the same footing as a title by sale." *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371. A deposit in a bank of issue, discount, and deposit cannot be transferred by a delivery of the pass book, because

wherever the book may be the depositor may withdraw the fund by check.

Possession of a deposit book in such a bank does not give a dominion or control over the fund and hence cannot operate, by delivery, to transfer ownership of the money deposited. *Jones v. Weakley*, 99 Ala. 441, 19 L. R. A. 100. Many of the cases cited or referred to above go to a very much greater extent than we think necessary, and we are not to be understood as adopting them without qualification. So far as they support the doctrine that a gift of a savings bank book worded as this one is, constitutes a valid donation of the deposit, we accept and approve them, but no further.

We hold, then, that if this deposit had been made by Miss O'Neill in her own and her sister's names as joint owners, payable to the order of either or the survivor, though all the money was in fact the property of Miss O'Neill; and if thereafter she had deliberately given the book to her sister with the intention of donating the fund to her and had reserved no control over it herself,—upon the acceptance of that gift by Mrs. Whalen there would have been a perfected gift of the money, vesting the ownership thereof in Mrs. Whalen and entitling her to the possession of it.

Though the delivery of the pass book would have been a delivery of the fund, the circumstances developed in the testimony fail to show a delivery of the book by Miss O'Neill to Mrs. Whalen. There is but a single witness who undertakes to prove the asserted delivery of the book, besides Mrs. Whalen. Their testimony, when weighed in connection with other facts, falls far short of establishing either an actual or a constructive delivery of the book. The witness, Mrs. Rhatigan, thus describes the gift: "Miss Elizabeth O'Neill told Mary that she never gave her anything while she lived, and that her two bank books was in the washstand drawer, and she could have the money, and to take care of it as well as she did."

She further stated that this occurred on Friday afternoon, September 24, and Miss O'Neill died Saturday morning about one o'clock. This witness also testified that the washstand drawer was locked and that Mrs. Whalen had the keys. Miss O'Neill became unconscious about four or five o'clock Friday afternoon, and continued so until her death. Mrs. Whalen testified that she hunted for her sister's keys and found them between the two mattresses and the bolster of the bed upon which Miss O'Neill was lying. She was then asked; "How long had your sister been dead when this search was made?" and she replied: "She was not over two hours dead; the undertaker was there; I just raised her up from the mattress and got them and put them in my pocket."

At this point her counsel interposed and remarked, "You started to say, 'I did not go right away when she told me,' and I did not hear the balance; please complete it." And she then went on: "I asked her where the keys were, and she did not know, and I raised up the mattress and got them; she,

said, 'Have you got them?' and I said 'Yes,' and she said, 'Those books in that washstand drawer are yours; take good care of them'; that is what I thought she said; that is the very words she said." This is all the evidence there is of a delivery of the bank book. Mrs. Whalen first explicitly stated that she did not get possession of the keys until two hours after her sister's death, and in the very next breath she asserts that she got them from under the mattress whilst her sister was still living. She got the bank book the Monday following Miss O'Neill's death.

Mrs. Rhatigan places the delivery of the books—such as she described it—in the afternoon, but it is quite apparent she left the house about noon and did not return until Miss O'Neill was unconscious. Mr. Milholland testified that Mrs. Whalen and other relatives of the deceased called at his office to hear the will read two days after the funeral. He then asked Mrs. Whalen if she had any papers or books belonging to her sister; she replied that she had some papers but no bank books, whereupon a niece who was present insisted that Mrs. Whalen had two bank books belonging to Miss O'Neill, but Mrs. Whalen stoutly denied that she had any bank books whatever. The day following Mrs. Whalen called again upon Mr. Milholland and handed him two bank books—the one in controversy and another. Mr. Milholland thereupon asked her if any of the money in the bank was hers, and "she answered, no, that none of it was hers—that none of it belonged to her." The gift set up and relied on was made, if at all, when the owner of the money was in *extremis*.

The claimant's version of the transaction is exceedingly unsatisfactory; and her distinct and emphatic assertion to Mr. Milholland that the money did not belong to her, spoken so recently after the alleged gift had been made that she could not well have forgotten that the money was hers if it had been in fact given to her but a few days previously, make it highly probable that loose and incoherent expressions of a dying woman have, as time wore on, grown, perhaps unconsciously, into the shape and form they now present through the testimony of these two witnesses. These death-bed donations to be upheld ought to be above question or suspicion at all times, but more especially when they render inoperative, as they would in this case, the provisions of a will made at a calmer and more collected moment.

The evidence to support them ought to be clear and free from uncertainty, for the temptation to seize upon disjointed sentences uttered when the physical frame is prostrated and the mental faculties are failing, and to convert them into a deliberate gift of the bulk of a dying person's estate, might be too often yielded to under the influence of interest or the promptings of avarice, and produce most grievous wrongs. The facility with which such gifts sometimes are proved is suggestive of great caution in weighing the evidence adduced to sustain them. To doubt them ought to be to deny them. "Around every other disposition

of the property of the dead the legislative power has thrown safeguards against fraud and perjury. Around this mode [*donatio mortis causa*] the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily proved devices." *Keepers v. Fidelity Title & Deposit Co.* 56 N. J. L. 303, 23 L. R. A. 184.

Mindful of the facility with which, after the alleged donor is dead, fraudulent claims of ownership may be founded on pretended gifts of his property, asserted to have been made while he was living, it is but a salutary precaution which demands explicit and

convincing evidence of every element needed to constitute a valid donation, whether it be a donation *inter vivos* or *mortis causa*. Even then fraudulent claims may prevail, but the rigid requirement of the clearest proof will at least diminish the number.

In our judgment, the evidence adduced to prove the gift of the bank book is too inconclusive and vague to support the appellant's claim. For this and the other reasons we have assigned, the decree awarding the fund in this case to the executor of Miss O'Neill must be affirmed with costs.

Decree affirmed, with costs in this court, the costs below to be paid as directed in the decree appealed from.

NEW JERSEY SUPREME COURT.

TRENTON PASSENGER RAILWAY COMPANY

v.

GUARANTORS' LIABILITY INDEMNITY COMPANY.

(60 N. J. L. 246.)

*A contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers carried by it is not invalid as against public policy because it covers losses resulting from its negligence or the negligence of its servants.

(June 3, 1897.)

PRESERVATION by the Circuit Court for Mercer County for the opinion of the Supreme Court of an action brought to enforce a policy of guaranty insurance against liability for losses incurred by plaintiff through injuries to passengers upon its road. *Judgment for plaintiff.*

Statement by **Magie**, Ch. J.:

The declaration in this case is founded upon a written contract, whereby the Guarantors' Liability Indemnity Company indemnifies the Trenton Passenger Railroad Company against legal liability for injury to or death of persons arising by reason of casualty occurring in, upon, about, or by reason of the street railroad of the Trenton Passenger Railway Company or its equipment, to an amount not exceeding \$5,000 for the injury to or death of any one employee, not to exceed \$5,000 for the injury to or death of any person other than an employee, and not to exceed \$20,000 in respect to any one casualty whereby several may be injured or killed. It further sets out various actions against the Trenton Passenger Railway Company for injuries which it claims fell within the contract of indemnity of the Guarantors' Liability Indemnity Com-

pany and that those actions had been prosecuted to judgment, but that the Guarantors' Liability Indemnity Company, although requested, had not paid them in accordance with the terms of their contract. The plea was the general issue. The issue joined was tried by the court, a jury being waived. The trial judge found that the Guarantors' Liability Indemnity Company had made the contract declared upon, and that, while such contract was in force, two judgments were obtained against the Trenton Passenger Railway Company for casualties and injuries falling within the terms of that contract, which judgments the latter company had paid. Thereupon the trial judge reserved for the determination of the supreme court the following question of law, namely: Whether the said contract of indemnity is a valid contract, or is void as against public policy, as being a contract to indemnify the said Trenton Passenger Railway Company, Consolidated, against losses resulting from its negligence, or from the negligence of its agents and employees.

Messrs. Robert S. Woodruff and Carroll Robbins for plaintiff.

Magie, Ch. J., delivered the opinion of the court:

The question reserved in this case is one of great interest, and is presented for determination for the first time in this court. The proof of the execution by the defendant company of the instrument on which the action is brought, which instrument contains plain stipulations for indemnifying the plaintiff company for losses arising from injuries done by it to its employees or the passengers carried by it, and the proof that such losses had occurred as were thus intended to be indemnified against, sufficiently established plaintiff's right to recover the stipulated indemnity, unless the instrument is not, in the eye of the law, a valid contract. It is obvious that the trial judge entertained doubts of the validity of the instrument in question, for, although no objection appears to have been made on the part of the defendant upon that point, he

*Headnote by **MAGIE**, Ch. J.

NOTE.—For other cases as to public policy in respect to insurance, see *Fidelity & C. Co. v. Elckhoff* (Minn.) 30 L. R. A. 586; and *Erb v. German-American Ins. Co.* (Iowa) 40 L. R. A. 845, and *note*.
44 L. R. A.

has deemed it necessary to submit it for determination to the full bench. The attitude of the defendant at the trial has been maintained in this court, for its counsel has presented no argument and made no claim that the instrument is not a binding and enforceable contract. The result is that our examination of the question has not been aided by the researches of counsel supporting its negative, but only of counsel supporting its affirmative. For this reason, I have given the question as close an examination as time would permit, lest something bearing thereon might be overlooked.

The proposition which one would assert who contested the validity of such a contract would obviously be this, namely, that a contract whereby a common carrier of passengers is to be indemnified against damages which he was required to pay for personal injuries occasioned by his negligence, or by the negligence of his agent, is contrary to public policy, and therefore unenforceable. It is admittedly difficult, if not impossible, to formulate a satisfactory statement of what is meant by the words "public policy." Mr. Justice Kekewich declared that it does not admit of definition, and cannot be easily explained. *Davies v. Davies*, L. R. 36 Ch. Div. 359. That the law has recognized one sort of public policy as a foundation for its judgment at one period, and another sort at another period, is undoubted. It is amusingly shown by Lord St. Leonards in *Egerton v. Brownlow*, 4 H. L. Cas. 1. Speaking of a case from the Year Books, he says (at p. 238): "It was an obligation with a condition that, if a man did not exercise his craft of a dyer within a certain town,—that is, where he carried on his business,—for six months, then the obligation was to be void; and it was averred that he had used his art there within the time limited, upon which Mr. Justice Hull, being uncommonly angry at such a violation of all law, said, according to the book: '*Per Dieu*, if he were here, to prison he should go until he made fine to the King, because he had dared to restrain the liberty of a subject.' Angry as the learned judge was at that infraction of the law, what has been the result of that very rule, without any statute intervening? That the common law, as it is called, has adapted itself upon grounds of public policy to a totally different and limited rule that would guide us at this day, and the condition which was then so strongly denounced is just as good a condition now as any that was ever inserted in a contract, because a partial restraint created in that way with a particular object is now perfectly legal." Another illustration occurs with respect to the obligations imposed by law founded on public policy on common carriers of goods. Originally, they were insurers of the safety of the goods against every loss, except such as occurred by the act of God or the public enemy, and any contract relieving them of any part of that obligation was held to be void. Gradually they have been permitted to contract for exemption from some of their liability, and public policy seems now effective only to the extent of prohibiting their

exemption by contract from any losses occurring by reason of their negligence and the negligence of their servants. For such losses the law founded on public policy still holds them bound. *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788.

From these varying applications of the principle called "public policy," I think it obvious that no accurate definition of that phrase can be devised in respect to any particular matter. In my judgment, the best that can be done is to say that, since the law abhors conduct injurious to the public interest or antagonistic to the public good, the courts will decline to enforce contracts which, at the time they are presented for consideration, require or involve conduct against public interest and public good. Such is the result of my consideration of the matter after examining many cases which exhibit the variant views taken by courts upon this subject, which variance is no more strikingly indicated than in the case of *Egerton v. Brownlow*, before cited. My researches have not been rewarded with the discovery of many expressions of judicial opinion or by many adjudications on the question reserved in this case. Obvious reasons exist why the judicial consideration of such a question would be infrequent. In actions upon contracts of indemnity, such as that on which this action is founded, the insured raises no question as to the validity of the contract. The insurer, if, as usually it is, a company engaged in seeking profit by making such contracts of insurance, is equally adverse to setting up or maintaining that the contracts by which its profits are made are, in the eye of the law, void. Adjudications and judicial opinions upon a class of contracts which seem to me to bear a strict analogy to those contracts, one of which is before us, are not infrequent. As before stated, common carriers of goods may, by contract with their employers, limit their liability for all losses from all peril except those arising from their negligence or the negligence of their servants. When the liability is so limited, the common carrier of goods stands answerable only for his negligence and that of his servants. The common carrier of passengers has never been deemed an insurer of their safety during carriage, but the law has imposed upon him a duty to take the highest care for the safety of the passenger. He is therefore liable for injuries done to the passenger only where they result from his negligence; that is, the failure to take the care for the safety of the passenger which the law enjoins. Both classes of carriers are therefore liable under such circumstances upon precisely the same grounds. Their liability arises from negligence which is a failure to bestow the care and skill which the situation of the parties and the subject-matter require. The negligence which will render them respectively liable may possibly differ in degree, but, although the distinction between what has been called gross negligence and ordinary negligence is now generally and with great

reason repudiated (*New York O. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627), it is identical in kind.

The only reason which I find possible to conceive to be capable of being urged in support of the proposition that the contract before us in this case is contrary to public policy is that the indemnity thereby provided for a common carrier of passengers may tend to render him less careful in the performance of his duty to his passengers than he otherwise would be. It is obvious that such is not the purpose of the contract for indemnity. The insurer does not contemplate the relaxation of the carrier's vigilance, which would tend to throw additional liability upon him. The insurer is held to the performance of his duty of vigilance both by his liability notwithstanding the indemnity, and by the fact that the vigilant carrier would obtain better terms in making the contracts of insurance. It is further obvious that, if a contract indemnifying the common carrier of passengers against liability arising from his negligence tends to a relaxation of vigilance inimical to the public interest, so a contract indemnifying a common carrier of goods against the consequences of his negligence must have the same effect, and be obnoxious to the rule avoiding contracts contrary to public policy. Yet it now seems well settled that a common carrier of goods may enforce contracts of insurance on goods carried against all losses including those occasioned by his negligence or the negligence of his servants. In an action upon such a contract of insurance which came before the Supreme Court of the United States, Mr. Justice Gray thus dealt with the claim that such contracts were void. He said: "No rule of law or of public policy is violated by allowing the common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance, he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility. If it were true that a shipowner, obtaining insurance by general description upon his ship and the goods carried by her, could, in case of the loss of both ship and goods by perils insured against, and through the negligence of the master and crew, recover of the insurers for the loss of the ship only, and not for the loss of the goods, some trace of the distinction would be found in the books. But the learning and research of counsel have failed to furnish any such precedent." *Phœnia Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873. The doctrine in that case was referred to with approval in *Orient Ins. Co. v. Adams*, 123 U. S. 67, 31 L. ed. 63, and *Liverpool & G. W. Steam Co. v. Phœnia Ins. Co.* 129 U. S. 397, 32 L. ed. 788. Afterwards the court was urged to review the doctrine of Mr. Justice Gray, and to declare that the insurance was an insurance against negligence, and contrary to public policy, and void; but the

court, speaking by Mr. Justice Blatchford, reaffirmed the doctrine, on the grounds stated in the opinion of Mr. Justice Gray. *California Ins. Co. v. Union Compress Co.* 133 U. S. 389, 33 L. ed. 732.

Various kinds of insurance against loss by fire or loss by perils of the sea would seem to be open to a like charge of a tendency to encourage negligence, which, at least when the policies are held (as they so frequently are) as collateral security for obligations of the insured, may be well argued to be against the public interest, and therefore void as against public policy. But no trace of any such claim can be found in text-books or adjudications. With respect to such contracts of insurance as that with which we are dealing, I have found but two expressions of judicial opinion in the books and reports. In the case of *Delanoy v. Robson*, 5 Taunt. 605, upon a motion to settle the venue, it incidentally appeared that the action was upon a contract of somewhat such character; and the reporter states a *querre* as to whether an insurance against damages that a shipowner might be liable to pay in consequence of his ship running down another be not illegal; and it is said *per curiam*: "It would be an illegal insurance to insure against what might be the consequences of the wrongful acts of the assured." This case affords no aid in the solution of the question, both because the question was not directly presented, but only incidentally considered, and because what the courts said may well be deemed limited to acts of the insured which were actively wrongful in distinction from being merely negligent. There is, however, an adjudication precisely in point in which the question thus arose: An incorporated company, authorized, among other things, to issue contracts of indemnity of the same character as that before us, became insolvent. Its business had not been confined to making such contracts but had extended to other contracts of indemnity; and the court, in distributing the assets, had before it creditors whose claims arose from other forms of contracts than those arising upon such contracts of insurance. In behalf of the other creditors, the court was urged to declare that the creditors who claimed upon such contracts of insurance should not be admitted to partake in the distribution of the assets, upon the ground that such contracts of insurance were obnoxious to public policy, and unenforceable and void. The opinion of the court was written by Chief Justice McSherry, and contains an admirable discussion of the question, reaching the conclusion that public policy does not avoid these contracts. In respect to the claim that the possession of such indemnity tends to beget negligence, he says: "Nor can we assume, as an unvarying rule, of which judicial notice will be taken, that a carrier of passengers, who has secured an indemnity to reimburse himself for losses which his own negligence may produce, will, merely because and solely in consequence of having such indemnity,—which at best, is but limited and partial,—necessarily disregard the duty to exercise the highest degree

of care. And, unless it be assumed as a postulate that the mere possession of an indemnity will of itself necessarily and invariably produce negligence, it does not logically follow that such a policy or indemnity is even incidentally or indirectly repugnant to public policy. The indemnity in no way affects the liability of the carrier to the person injured. The utmost that it does, precisely as in the case of a carrier of goods, is to afford him a fund out of which he may be reimbursed, and that, too, perhaps, but partially; for in all these policies the liability of the insurer is always limited and confined to a specifically designated sum." *American Casualty Ins. Co.'s Case*, 82 Md. 535, 35 L. R. A. 97.

The result is that the reserved question must be answered in favor of the validity of the contract upon which this action is founded, and, as the special finding of the trial judge shows that he had assessed the damages of the plaintiff at the sum of \$978.36 *judgment should be ordered entered for the plaintiff for that sum.*

It is proper to observe that the decisions of this court in *Kinney v. Central R. Co.* 32 N. J. L. 407, 90 Am. Dec. 675, and of the

court of errors in the same case (34 N. J. L. 513, 3 Am. Rep. 265), are not at all antagonistic to the views above expressed. It was held in both courts that, when a common carrier of passengers agreed to carry a passenger gratuitously, a valid contract might be made between the carrier and such a passenger, exempting the carrier from all liability even for injuries resulting from its negligence or the negligence of its servants. But this was distinctly put upon the ground that in such case the ordinary relation of a passenger and common carrier did not arise, but rather a relation (as the learned chief justice pointed out) analogous to that of a bailor and a gratuitous bailee. Assuming that it may be inferred from those decisions that, when the ordinary relation of common carrier and passenger has arisen, a contract exempting the former from liability to the latter for injuries resulting from its negligence or the negligence of its servants would be invalid, it only results that the common carrier of passengers is left invariably liable for the consequences of its negligence, precisely as is above shown the common carrier of goods is liable.

NEW YORK COURT OF APPEALS.

William R. LAIDLAW, *Respt.*,

v.

Russell SAGE, *Appt.*

(158 N. Y. 73.)

1. The party relying on the exception in a statute permitting appeal from judgments or orders finally determining actions excepting unanimous decisions that there is evidence to sustain a finding of fact must show from the record that the decision was unanimous.
2. A statute limiting the right of appeal in cases of personal injury has no application to judgments rendered before its passage.
3. For the purpose of showing that a person's act in the face of an impending explosion was voluntary his admission that everything he did was intentional cannot be submitted to the jury without his qualifying statements denying the commission of the act with which he is charged.
4. A charge that defendant drew plaintiff in front of him to serve as a shield from an impending explosion is not supported by the uncorroborated evidence of plaintiff whose memory was seriously affected by the accident so as to justify submission of the case to the jury where this testimony is contradicted by defendant, several disinterested witnesses, and by well-known and recognized physical facts about which there is no conflict.

NOTE.—The above case is a remarkable one and unique in its facts.

On the general question of intent as an element of simple assault or assault and battery, see note to *Vosburg v. Putney* (Wis.) 14 L. R. A. 226.

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5. One who draws another in front of him to serve as a shield from an impending explosion cannot be held liable for injuries received by the latter from the explosion if it is not shown that the injuries were increased by such act.
6. An action for injuries caused by being drawn in front of another to serve as a shield from an impending explosion should not be submitted to the jury in the absence of any evidence beyond mere conjecture tending to show that plaintiff's injuries were thereby increased.
7. The explosion, and not the act of one in drawing another in front of him to act as a shield when an explosion of dynamite by a third person is impending, is the proximate cause of such other's injuries which are not shown to have been increased by such act.
8. Upon the question whether or not one person held another in front of him as a shield from an impending explosion evidence is not admissible that one whom witness took to be the former had said he was not injured because protected from the explosion.
9. One accused of holding another in front of him as a shield from an impending explosion cannot, on cross-examination, in a suit for damages for the injuries, be shown not to have exhibited proper sympathy or paid proper attention to plaintiff after the injury.
10. Evidence of defendant's wealth, property, and business is not admissible in a suit for negligent injuries.

(January 10, 1899.)

APPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a

judgment of the New York County Circuit Court in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's using plaintiff as a shield from an impending explosion. *Reversed.*

The facts are stated in the opinion.

Messrs. John F. Dillon, Edward O. James, and Rush Taggart, for appellant:

The provisions of the Constitution, and of § 191 of the Code, have no application to this appeal, because the judgment and order appealed from does not state that the decision was unanimous, and that fact does not appear of record.

Kaplan v. New York Biscuit Co. 151 N. Y. 171.

This court has always exercised jurisdiction to determine whether the evidence was sufficient to justify the submission of the case to the jury, or to sustain their verdict, when that question has been properly presented on appeal by an exception.

Schwinger v. Raymond, 105 N. Y. 648; *Bond v. Smith*, 113 N. Y. 378; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48; *Hemmens v. Nelson*, 138 N. Y. 518, 20 L. R. A. 440; *Hudson v. Rome, W. & O. R. Co.* 145 N. Y. 408; *Re Harriot*, 145 N. Y. 540; *Cadwell v. Arnheim*, 152 N. Y. 182; *Szuchy v. Hillside Coal & I. Co.* 150 N. Y. 219; *Kaplan v. New York Biscuit Co.* 151 N. Y. 171; *Diver v. Hall*, 21 Misc. 452.

This is not a jurisdiction which usurps the prerogative of the general term. But it is a jurisdiction which will reverse a judgment upon a verdict found upon insufficient evidence, which, in the eye of the law, is no evidence.

Bauleo v. New York & H. R. Co. 59 N. Y. 356, 17 Am. Rep. 325; *Pollock v. Pollock*, 71 N. Y. 137; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48; *Hemmens v. Nelson*, 138 N. Y. 517, 20 L. R. A. 440.

Or a verdict predicated upon conjecture, or "food for speculation."

Bond v. Smith, 113 N. Y. 378; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194.

Or a verdict found contrary to undisputed physical or scientific facts which make the truth of the conflicting evidence impossible.

Hudson v. Rome, W. & O. R. Co. 145 N. Y. 408.

Or a verdict which finds the cause of plaintiff's injuries to be something for which the defendant is liable, when the evidence makes it just as probable that the cause was something for which the defendant is not liable.

Cordell v. New York C. & H. R. R. Co. 75 N. Y. 330; *Searles v. Manhattan R. Co.* 101 N. Y. 661; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492; *Dobbins v. Brown*, 119 N. Y. 188; *Grant v. Pennsylvania & N. Y. Canal & R. Co.* 133 N. Y. 657; *Ruppert v. Brooklyn Heights R. Co.* 154 N. Y. 90.

Or a verdict awarding damages which are neither the probable result of the wrong, or capable of proof.

Butler v. Manhattan R. Co. 143 N. Y. 417, 26 L. R. A. 46.

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Defendant's acts were not the proximate cause of plaintiff's injuries.

1 Shearm. & Redf. Neg. §§ 25, 26; *Hofnagle v. New York C. & H. R. R. Co.* 55 N. Y. 608; *Storey v. New York*, 29 App. Div. 316; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Scheffer v. Washington City, V. M. & G. S. E. Co.* 105 U. S. 249, 26 L. ed. 1070; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 23, 10 Am. Rep. 205.

An accident cannot be attributed to a cause, unless without its operation it would not have happened.

Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; *Searles v. Manhattan R. Co.* 101 N. Y. 661; *Taylor v. Yonkers*, 105 N. Y. 203, 59 Am. Rep. 492; *Ayres v. Hammondsport*, 130 N. Y. 665; *Grant v. Pennsylvania & N. Y. Canal & R. Co.* 133 N. Y. 657; *Ruppert v. Brooklyn Heights R. Co.* 154 N. Y. 90.

One suing to recover damages for injuries must not only prove the negligence, but also that the injury was the proximate result of such negligence.

Read v. Nichols, 118 N. Y. 224, 7 L. R. A. 130; *Day v. Crossman*, 1 Hun, 570; *Kelsey v. Jewett*, 28 Hun, 51; *Williams v. Delaware, L. & W. R. Co.* 39 Hun, 430; *Murtaugh v. New York C. & H. R. R. Co.* 49 Hun, 456; *Mars v. Delaware & H. Canal Co.* 54 Hun, 625; *Magee v. Caro*, 1 N. Y. City Ct. Rep. 147; *Swain v. Schieffelin*, 134 N. Y. 478, 18 L. R. A. 385; *Lowery v. Western U. Teleg. Co.* 60 N. Y. 198, 19 Am. Rep. 154; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Crain v. Petrie*, 6 Hill, 522, 41 Am. Dec. 766; *Hoey v. Felton*, 11 C. B. N. S. 142; *Vicars v. Wilcocks*, 8 East, 1; *Ward v. Weeks*, 7 Bing. 211; *Storey v. New York*, 29 App. Div. 316.

Upon this question of proximate cause there is no real distinction between a wrongful act and a negligent act. In either case the party in fault is liable if the injury is caused by his act; but if it is caused by the wholly independent act of some third person, he is not liable.

Addison, Torts, p. 7; *Scott v. Shepherd*, 3 Wils. 403; *Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268.

The plaintiff was not moved from a place of safety to a place of danger. He stood in the midst of the danger before he was moved.

Juries cannot be required to do what is manifestly impossible, except by the barest guessing, and then have the result approved as a verdict founded upon evidence.

Bond v. Smith, 113 N. Y. 378; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194; *Bauleo v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48; *Hemmens v. Nelson*, 138 N. Y. 518, 20 L. R. A. 440; *Ludson v. Rome, W. & O. R. Co.* 145 N. Y. 408; *Ruppert v. Brooklyn Heights R. Co.* 154 N. Y. 90; *Butler v. Manhattan R. Co.* 143 N. Y. 417, 20 L. R. A. 46; *Searles v. Manhattan R. Co.* 101 N. Y. 661; *Taylor v. Yonkers*, 105 N. Y. 202; *Dobbins v. Brown*,

119 N. Y. 188; *Grant v. Pennsylvania & N. Y. Canal & R. Co.* 133 N. Y. 657.

The undisputed physical facts demonstrate that plaintiff's story is impossible.

Hudson v. Rome, W. & O. R. Co. 145 N. Y. 408.

Messrs. Noah Davis, Joseph H. Choate, Adolph L. Pincoffs, and Henry Wynans Jessup, for respondent:

As it does not appear from this record that the justices of the court below were divided upon the question as to whether there was evidence supporting or tending to support the verdict that question cannot be considered by this court.

Even if this court can in any way consider the question where there is evidence supporting the verdict, it can only reverse the decision of the court below in case it should find that the verdict and the decision are either against the undisputed testimony or without any testimony whatever to support it.

Chrystal v. Troy & B. R. Co. 105 N. Y. 164; *Crim v. Starkweather*, 136 N. Y. 635; *White v. Benjamin*, 150 N. Y. 258; *Cox v. Stokes*, 156 N. Y. 491; *Saucky v. Hillside Coal & I. Co.* 150 N. Y. 219; *Arnold v. Norfolk & N. B. Hosiery Co.* 148 N. Y. 392; *Otten v. Manhattan R. Co.* 150 N. Y. 395.

The laying of hands upon the plaintiff by Mr. Sage for the purpose of shielding himself from an injury (which he alone knew was threatened) by changing plaintiff's position so as to interpose plaintiff between himself and such danger was an unlawful interference with plaintiff's person, and the carrying out of such intent by the actual removal of plaintiff without his consent renders defendant liable for the injury plaintiff suffered in consequence of the wrongful and unlawful act.

1 Addison, Torts, p. 214; *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250; *Mercer v. Corbin*, 117 Ind. 450, 3 L. R. A. 221; 2 Bishop, Crim. L. § 36; *Vosburg v. Putney*, 80 Wis. 523, 14 L. R. A. 226.

The defendant is liable for the injuries suffered by plaintiff in consequence of defendant's unlawful act, even if such unlawful act was not the sole cause of such injuries.

Shearm. & Redf. Neg. § 31; see § 39; *Mott v. Hudson River R. Co.* 8 Bosw. 343; *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267; *Wharton*, Neg. § 144; *Eaton v. Boston & L. R. Co.* 11 Allen, 500, 87 Am. Dec. 730; *Colegrove v. New York & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418; *Webster v. Hudson River R. Co.* 38 N. Y. 260; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Burrows v. March Gas & Coke Co.* L. R. 5 Exch. 67; *Sutherland*, Damages, § 40; *Meade v. Chicago, R. I. & P. R. Co.* 68 Mo. App. 92; *The Joseph B. Thomas*, 81 Fed. Rep. 578.

As the plaintiff has shown that the specific injuries he received were due to the act of the defendant, the defendant cannot escape liability for such injuries by claiming that similar injuries might have been received by the plaintiff if he had not been moved.
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Slater v. Mersereau, 64 N. Y. 138; *Meade v. Chicago, R. I. & P. R. Co.* 68 Mo. App. 92.

Martin, J., delivered the opinion of the court:

This action was commenced May 26, 1892. Its purpose was to recover for personal injuries sustained by the plaintiff in consequence of an explosion which occurred in the defendant's office, in the city of New York, on the 4th day of December, 1891. There is no allegation in the complaint, nor was there any proof upon the trial, which even tended to show that the defendant was in any way responsible for the explosion which was the cause of the plaintiff's injury. The evidence disclosed that a stranger, whose name was subsequently found to be Norcross, called at the defendant's office December 4, 1891, at about 10 minutes past 12 o'clock, said he desired to see the defendant in relation to some railroad bonds, and had a letter of introduction from Mr. Rockefeller. When asked to send it to the defendant, he stated that he preferred to present it in person, and that he only wanted to say two or three words. Upon receiving this message the defendant stepped from his private office into the anteroom, went to the window, and looked into the lobby, where he saw Norcross sitting upon a settee. At that time the defendant met the plaintiff, who said he had a message from Mr. Bloodgood, and the defendant thereupon turned the knob of the door, and the plaintiff passed into the anteroom of the office. The former then spoke to Norcross, who instantly arose, took his carpet bag in his left hand, and, approaching him, handed him a letter which was supposed to be from Mr. Rockefeller, which he took, opened, and read. It was a typewritten communication, the substance of which was: "The bag I hold in my hand contains ten pounds of dynamite. If I drop this bag on the floor, the dynamite will explode, and destroy this building in ruins, and kill every human being in the building. I demand \$1,200,000, or I will drop the bag. Will you give it? Yes or no?" The defendant read the letter twice, folded it, handed it back to Norcross, and then commenced parleying with him, stating that he had an engagement with two gentlemen, that he was short of time, and, if it was going to take much time, he wanted him to come later in the day. Norcross, after a second, said "Then do I understand you to refuse my offer?" to which the defendant replied, "Oh, no, I don't refuse your offer. I have an appointment with two gentlemen. I think I can get through with them in about two minutes, and then I will see you." Norcross held the bag at the end of his fingers, walked backward towards the door through which he came, and when he reached the threshold, he stopped, and looked at the defendant. The defendant stepped back a little towards the desk that was in the anteroom, while Norcross was going the other way. As he reached the threshold, he looked at the defendant, and said, "I rather infer from your answers that you refuse my offer," to which the defendant answered, "Is there anything

in my appearance that would cause you to think that I would not do as I say I would?" and repeated that he had an appointment with two gentlemen, and that he could get through in about two minutes, and would then see him. Norcross then gave one look, stepped to one side, when the flash came, and it was all over in two seconds. In backing down the room, the defendant came to the desk, and was partially sitting upon the edge of it when the explosion occurred. After the explosion it was found that everything in the office was wrecked. The partitions, floors, joists, plaster, desks, tables, chairs, and other furniture were destroyed, the window sashes and window frames were blown out, even in the private office. Norcross was blown to pieces, and Norton, one of the clerks in the defendant's office, was hurled through the window to the street below, where he met his death. A steel safe which was locked and stood in an adjoining room was blown open, its contents scattered upon the floor with other *débris*, and every person who was in the room was either killed or seriously injured. Indeed, the explosion was so violent, so general, and so destructive in its effect that it seems little less than miraculous that any person who was present should have escaped with his life. This portion of the transaction is undisputed in any essential or material particular.

The plaintiff claims that, upon entering the office, he passed the defendant and Norcross, who were conversing in the lobby near the door of the anteroom; that he entered the anteroom, which was about 8 by 16 feet, went to a table or desk near the center of the room, where he stood waiting for the defendant, with his back to the door, looking towards Mr. Norton, who stood by the ticker at the window, looking out on Rector street; that, while he stood there, he once or twice glanced over his shoulder, saw that the defendant was inside the anteroom door, and that Norcross was just outside; that he heard nothing said, said nothing himself, and saw no paper in the defendant's hand; that he turned, and looked towards the window, with his back to the defendant, when the latter suddenly came in range of his vision on his left side, came over, and placed his hand on his shoulder; that afterwards he dropped his left hand, and took the plaintiff's right hand in his, and gently moved him over towards the direction in which he stood, which was from the plaintiff's right to his left, and that he gently moved him about the width of his body, about 15 inches, or probably more. He then testified: "I changed my position towards Mr. Sage about 15 inches. I changed my position in his general direction, but in front of us. I still kept my position as far as Rector street was concerned and the door of the entry. I had my back to the door all the time. I was in a line between Mr. Sage and Mr. Norcross.

... Mr. Sage rested one thigh on the corner of the table, and then said over my shoulder, to this stranger, 'If I trust you, why can you not trust me?' or, 'If you cannot trust me, I cannot trust you,' or words in that general line and to that effect, and

then the explosion immediately followed." Upon cross-examination he testified: "I saw him [Mr. Sage] come within the range of my vision to my left. I can safely say that without looking at me he put his hand on my left shoulder, put his left hand on my left arm, and took my left hand in his left hand. It was not quite at that moment that he sat down on the corner of the desk. He did not let go of my left hand with his left hand after taking my left hand. He did not take my left hand in both hands at that moment. He did a moment later, and then he sat down on the corner of the desk with my left hand in both his hands. My hand was not held specially tight. It was covered by both his hands. At that time my position was changed from where I stood when he put his left hand on my shoulder. I was conscious at the time of force being used upon me sufficient to move me. I was conscious of force being used upon me to a certain extent. In a sense it was imperceptible, and in a sense it was not. I spoke of it as being a very gentle movement. I don't think I said it was so gentle as to be imperceptible. I didn't say that. I said it was gentle. It was not violent. I don't think I said it was imperceptible. The whole change of my position was about the width of my body; should think 18 inches towards my left." He also gave evidence to the effect that he had previously testified that the defendant did not use any force upon him, and he never thought of such a thing as that until after the explosion; that he did not think he was conscious that the defendant was pulling him at the time, and he could not say that he was exactly conscious of any force of Mr. Sage's hands in moving him; that he was moved easily and without resistance; that he moved voluntarily because he offered no resistance; that he did not think he was conscious of being pulled at the time; and that that testimony was true.

As to this part of the transaction, the defendant testified that, when he reached the corner of the table, the plaintiff was about 4 feet from him towards the partition, and that they were in that position when the explosion occurred. He denied that he ever had his hands upon the person of the plaintiff in any manner whatever until after the explosion; testified that at the time the plaintiff was not between him and Norcross for an instant, and that he did not at any time intend or design interposing the body of the plaintiff between himself and Norcross; that he did not put himself behind the plaintiff and that no portion of his body was behind the plaintiff; that he did not touch him at all, and made no such statement to Norcross as was testified to by the plaintiff; that, after the explosion, they were found thrown together, and that he lifted the plaintiff, which was the first time he had his hand upon him. The evidence of the defendant was corroborated in most of its essential particulars by the testimony of Frank Robertson, who was in the office at the time. There was also other proof which tended to corroborate him, and which was in conflict with the theory and testimony of the plaintiff.

This case has been tried four times, and passed upon three times by the intermediate appellate tribunal. The history of this litigation has shown an evolution in the law held to be applicable to it which is somewhat unusual. Upon the first trial, the complaint was dismissed by the trial court upon the ground that the plaintiff had failed to establish any proper connection between the act of the defendant and the independent act of Norcross which caused the injury. In other words, it held that, under the principles of law applicable to the subject, the acts of the defendant were not shown to be the proximate cause of the plaintiff's injury. That judgment was reversed by the general term of the supreme court which in effect held that no question of proximate cause was involved; that if the defendant put his hand upon or touched the plaintiff and caused him to change his position with an intent to shield himself, he was guilty of a wrongful act towards him; that, if the plaintiff was injured by the happening of the catastrophe, the burden of proof was upon the defendant to establish the fact that his wrongful act did not in the slightest degree contribute to any part of the injury which the plaintiff sustained by reason of the explosion; and that it was not necessary for the plaintiff to show that he would not have been so severely injured if he had been left standing in his original position. Upon the second trial the plaintiff had a verdict. The court seems to have charged the jury in accordance with the principles laid down by the general term upon the first appeal. Upon that trial, however, the defendant's counsel requested the court to charge: "If the jury find from the evidence that the defendant did take the plaintiff, and use him as a shield, but that this action was involuntary, or such as would instinctively result from a sudden and irresistible impulse in the presence of a terrible danger, he is not liable to the plaintiff for the consequences of it." That request the court refused, but added: "I will charge it; that the essence of the liability must be a voluntary act." Upon the second appeal, that question having been thus sharply presented, the general term again reversed the judgment, upon the ground that the court erred in refusing to charge that request. Upon the third trial the jury disagreed. Upon the last trial, which is now under review, the trial court disregarded the former decisions of the general term, and charged that the measure of the plaintiff's damages was the difference between those he actually sustained, and such as he would have received if he had not been interfered with, and that the burden of proving such damages was upon the plaintiff. It also charged that if the defendant involuntarily put his hands upon the plaintiff in a moment of great excitement confronted with immediate and serious danger, without meaning to interfere with him, he would not be responsible. But it submitted the question whether the act of the defendant was deliberate and intentional to the jury, calling its attention to the fact that the defendant testified that "he was in perfect possession of his senses, recollected

everything that was done, that everything he did there was done intentionally," and then charged that if, under those circumstances, he voluntarily put out his hand, and touched the plaintiff, a cause of action was made out, and the plaintiff was entitled to a verdict. In this portion of its charge, the court assumed, and stated to the jury, that the defendant testified that everything he did was done intentionally, as proof of his having intentionally interfered with the person of the plaintiff. The propriety of this portion of the charge will be subsequently considered.

On the trial George Baillard was called as a witness, and testified to having seen someone in O'Connell's drug store whom he believed to be the defendant; that someone stepped up to him, and asked if he was injured very much; that he answered that he was not; that he understood him to say something about being protected, or a protection that he had had from the explosion. This evidence was objected to; the objection was overruled; and the defendant accepted. At the conclusion of the plaintiff's case, and again when the entire evidence was closed, the defendant moved that this testimony be stricken out. He also asked that the jury be instructed to disregard it. These motions were denied, and the defendant excepted. When the plaintiff's evidence was closed, the defendant moved for a nonsuit. Again, at the close of all the testimony, he moved for a nonsuit, that the plaintiff's complaint be dismissed, and that a verdict be directed in his favor upon sufficient grounds; so that the exceptions of the defendant to the denial of those motions fully raise all the questions which are involved or have been discussed upon this appeal. At the conclusion of the charge, the defendant excepted to portions of it, requested the court to charge certain propositions which were refused, and by exceptions to those rulings again raised the questions involved. Therefore, in the consideration of the legal questions presented, it must be assumed that they were properly raised, not only by a motion to nonsuit and to dismiss the complaint, but also by motions to direct a verdict for the defendant, and by exceptions to the charge and the refusal of the court to charge as requested.

Upon an appeal from the judgment entered upon the verdict rendered at the last trial, the appellate division obviously intended to follow the previous decisions of the general term so far as they related to the plaintiff's right of recovery, to the end that the question of the liability of the defendant, under the facts and circumstances proved, might be properly presented to this court, and did not assume the responsibility of passing upon the correctness of the previous decisions in that respect. It, however, discussed many of the questions raised by the defendant's counsel, and, among other things, attempted to show that there was sufficient evidence to justify a jury in finding that there were two ascertained lines of direction which the explosion followed, and that one of them was in the direction where the plaintiff claims that he and the defendant stood.

But when we refer to the evidence bearing upon that question, and which is said to justify that conclusion, we are unable to discover its existence in the record. Indeed, in the discussion following, which involved the improbability of the plaintiff's theory that the defendant drew him in front of himself as a shield, when examined in the light of the injuries to the defendant and their location upon his person, the learned judge delivering the opinion advanced as an argument that it was not impossible that, "in the titanic whirlwind of the explosion," those injuries might have occurred. He said that there was nothing more extraordinary in that incident than in the circumstance that the force of the explosion blew open a large steel safe, and scattered its contents about the room, adding: "No one can account for the eccentricities of such an occurrence. If there were known and provable unvarying incidents of such phenomenal events, some ascertained physical law acting uniformly and equally on all such occasions, we might be able to say what was or what was not impossible within the operation of such law, but we have no such guides or *criteria*." We think the last suggestions made by the learned judge are entitled to much more weight, and are much more probable, than the theory which precedes them, and with which the latter are utterly inconsistent. Indeed, the whole discussion seems to be based upon the idea that the defendant was bound to establish the impossibility of the theory upon which the plaintiff relied; and in its argument that court did not seem to consider that any burden rested upon the plaintiff to prove his theory with any certainty, notwithstanding the lack of substantial proof to show its correctness or existence. That opinion can hardly be read without reaching the conclusion that the learned judge was wrestling with inconsistencies impossible to harmonize, and yet that the purpose of the court was to place the case in a position where the questions of law relating to the right of the plaintiff to a recovery in this action should be presented to, and determined by, the court of appeals.

There are certain questions of law involved, which were discussed upon the argument, that we are called upon to decide. We have deemed it necessary to state the facts and history of this protracted litigation somewhat fully, to the end that the legal questions may be plainly presented and clearly understood in their connection with them.

The first question of law presented relates to our jurisdiction to hear and determine this appeal. The respondent contends that, inasmuch as the record does not show affirmatively that the justices of the appellate division were divided upon the question as to whether there was evidence supporting or tending to sustain the verdict, that question, at least, cannot be considered by this court, and relies upon § 1337 of the Code of Civil Procedure as sustaining his position. In examining the question of the appealability of this case, and the questions which may be determined upon this appeal, it be-

comes necessary to consider the provisions of the Constitution and statutes, as well as the decisions of the court relating to the subject. Section 9 of article 6 of the Constitution declares: "No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals." After the adoption of that provision, the legislature amended § 190 of the Code of Civil Procedure so as to provide: "From and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the supreme court in either of the following cases and no others: (1) Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that, upon affirmance, judgment absolute shall be rendered against them." The second subdivision of that section provides for the certification by the appellate division of questions of law for determination by the court of appeals. Then follows § 191, which contains certain limitations, exceptions, and conditions to the provisions of § 190; and in that section is found a provision in which the same language is employed as in the provision of the Constitution above cited. It also provides that no appeal shall be taken from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, when the decision of the appellate division is unanimous unless that court shall certify that in his opinion a question of law is involved which ought to be reviewed by the court of appeals, or unless, in case of its refusal to so certify, an appeal is allowed by a judge of a court of appeals. It likewise provides that the jurisdiction of the court is limited to the review of questions of law.

Here, then, we find that both the Constitution and the statutes provide that no unanimous decision of the appellate division that there is evidence supporting or tending to sustain a finding or verdict not directed shall be reviewed by this court. But the provisions of § 190 are general, and declare that appeals may be taken as of right to this court from judgments or orders finally determining actions or special proceedings. This confers upon a party the absolute right to appeal in those cases, unless it falls within some of the limitations contained in the subsequent section. The question here presented is how or in what manner the fact that the case falls within some limitation, if it does, is to be made to appear. Inasmuch as § 190 in general terms confers the right of appeal, the question is, If it is limited by some other provision of the statute, upon whom is the burden of showing that fact? It would seem that, inasmuch as the appellant in this case was given the right of appeal in express terms, he might rely upon that general provision, and if it fell within

any of the limitations of the statute, and the respondent claimed that the appeal was not well taken, the burden of showing that fact rested upon him. In *Kaplan v. New York Biscuit Co.* 151 N. Y. 171, this court held that the burden of showing that a judgment of affirmance in an action for a personal injury was by a unanimous decision of the appellate division rested upon the party asserting it, and that, in order to deprive the court of appeals of the power to review the case under § 191 of the Code of Civil Procedure, the fact should be established by the party claiming it, either by the judgment or by a certificate of the court appearing in the record. It is true that question arose under the amendment of § 191, made in 1896, and not under subdivision 4. Nor were the provisions of § 1337 passed upon in determining that case. Still, we think the principle of that decision is applicable here; that we should hold now, as we held there, that the judgment is reviewable in this court, unless the affirmance was by the unanimous decision of the appellate division; and that the burden of showing that fact rests upon the party asserting it, and should appear in the record. We think that § 1337 does not in any way interfere with the principle of the decision in that case, but that the provision that, where the justices of the appellate division from which the appeal is taken are divided as to whether there is evidence supporting or tending to sustain a finding or verdict not directed by the court, a question for review is presented, is but another way of stating what is contained in subdivision 4 of § 191 of the Code, and in no way relieves the party who asserts it from the burden of establishing the unanimity of the decision. Hence, we are of the opinion that the contention of the respondent in this respect cannot be sustained, and that the question whether there is evidence supporting or tending to sustain the verdict may be reviewed upon this appeal. We think we should so hold, especially when we consider the fact that the appellate division refused to certify that its decision was unanimous, and has so plainly indicated a desire and purpose to have the questions involved decided by this court. Manifestly, the amendment to § 191 passed in 1896, limiting appeals in cases of personal injury, has no application, because the judgment appealed from was rendered March 12, 1896, before the passage of that act. *Croveno v. Atlantic Ave. R. Co.* 150 N. Y. 225.

As bearing upon the contention of the respondent as to the appealability of this case, it may be properly added that here every point or question upon which the appellant relies was raised by an exception to the denial of a proper motion to direct a verdict for the defendant, by an exception to the charge of the court, to its refusal to charge as requested, or by some other ruling upon the trial to which a proper exception was taken. Therefore, in its further examination, all the questions of law which are presented by the appellant must be regarded as properly before us for consideration.

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The primary question which lies at the foundation of the respondent's right of recovery is whether there was sufficient evidence to justify the court in refusing to direct a verdict for the defendant, or in submitting to the jury the question of the defendant's liability. This general question seems to depend for its solution upon several subordinate ones. These questions are: First. Was there sufficient evidence that the defendant performed any act or was guilty of any omission which rendered him even technically liable to the plaintiff? Second. If so, was the proof sufficient to justify the court in submitting to the jury the question of substantial damages. And, third, were the alleged acts of the defendant the proximate cause of the plaintiff's injury? A consideration of these questions in the order in which they are stated seems necessary to a proper determination of the original one.

1. That, at the time of the occurrence which was the subject of this action, the defendant suddenly and unexpectedly found himself confronted by a terrible and impending danger, which would naturally, if not necessarily, terrify and appall the most intrepid, is shown by the undisputed evidence. If, with this awful peril before him, he maintained any great degree of self-control, it indicated a strength of nerve and personal bravery quite rare, indeed. That the duties and responsibilities of a person confronted with such a danger are different and unlike those which follow his actions in performing the ordinary duties of life under other conditions is a well-established principle of law. The rule applicable to such a condition is stated in *Moak's Underhill on Torts* (p. 14), as follows: "The law presumes that an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily. It is there said that this rule seems to be founded upon the maxim that self-preservation is the first law of nature, and that, where it is a question whether one of two men shall suffer, each is justified in doing the best he can for himself. This principle of pressing danger, and an act or omission in its presence, was discussed in the *Squib Case* (*Scott v. Shepherd*, 2 W. Bl. 894), and in the *Wine Case* (*Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 260). That principle has been many times affirmed by the decisions of the courts of this state as well as others. Indeed, the trial court recognized this doctrine in its charge, but submitted to the jury the question whether the act of the defendant was involuntary, and induced by impending danger, adding that the testimony of the defendant that everything he did, he did intentionally, was sufficient to justify it in finding that he voluntarily moved the plaintiff in the manner claimed by him. But, when we examine the defendant's evidence we find he testified that he never had his hands on the person of the plaintiff in any manner whatever until after the explosion, and that he did not at any time have any intent or design of interposing the body of the plaintiff between himself and the stranger. The testimony of the defendant, to which the

court referred in its charge, seems to have been substantially that he was as cool and collected as any man could well be with the intimation made by Norcross; that he exercised his best judgment under the circumstances; that he did nothing unconsciously, spontaneously, or without deliberation, but did the best he could, and exercised the best judgment he could, to avoid any accident; that he did nothing by impulse; and that what he did he did as deliberately as he could under the circumstances. This evidence seems to fall short of justifying the statement of the court that he testified he was in perfect possession of his senses, recollected everything that was done, and that everything he did there was intentional, as it very materially differed from and essentially modified the statement contained in the charge. The statement of the court as to the admission of the defendant can hardly be said to be a fair deduction from his evidence. Nor is the justice of eliminating from its statement to the jury the fact that the admissions he did make were accompanied by evidence that he in no way touched the plaintiff, and had no intention of doing so, quite appreciated. If the court desired to use the admission of the defendant as evidence of such a fact, the evidence should have been correctly stated, and the attention of the jury called to the entire admission, and not to a part alone. Here, as where there is an introduction of any other conversation or admission by a party, the remainder which tends to qualify or explain the portion relied upon should be considered as a part of it, especially where it is a qualification of the other, and rebuts or destroys the inference to be drawn or the use to be made of the portion put in evidence or relied upon. While it is doubtless true that a portion of the testimony of a witness may be credited to a jury, and a portion discredited, still, when a part of the evidence is modified or qualified by another portion, it is far from clear that one portion may be rejected, and the other given credit. But, be that as it may, it is extremely difficult, upon a consideration of all the evidence in the record relating to this subject, to see how a jury was justified in finding that the defendant voluntarily interfered with the person of the plaintiff.

The only witness whose testimony is relied upon to show any interference with the plaintiff by the defendant was the plaintiff himself. He not only had all the interest of a party to the action, but the undisputed proof disclosed that his memory had been very seriously impaired, and to such an extent that he was unable to remember from day to day or hour to hour what he was told to do, and that this condition of his mind continued from the time of the accident until the last trial of this case. Upon the other hand, the defendant clearly and positively denied that he interfered with his person at all, and he is corroborated by at least one unbiased witness upon that subject, and in many of the details of the transaction by the witnesses Osborne, James, and Hummel, whose evidence was in direct conflict with that given by the plaintiff. Moreover,

when the testimony of the plaintiff is read, it is quite manifest that it does not clearly disclose any movement of his body, if any occurred, that was not his own voluntary act, uncontrolled by any force upon the part of the defendant. There were also certain physical facts established by the proof, and uncontradicted, which tend to show that the plaintiff's theory that he was in front of the defendant was impossible. If, as is claimed by the plaintiff, the defendant employed his body as a shield, and it was between him and the place of the explosion, it is quite difficult to comprehend how the missiles which were found in the defendant's body in front, and near the median line could have reached him, especially if, as is the plaintiff's theory, the explosion followed two straight lines. Nor can we quite understand how, if, when the explosion occurred, the plaintiff's left hand was in both of the defendant's, resting upon the defendant's left thigh, the defendant's hands could have been so seriously injured and wounded by flying substances as the proof shows they were. With this condition of the proof, it is quite difficult to say that there was any such evidence of the defendant's intentional interference with the plaintiff as would entitle him to recover in this action, or have the question submitted to a jury. The evidence which appears to be in conflict with the position of the defendant, to say the most, is nothing more than a mere scintilla, and was met, not only by the positive testimony of disinterested witnesses, but also by well-known and recognized physical facts, about which there is no conflict. Therefore it would seem that the plaintiff was not entitled to even nominal damages, and that it was the duty of the court to have directed a verdict for the defendant.

2. Was there sufficient evidence to justify the court in submitting to the jury the question of substantial damages? If, for the purpose of this discussion, it be admitted that the plaintiff was moved as testified to by him, and that the act of the defendant was voluntary and intentional, yet we are unable to find any sufficient evidence in the record to justify the court in submitting to the jury the question whether the plaintiff's injuries arose in consequence of the act of the defendant in moving him. The court in effect charged the jury that if the defendant interfered with the body of the plaintiff, and his injuries were inflicted because of a change in his position, then it might allow the plaintiff for the injuries which he sustained in consequence of the wounds which it found were caused by his change of position; and the jury was permitted to pass upon the question whether he sustained more or different injuries than he would if he had not been moved. The contention of the respondent is that the evidence disclosed that there were two straight and well-defined lines of explosion, and that it tended to show that the plaintiff was drawn into one of them. But we find no proof either that the lines of explosion claimed did not include the place where the plaintiff originally stood, or that a wave of explosion did not

pass over that portion of the room, which was as forceful and destructive as that passing in any other direction.

The evidence relied upon by the plaintiff to show that there were these two defined lines was the location of the wounds upon the body of the plaintiff and the testimony of the witness Reeves. When we examine the evidence bearing upon the character and location of the plaintiff's wounds, it falls far short of establishing any well-defined line of explosion. Nor do we think any such inference can be drawn from the situation as described by the plaintiff and other witnesses. And, when we examine the evidence of the witness Reeves, we find in it nothing to sustain the contention of the plaintiff. He testified that there were thirty-five to forty joists or beams, which ran north and south, which were injured, and that the breakage ran through the joists in a northeasterly direction. He was then asked whether there were fractures in any other direction in the beams or joists from that hole, to which he answered that he had put in new beams on the Rector street side of the partition leading into Mr. Sage's office; that he put in about twenty-eight or thirty new ones; and that the balance were not so badly fractured, so that they were reinforced without taking the old beams out. We find nothing in this evidence to indicate that there was any distinct line of explosion in any other direction than northeasterly. That the splitting of the joists, if it occurred, would naturally extend lengthwise of them, there can be little doubt. But the plaintiff's claim that there is anything in this evidence which shows a second distinct line of explosion within which he was drawn, even if he was moved as he testified, surely cannot be sustained. Consequently, there was nothing but the merest conjecture upon which the jury could base any finding that he was more severely injured by being moved. That he was bound to establish some wrongful act upon the part of the defendant, and that that act was the cause of the injury for which he sought to recover, there can be no doubt. Nor is there any doubt that the burden of proof upon both of those questions rested upon him. The courts below have so held, but, notwithstanding their views of the law, they have submitted those questions to the jury.

In *Baulec v. New York & H. R. Co.* 59 N. Y. 356, 366, 17 Am. Rep. 325, Judge Allen said: "It is not enough to authorize the submission of a question, as one of fact, to a jury, that there is some evidence. A scintilla of evidence, or a mere surmise, . . . would not justify the judge in leaving the case to the jury." And in that case it was held that as "at most, the jury could only conjecture that the defendant might have been wanting in the care and caution proper to be exercised in such a case, . . . the case was properly withheld from the jury." In *Pollock v. Pollock*, 71 N. Y. 137, 153, Folger, J., said: "Insufficient evidence is, in the eye of the law, no evidence;" and then cited the language of Maule, J., in *Jewell v. Parr*, 13 C. B. 916, where he said: "When 44 L. R. A.

we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established." Again, in *Bond v. Smith*, 113 N. Y. 378, 385, Earl, J., stated the duties of the court in considering such a question as follows: "We have no right to guess that he was free from fault. It was incumbent upon the plaintiff to show it by a preponderance of evidence. She furnished the jury with nothing from which they could infer the freedom of the intestate from fault. She simply furnished them food for speculation, and that will not do for the basis of a verdict. The law demands proof, and not mere surmises. The authorities are ample to show in such a case the plaintiff should have been nonsuited,"—citing *Cordell v. New York C. & H. R. R. Co.* 75 N. Y. 330; *Dubois v. Kingston*, 102 N. Y. 219. In *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 98, 15 L. R. A. 194, which was an action for negligence by which it was claimed that the plaintiff's intestate lost his life, Judge Finch, in delivering the opinion of the court, said: "But the respondent and the general term insist that some other theory may be adopted, and, in order to do so, enter upon the realm of conjecture, and ask that a jury, in the utter absence of proof, may be allowed to guess that there was some negligence on the part of the defendant which might have tended to cause the death of the intestate. . . . What is claimed is that there is proof that some of the operatives fled to this escape, but could not use it on account of the blinds; and we are asked to permit a jury to guess or conjecture that Pauley was one of these, without any proof of the fact, and in the face of the evidence that no one who did use it or approach it saw him at all," and then adds: "We think the duty imposed by the statute was fairly and fully performed, and, even if it was not, that we are not to resort to conjecture, and permit a verdict to be based on bare possibilities alone. . . . A mere conjecture, built upon a bare possibility, will not suffice to transfer the money or property of one man to the possession and profit of another. As we said in *Bond v. Smith*, 113 N. Y. 378, food for speculation will not serve as the basis of a verdict." Again, in discussing this question in *Linkauf v. Lombard*, 137 N. Y. 417, 425, 20 L. R. A. 48, Judge Gray, writing for this court, declared: "To permit a jury to speculate and surmise upon a question of responsibility is to withdraw from the litigant a safeguard intended for the protection of his rights. He is entitled to the judgment of the court upon questions to which the character of the evidence admits of but one answer. No such possibilities of a failure of justice should be countenanced,"—and then quotes from the opinion of Justice Clifford in *Schuyllkill & D. Improv. Co. v. Munson*, 14 Wall. 442, 20 L. ed. 867, the following: "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof un-

less the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that, if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, nor whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed; and adds: "The rule should be regarded as settled, under all the authorities, as well by the decisions of the courts of this state as by those of England, that, where there is no evidence upon an issue before the jury, or the weight of the evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct the verdict as the case may require." In the case of *Hemmens v. Nelson*, 138 N. Y. 517, 20 L. R. A. 440, this court again asserted the doctrine so clearly stated in the *Linkauf Case*. In discussing that question in *Hudson v. Rome, W. & O. R. Co.* 145 N. Y. 408, 412, Haight, J., said: "But where the evidence, which appears to be in conflict, is nothing more than a mere scintilla, or where it is met by well-known and recognized scientific facts, about which there is no conflict, this court will still exercise jurisdiction to review and reverse if justice requires"—citing *People, Coyle, v. Martin*, 142 N. Y. 352, *Hemmens v. Nelson*, 138 N. Y. 517, 20 L. R. A. 440, and *Linkauf v. Lombard*, 137 N. Y. 417, 425, 20 L. R. A. 48. See also *Cadwell v. Arnheim*, 152 N. Y. 182; *Hannigan v. Lehigh & H. River R. Co.* 157 N. Y. 244.

Thus, we see that this court has, in a long line of decisions, uniformly held that, to justify the submission to the jury of any issue, there must be sufficient proof to sustain the claim of the party upon whom the onus rests, and that mere conjecture, surmise, speculation, bare possibility, or a mere scintilla of evidence is not enough. When the principle of these cases is applied, it becomes obvious that the court was not justified in submitting to the jury the question whether the plaintiff suffered any substantial damages by reason of his having been moved in the manner claimed, even though it should find that the defendant moved him. No one can read the evidence in the record as to the nature, power, and effect of the explosion, and the results that followed, without reaching the conclusion that it utterly failed to show that the plaintiff was more seriously injured than he would have been if he had remained where he claims to have first stood. Indeed, we can find no proof sufficient to justify the conclusion that there was any place of safety, or comparative safety, in any of the rooms occupied by the defendant. The explosion swept with terrific force over them all, destroying or seriously injuring every person or thing with which it came in contact. Under such circumstances, to permit

a jury to guess or conjecture that the plaintiff's injuries were more serious or severe than they would have been if his position had not been changed, is, in the language of Judge Gray, "to withdraw from the litigant a safeguard intended for the protection of his rights." We think the court erred in not directing a verdict for the defendant, at least so far as substantial damages were concerned, upon the ground that there was no sufficient proof that the plaintiff sustained any injury in consequence of the alleged conduct of the defendant.

3. We are next brought to the consideration of the question whether the alleged acts of the defendant were the proximate cause of the plaintiff's injury. As has already been suggested, there is no allegation or proof which tends to show that the defendant was in any way responsible for the explosion, or that there was any connection whatever between the defendant's acts and the explosion which followed. Indeed, the counsel for the respondent frankly states in his brief: "It has never been claimed, either in the pleadings or in the argument, that Mr. Sage's liability can be predicated on the fact that any act of his caused or invited a catastrophe, or that he used defiant or injudicious language." Nor does the respondent claim that the defendant was in any way responsible, directly or indirectly, for the explosion itself. Therefore, if the explosion was the proximate cause of the plaintiff's injury, the defendant cannot be held responsible. While the learned general term stated that there was no question of proximate cause in this case, we are unable to indorse that statement, or to understand the basis for it. The doctrine of proximate cause is a fundamental rule of the law of damages, to the effect that damages are to be allowed in general only for the proximate consequences of the wrong, although sometimes the question of proximate cause is applied to consequential damages for the breach of a contract, as well as to damages for negligence or tort. That the principle of proximate cause is applicable in an action for tort seems to be established by all the authorities, and we find none holding a contrary doctrine. While there may be a degree of uncertainty as to the plain signification of the term "proximate cause," or rather in its application to various cases, still in this case there can be no question as to what was the proximate and immediate cause of the plaintiff's injury. Bishop, in his work on Noncontract Law (§ 42), in discussing this question, after remarking as to the uncertainty with which the term "proximate cause" may have been used and applied, and after defining the terms "proximate" and "remote" cause, says: "If, after the cause in question has been in operation, some independent force comes in, and produces an injury not its natural or probable effect, the author of the cause is not responsible." In *Shearman & Redfield, Neg. § 26*, it is said: "The breach of duty upon which an action is brought must be not only the cause, but the proximate cause, of the damage to the plaintiff. . . . The proximate

cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred." Wharton thus discusses the question: "Supposing that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter [as to which I am not contractually bound]. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured." Wharton, Neg. § 134.

As has been said in an anonymous article in the American Law Review: "A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible; it is one which can be used as a term by which a proposition can be demonstrated, that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between which and the effect is uncertain, vague, or indeterminate. It does not contain in itself the element of necessity between it and its effect. Marsilius Ficinus says: "From the remote cause the effect does not necessarily follow. This idea of necessity—the necessary connection between the cause and the effect—is the prime distinction between a proximate and a remote cause. The proximate cause being given, the effect must follow. But, although the existence of the remote cause is necessary for the existence of the effect (for, unless there has been a remote cause, there can be no effect), still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow." 4 Am. L. Rev. pp. 201, 205. In *Marble v. Worcester*, 4 Gray, 396, Chief Justice Shaw said: "On account of the difficulty in unraveling a combination of causes, and of tracing each result, as a matter of fact, to its true, real, and efficient cause, the law has adopted the rule before stated, of regarding the proximate, and not the remote, cause of the occurrence, which is the subject of inquiry." In *Crain v. Petrie*, 6 Hill, 522, 524, 41 Am. Dec. 765, the question of special damages was involved, and, consequently, the question of proximate cause; that is, whether the special damages were the legal and natural consequences of the wrong complained of. Nelson, Ch. J., 44 L. R. A.

in that case said: "To maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained of." In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. ed. 250, it was said: "The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." In *Hofnagle v. New York C. & H. R. R. Co.* 55 N. Y. 612, it was held that the act of one person cannot be said to be the proximate cause of an injury when the act of another person has intervened and directly inflicted it.

Another principle of proximate cause which seems to be well established is that an accident or injury cannot be attributed to a cause unless, without its operation, it would not have happened. *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492; *Ayres v. Hammondsport*, 130 N. Y. 665; *Grant v. Pennsylvania & N. Y. Canal & R. Co.* 133 N. Y. 657. When damages claimed in an action are occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which he is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause, and the jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the act of the defendant is not sufficient. *Searles v. Manhattan R. Co.* 101 N. Y. 662. The plaintiff must fail if the evidence does not show that the injury was the result of some cause for which the defendant is responsible; and, where the proof is by circumstances, the circumstances themselves must be shown, and not left to rest in conjecture; and, when shown, it must appear that the inference sought is the only one which can fairly and reasonably be drawn from the facts. *Ruppert v. Brooklyn Heights R. Co.* 154 N. Y. 94.

When we apply to the undisputed facts of this case these rules relating to proximate cause, it becomes quite manifest that the judgment in this action cannot be upheld. All the injuries which the plaintiff sustained were caused directly and immediately by the act of Norcross in exploding the dynamite. That was clearly the proximate, and we think the only, cause of the plaintiff's injury. It was the only efficient cause, as, confessedly, without the explosion the plaintiff would not have been injured; and under no circumstances can it be properly said that the act of the defendant in changing the plaintiff's position a few inches to the left of where he previously stood caused the explosion or occasioned the catastrophe. Surely, that was not an act without which the explosion would not have occurred, nor can it be held to have been the proximate cause of the explosion. The most that can be said is that it produced a situation which existed at the moment it occurred. Obviously, the explosion

would have occurred if the defendant had moved the plaintiff in an opposite direction, or had not moved him at all. Nothing which the defendant did could have produced the injury sustained by the plaintiff without another independent intervening cause. There was no evidence in the case of any unnecessary relation of cause and effect between the act of which the plaintiff complains and the explosion which caused the injury. Under the proof, we think the question whether the defendant's act was the proximate cause of the plaintiff's injury was a question of law, and that the court erred in not directing a verdict on that ground.

Another ground upon which the defendant seeks to sustain this appeal is that the court erred in refusing to strike out, and in not instructing the jury to disregard, the evidence of George Baillard, to which we have already referred. While it is possible that there was sufficient proof to justify the jury in finding that the "elderly stranger" to whom the witness referred was the defendant, still, it is obvious that the evidence admitted was so general and inconclusive as to render it only conjectural as to whether it related to the subject at issue at all. It was that the witness understood this "elderly stranger" to say something about being protected,—about a protection he had had from the explosion. As to the nature of the protection, its extent, whether by physical matter or an overruling Providence, or a protection of some other character, nothing was attempted to be shown. It seems to us quite clear that no such uncertain statement should have been submitted to a jury or permitted to become the basis of a verdict involving the rights of parties. It was too uncertain, indefinite, and vague to be permitted to serve any such purpose.

Our attention is also called to various rulings of the trial court which arose upon the cross-examination of the defendant. His cross-examination was a severe and rigorous one. While, perhaps, it was not objectionable upon that ground alone, we think the plaintiff's counsel was permitted to go beyond the legitimate bounds of a proper cross-examination in several respects, to which we cannot call attention in detail within the proper limits of this opinion. Counsel was permitted to prove upon the cross-examination of the defendant, or at least to attempt to do so, that the defendant had not shown proper sympathy or paid proper attention to the plaintiff after he was injured. How that evidence could properly bear upon the legal rights of the parties it is extremely difficult to understand. The only purpose it could serve was to prejudice and excite the passions of the jury.

Again, we find rulings which were made on the cross-examination of the defendant in regard to the article in the New York World, which we think cannot be upheld.

It has ever been the theory of our government, and a cardinal principle of our jurisprudence, that the rich and poor stand alike in courts of justice, and that neither the wealth of the one nor the poverty of the other shall be permitted to affect the admin-

istration of the law. Evidence of the wealth of a party is never admissible, directly or otherwise, unless in those exceptional cases, where position or wealth is necessarily involved in determining the damages sustained. As to this general proposition there can be no doubt, and no authorities need be cited. Notwithstanding this well-established principle, the plaintiff was permitted to show by the defendant, upon his cross-examination, substantially, or at least to a great extent, the amount of property possessed by him, its character, and his business. He was permitted to show the number of railroads the defendant operated, the banks in which he was a director, that he dealt in stocks, that he loaned money, and other details of his affairs. We think much of this evidence was improperly received, and that the exceptions were valid. But we deem it both unnecessary and unwise to extend this necessarily protracted opinion by either discussing those questions or considering the various other exceptions contained in the record which present questions that are serious, if not fatal, to this judgment. No good purpose could be served by such a course, as the judgment must be reversed upon the more substantial grounds which have been fully discussed.

It is impossible to consider the plaintiff's injuries without a feeling of profound sympathy. His misfortune was a severe one, but sympathy, although one of the noblest sentiments of our nature, which brings its reward to both the subject and actor, has no proper place in the administration of the law. It is properly based upon moral or charitable considerations alone, and neither courts nor juries are justified in yielding to its influence in the discharge of their important and responsible duties. If permitted to make it the basis of transferring the property of one party to another, great injustice would be done, the foundation of the law disturbed, and anarchy result. Hence, every proper consideration requires us to disregard our sympathy, and decide the questions of law presented according to the well-established rules governing them.

The judgments of the Appellate Division and of the Trial Court should be reversed, and a new trial granted, with costs to abide the event.

All concur, except **Parker, Ch. J.**, not voting, and **Gray, J.**, absent.

UNION INSURANCE COMPANY of Philadelphia *et al.*, *Respts.*,

v.

CENTRAL TRUST COMPANY of New York *et al.*, *Appts.*

(157 N. Y. 633.)

1. A deposit made to secure payment

NOTE.—As to revocation of award, see also *People, Union Ins. Co., v. Nash* (N. Y.) 2 L. R. A. 180, and *note*; and *Guild v. Atchison, T. & S. F. R. Co.* (Kan.) 33 L. R. A. 77.

For binding effect of agreement to arbitrate, see also *Kinney v. Baltimore & O. Employee's Assn.* (W. Va.) 15 L. R. A. 142.

of an award under an arbitration agreement becomes forfeited upon revocation of the arbitration and subject to payment of the damages allowed by statute against one who revokes an arbitration, although made by a third person who committed no breach of the agreement and had no control over the one who did so.

2. That an arbitration agreement provides that the costs shall not become part of the amount for which a deposit made to secure payment of the award shall be liable, will not, in case the deposit is forfeited by revocation of the award, prevent the deposit from becoming chargeable with the costs which the statute casts upon the one who revokes an arbitration.

(January 10, 1899.)

A PPEAL by defendants from a judgment of a General Term of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in favor of plaintiffs in an action brought to enforce a lien on a deposit made to secure compliance with the award to be made upon a submission to arbitration. *Affirmed.*

Statement by Vann, J.:

On the 10th of October, 1885, a quadripartite agreement was entered into between the Union Insurance Company, party of the first part, the Insurance Company of the state of Pennsylvania, party of the second part, the Continental Insurance Company, party of the third part, and Lorenz Dimick, party of the fourth part, which, after reciting the existence of certain controversies between the parties of the first and second parts and the parties of the third and fourth parts, arising chiefly out of the dealings of said Dimick and his firm in the affairs of said parties, and that certain civil actions were pending between the parties of the first and second parts, respectively, and the parties of the third and fourth parts, provided that all the matters embraced in said actions, as well as all other actions or causes of action pending or existing between the parties of the first and second parts, or either of them, and the party of the third part and the party of the fourth part, individually or as a member of the firm of Crosby & Dimick, or either of them, and all claims of the party of the third part and the party of the fourth part, respectively, against the party of the first part and the party of the second part, respectively, and of the party of the third part against the party of the fourth part, and *vice versa*, should be submitted to three arbitrators, two of whom were named and authorized to appoint the third. It was further agreed that a judgment might be entered in the supreme court upon the award, and that such award should be final and without right of review by appeal or otherwise by either of the parties, who expressly waived "any and all right under the statute or otherwise to apply to the court in any manner or on any ground to stay or prevent entry of an order of confirmation or entry of judgment upon such award." It was further provided that neither of the parties should "have the right to revoke the submis-

sion to arbitrators herein provided for, or this agreement, or any part thereof, and such arbitration shall not terminate or be revoked by the dissolution or death of either or any of the parties hereto." In case of the dissolution or death of any party, proceedings under the submission were to continue against the personal representatives or successors, "and any revocation by operation of law, and any and all right of revocation given or permitted by statute or otherwise," was "expressly waived and abandoned." The compensation and expenses of the arbitrators and the expenses of witnesses were to be borne equally by the parties, each paying one fourth thereof, "the same to be advanced from time to time in the proportion above mentioned, upon the certificate of the arbitrators or a majority of them; the expenses of witnesses to be adjusted and allowed by the arbitrators or a majority of them." The compensation of the arbitrators was fixed at \$50 a day, but was not to exceed the sum of \$5,000 to each, in the aggregate. No part of the costs or expenses of the arbitration or of the witnesses was to be recovered by the prevailing party or parties, or entered in the judgment, and any limitation by statute as to the rate of such compensation was waived. The agreement further provided "that, at or before the execution and delivery of this agreement, there shall be deposited with the Central Trust Company of the city of New York security satisfactory to the parties of the first and second parts, to the amount of \$50,000, to secure the payment, performance, and satisfaction of any award in favor of said parties of the first and second parts, or either of them, that may be made against said Dimick in said arbitration by said arbitrators, or a majority of them; payment and satisfaction of said award, up to said amount of \$50,000, to be paid upon demand by said Central Trust Company of New York, in accordance with any judgment that may be entered upon such award." The parties of the first and second parts each agreed to discontinue all civil actions pending in their favor, or in favor of either of them, against the parties of the third and fourth parts, or either of them; and it was provided that, if said actions were not thus discontinued, said security might at once be withdrawn. This agreement was executed in quadruplicate, by said Dimick, October 10, 1885; by the Union and State Companies, respectively, October 14, 1885; and by the Continental, October 17, 1885. On the 13th of October, 1885, the Continental Company deposited with the Central Trust Company a certificate for 500 shares of Harlem Railroad stock, which was accepted instead of the \$50,000 in cash required by the agreement, and the trust company gave a receipt to the plaintiffs, dated on the same day, stating that said shares were to be held in accordance with the terms of said agreement. On the 18th of October, 1887, after the arbitration had proceeded for about two years, and before it was closed or the matters in controversy submitted to the arbitrators for decision, said Dimick revoked the arbitration, and such revocation was subsequently adjudged to be in all respects

valid and conclusive. *People, Union Ins. Co., v. Nash*, 111 N. Y. 310, 2 L. R. A. 180.

The complaint, after setting forth the foregoing facts in substance, further alleged that the plaintiffs had incurred costs and expenses, and had suffered damages, in preparing for the arbitration, and in conducting the proceedings thereunder to the time of the revocation, exceeding the sum of \$50,000. The wife and executrix of said Dimick was made a party to the action, he having died on the 29th of February, 1888. The Central Trust Company was not a party to the agreement, but is a party to the action. The relief demanded was that the said stock should be sold, the rights and interests of the parties therein determined, and that the plaintiffs be paid, out of the proceeds, "the amount of their costs, expenses, and damages incurred and suffered as aforesaid." Upon the trial of the action at special term, it was held that the plaintiffs' costs, expenses, and damages incurred in preparing for the arbitration should be allowed to the amount of \$40,178.45; that the shares of stock in question were subject to a charge in favor of the plaintiffs for the payment to them of that sum; that the Central Trust Company should sell the stock, and out of the proceeds pay said sum to the plaintiffs, with leave to the Continental Company, or its assigns, at any time prior to the sale, to redeem said stock by the payment of said sum to the plaintiffs. The judgment entered accordingly was affirmed on appeal to the general term, and the defendants came here.

Messrs. William Allen Butler, John Notman, and William C. Trull, for appellants:

The rights of the several parties were fixed by the agreement of submission, dated October 10, 1885, and must be determined according to its terms.

By the plain terms of the agreement of submission the required deposit of \$50,000 was solely to secure payment, performance, and satisfaction of any award in favor of the plaintiffs against Dimick in accordance with any judgment that might be entered upon such award. The words employed convey a definite meaning which must be regarded as the one intended.

Schoonmaker v. Hoyt, 148 N. Y. 425.

Fairly construed according to its plain meaning and the rule of interpretation applicable to the agreement, an award by the arbitrators in favor of the plaintiffs against Dimick, and a judgment entered thereon, were conditions precedent to any claim by the plaintiffs to the fund deposited with the Central Trust Company under the terms of the agreement.

Moore v. Cockcroft, 4 Duer, 133.

The case at bar falls within the rule that where, under a contract, payment is to be made upon certain specified conditions, those conditions must be shown to have been performed or to exist as prescribed by the contract, before any claim or cause of action arises for the recovery of the stipulated payment.

Delaware & H. Canal Co. v. Pennsylvania 44 L. R. A.

Coal Co. 50 N. Y. 250; *Sweet v. Morrison*, 116 N. Y. 19; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49.

While the revocation by Dimick was a breach of the agreement of submission, it entailed no other consequence than to give the aggrieved parties an action for damages against him, and gave plaintiffs no claim on the fund deposited to secure payment of any award and judgment.

People, Union Ins. Co., v. Nash, 111 N. Y. 310, 2 L. R. A. 180.

Though a party may be able to revoke the authority of the arbitrator he cannot revoke the instrument of submission, but will be liable to an action on such instrument. The remedy for revocation of a submission when not under seal is by action for breach of agreement.

Brown v. Tanner, McClell. & Y. 464; *Warburton v. Storr*, 6 Dowl. & R. 213.

When the submission is by deed, the revoking party is liable to an action on the covenant.

Milne v. Gratwic, 7 East, 608; *King v. Joseph*, 5 Taunt. 452.

The deposit clause of the agreement of submission is not affected by § 2384 of the Code of Civil Procedure.

The contention that whether the deposit clause in the agreement of submission is treated as a part of that instrument, or as collateral thereto, or by way of suretyship, it is, in any case, the equivalent of a bond to perform the award, the penalty of which was recoverable in case of revocation of the submission, is untenable.

A contract for suretyship must be strictly construed, and most favorably to the surety, since such a contract is always *strictissimi juris*.

Ward v. Stahl, 81 N. Y. 406; *National Mechanics' Bkg. Asso. v. Conkling*, 90 N. Y. 116, 43 Am. Rep. 146; *People v. Backus*, 117 N. Y. 196; *John Hancock Mut. L. Ins. Co. v. Lowenberg*, 120 N. Y. 44.

Messrs. William V. Rowe, Hood Gilpin, and Treadwell Cleveland, for respondents:

The security deposited is, in law, and so far as the liability in question is concerned, the precise equivalent of a personal surety, or of the penalty of a bond, to secure performance of the award.

Where a submission to arbitration has been revoked, the penalty is forfeited; but the plaintiff can recover no more than the actual damages sustained.

Allen v. Watson, 16 Johns. 205.

The revisers proceeded so to declare the law in the Revised Statutes.

Revisers' Notes, 3 Rev. Stat. 2d ed. 775; 5 Edmonds, Stat. 763.

So far as concerns the right of action, the present Code is merely affirmative and declaratory.

A cause of action or a remedy may be justified and maintained, at a party's option, either under the Code or under the principles of the common law, which the Code thus declares, the amount of the recovery being alone limited by the negative words of the statute.

Sutherland, Stat. Constr. § 202; Sedgw. Stat. & Const. L. pp. 29, 30; 2 Coke, Inst. p. 230; Bishop, Written Laws, § 164.

The revocation of a submission, by making performance of an award impossible, creates a cause of action against the party revoking, for breach of contract, and forfeits all penalties conditioned to secure performance of the award.

Hochster v. De La Tour, 2 El. & Bl. 678; *Roper v. Johnson*, L. R. 8 C. P. 167; *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460; *Synge v. Synge* [1894] 1 Q. B. 466; *Frost v. Knight*, L. R. 7 Exch. 111; *Warburton v. Etorr*, 4 Barn. & C. 103; *Brown v. Leavitt*, 26 Me. 257; *Frost v. Clarkson*, 7 Cow. 24; *Crist v. Armour*, 34 Barb. 378; *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Robinson v. Frank*, 107 N. Y. 655; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Nichols v. Soranton Steel Co.* 137 N. Y. 471.

Revocation of a submission is a breach of an agreement to "abide by" and "perform an award," and forfeits the penalty of the submission bond.

Vynior's Case, 8 Coke, 816; 1 Comyns' Dig. p. 663; 1 Rolle, Abr. p. 331; 1 Dane, Abr. p. 277, chap. 13, art. 14, § 15; Russell, Arbitration & Award, 109; *Brown v. Leavitt*, 26 Me. 257; *Frets v. Frets*, 1 Cow. 341; *Warburton v. Storr*, 4 Barn. & C. 103; *Brown v. Tanner*, McClel. & Y. 467; *Baldway v. Ouston*, 1 Vent. 71; Caldwell, Arbitration, p. 32; Morse, Arbitration & Award, p. 239; *Quimby v. Melryn*, 28 N. H. 250; *Aspinwall v. Tousey*, 2 Tyler (Vt.) 342; *Craftsbury v. Hill*, 28 Vt. 764; *Allen v. Watson*, 16 Johns. 209; *Gray v. Crosby*, 18 Johns. 219.

This breach of contract by Dimick, the principal, necessarily, at the same time, bound and made liable his surety and all securities deposited to secure performance.

Colebrooke, Collateral Securities, 2d ed. § 111, p. 202.

Where a person pledges or mortgages his own property to secure the debt of another, the property so pledged or mortgaged occupies the position of a surety.

24 Am. & Eng. Enc. Law, p. 722; 1 Brandt, Suretyship & Guaranty, 2d ed. §§ 34, 35; *Ferris v. Spooner*, 102 N. Y. 10.

Vann, J., delivered the opinion of the court:

Each party to the submission agreement, which was quadripartite in character, was bound only to the extent of the promises, express or implied, made by them respectively. *Berry Harvester Co. v. Walter A. Wood Mowing & R. Mach. Co.* 152 N. Y. 540. While the contract required a deposit to be made in behalf of Dimick for the benefit of the plaintiffs, it did not expressly provide by whom it was to be made. The object of the deposit was to secure performance of any award against Dimick in favor of the plaintiffs, or either of them. It was not to secure performance by him of the arbitration agreement, generally, but simply of that part relating to payment of the award. Every other covenant, by whomsoever made, stood without security. The deposit bore no relation to any part of the agreement other than 44 L. R. A.

that pertaining to satisfaction of the award by Dimick, except the provision that, unless the pending actions were discontinued, the security might be withdrawn. In making the deposit, therefore, the Continental Company pledged its property for the purpose of securing payment by Dimick of any award made against him in favor of the Union and State Companies, which thereupon became the pledgees, the Continental Company the pledgeor, and the trust company the holder of the pledge, in trust for the purpose aforesaid. As the object of the pledge was to secure performance of a certain act by Dimick, while the subject of the pledge belonged to the Continental Company, the latter became entitled to the rights of a surety with reference to the thing pledged, although it was not subject to the affirmative obligations of a surety; for it made no promise to perform for another, but simply deposited its property to secure fulfilment of a specified act by another upon a contingency named for the benefit of third parties. It was not a surety in the sense of one who had engaged to answer for the debt, default, or miscarriage of another, and it was not sued as a surety. No affirmative relief was asked, and no personal claim made against it. This action, therefore, is, in effect, a proceeding *in rem* to foreclose the pledge by securing a sale of the thing pledged for the benefit of the plaintiffs.

It is claimed by the defendants that the submission agreement furnishes no basis for such an action, because the condition of the pledge has not been broken. As the condition of the pledge was the payment of the award, they insist that an actual award was a condition precedent to the right to foreclose; and as there has been no award, and none can now be made, the agreement to pledge is *functus officio*, and the trust company is under an implied obligation to return the thing pledged to its owner. On the other hand, the plaintiffs claim that this action can be maintained under § 2384 of the Code of Civil Procedure, "in connection with well-settled common-law principles, as one based either upon the terms of the submission as a whole," or that part thereof which provided for the deposit. The section referred to is found in that part of the Code relating to arbitrations, and is as follows: "Liability of Party Who Revokes. Where a party expressly revokes a submission, made either as prescribed in this title or otherwise, any other party to the submission may maintain an action against him, and also against his sureties, if any, upon the submission, or any instrument collateral thereto, in which action the plaintiff may recover all the costs and other expenses, and all the damages, which he has incurred in preparing for the arbitration, and in conducting the proceedings to the time of the revocation. Either of the arbitrators may recover, in an action against the revoking party, his reasonable fees and expenses." Section 2384. The next section provides that "a sum, penalty, forfeiture, or damages, shall not be recovered for a revocation of a submission to arbitration, made either as prescribed in this title

or otherwise, except as prescribed in the last section; notwithstanding any stipulated damages, penalty, or forfeiture, expressed in the submission, or in any instrument collateral thereto." The 1st section quoted authorizes an action against one who revokes a submission, and also against his sureties upon the submission, as well as against his sureties upon any instrument collateral to the submission, to recover all the costs and other expenses, and all the damages incurred in preparing for and conducting the proceedings to the time of revocation; and the 2d section limits the recovery to such costs, expenses, and damages, even if the submission provides for a more extended recovery. These sections reproduce, in substance, similar provisions contained in the Revised Statutes. 2 Rev. Stat. pp. 544, 545, §§ 23, 25. Before the passage of the Revised Statutes, it had been held in *Allen v. Watson*, 16 Johns. 205, that a party could revoke the powers conferred by an arbitration bond, but the consequence was a forfeiture of the penalty, although the other party could recover no more than the actual damages sustained. The revisers, in their notes, refer to this case, and state that it was deemed useful to finally settle "the much agitated question respecting stipulated damages which are frequently inserted in submissions to avoid the general rule of law concerning penalties"; otherwise, a resort to equity would have been necessary to obtain relief from the forfeiture. We think this is what the Code accomplishes, and that it does not place a limitation upon the right of action at common law to recover damages for revocation, except by limiting the amount of the recovery. It creates no new or exclusive remedy, but confirms an old one, and fixes the measure of damages. The act of revocation by Dimick made the condition upon which the deposit was made impossible of performance. He thereupon became liable, not for an award, but for the expenses incurred in the effort to secure an award, which were rendered of no effect by his act. He voluntarily disabled himself from performing his covenant to pay the award, and that, according to the authorities, was in itself a breach of the covenant.

The earliest authority upon the subject is the celebrated *Vynior's Case*, 8 Coke, 81b, where the condition of an arbitration bond was "to stand to, abide by, and perform an award." The only breach by the defendant was a revocation of the authority of the arbitrators. It was resolved that the defendant, by his own act, "made the condition of the bond impossible . . . to be performed, and, by consequence, his bond is become single, and without the benefit or help of any condition, because he has disabled himself to perform the condition." This has been followed for many years, and has been made the basis of a multitude of judgments, both in England and in this country. Thus, in *Warburton v. Storr*, 4 Barn. & C. 103, 108, the defendant agreed, under a penalty, to perform an award, and, by revocation of the submission, prevented himself from doing so; but he was held to have broken his agreement, and thereby to have subjected himself 44 L. R. A.

to an action for the penalty. *Vynior's Case* is the only one cited, and the court, relying upon it, said "that if a party covenants to do a certain thing, and afterwards, by his own act, disables himself from performing it, that is in itself a breach of the covenant." So, in *Brown v. Tanner*, McClell. & Y. 464, it was held that the defendant's revocation of his submission, whereby the performance of his agreement to stand to, obey, abide, and fulfil the award, became impossible, was a breach of that agreement. In *Craftsbury v. Hill*, 28 Vt. 763, the condition of an arbitration bond was that, if the principle should "well and truly observe, perform, and keep the award and determination which the said arbitrators shall make and publish," the obligation was to be void. The only breach of the condition alleged was a revocation of the submission; and it was held on demurrer that it was a breach of the submission, because the principal had deprived the arbitrators of the power to make an award, as well as himself of the power to observe, perform, and keep it, and that this, in legal effect, was a forfeiture of the bond, and a breach of the condition, rendering both principal and surety liable. Where a defendant, by preventing one of three referees from acting with the others, defeated any valid award, it was held to be a sufficient breach of an agreement for having and perfecting a reference. *Quimby v. Melvin*, 28 N. H. 250. In *Brown v. Leavitt*, 26 Me. 251, 256, the court said: "It is a general rule that any party or any one of a party may revoke his submission before award made, giving notice thereof to the arbitrators. But then he forfeits his obligation he has given to abide the award. 1 Dane, Abr. 277, chap. 13, art. 14, § 16; *Milne v. Gratia*, 7 East, 608; *King v. Joseph*, 5 Taunt. 452. . . . It is a well-established rule of law that if a party covenants to do a certain thing, and afterwards, by his own act, disables himself from doing it, or declines doing it when he was able, it is a breach of the covenant."—citing *Vynior's Case* and *Warburton v. Storr*. The principle is not confined to agreements of submission, but is applied to contracts generally; and the rule is universally recognized that where a party, before the time of performance arrives, puts it out of his power to keep his contract, there is an immediate right of action for a breach of that contract by anticipation. *Hochster v. De La Tour*, 2 El. & Bl. 678; *Frost v. Knight*, L. R. 7 Exch. 11, 114; *Synge v. Synge* [1894] 1 Q. B. 466; *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460; *Orist v. Armour*, 34 Barb. 378; *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Howard v. Daly*, 61 N. Y. 362, 375, 19 Am. Rep. 285; *Ferris v. Spooner*, 102 N. Y. 10; *Nichols v. Scranton Steel Co.* 137 N. Y. 471, 485. In *Frete v. Frete*, 1 Cow. 335, 341, a bond in fact given for the performance of an award contained no condition. One of the parties revoked, and it was declared that, "by the revocation, the penalty of the bond is forfeited, and an action lies upon it to recover the damages actually sustained." In Russell, Arbitration & Awards, p. 100, it is laid down that "every submission contains some words ex-

pressing or implying the agreement of the parties to abide by and perform the award of the arbitrator. Preventing the award being made is a breach of this agreement as much as not performing it when made, and, when the submission is by bond, is a forfeiture of the penalty."

In the case before us the pledge was made to secure performance by Dimick, and, as he failed to perform by depriving himself of the power to perform, he broke the condition upon which the pledge was made. As was said in *Ferris v. Spooner*, 102 N. Y. 10, where property was pledged for performance by a party, "when therefore he repudiated the further performance of the contract, the plaintiff was . . . set at liberty to enforce his securities." If he had furnished sureties for the performance of an award, they would have been liable, because revocation prevented an award, and constituted a breach of the promise to perform. This would be true even if the promise of the sureties was limited to payment of the award, and did not apply to any other part of the agreement of submission, because, by voluntarily preventing an award, he virtually broke the agreement to perform the award. He was "bound to stand to the award," and when he made an award impossible and disabled himself from performing the condition of the pledge, he thereby broke the condition itself. We have a pledge as security in place of personal sureties. The pledge is to secure performance of an award when made. If there had been no revocation, and an award had been made to the plaintiffs of \$50,000, they could have proceeded against the subject of the pledge by an action to foreclose their lien thereon, to procure a sale thereof, and payment of their claim out of the proceeds. We have not that exact case before us, which would be an actual breach of the condition on which the pledge was made; but we have its equivalent, in an implied breach of that condition, because Dimick intentionally rendered an award impossible. If the 500 shares of stock could have been sold by proceedings *in rem* founded on an actual award, the same proceedings may be maintained, founded upon that which the authorities regard as having the same effect as a breach of the condition to pay the award. The pledge was to be forfeited upon the making of an award and nonpayment thereof, and the pledge was forfeited by the act of Dimick in making an award impossible. Here the statute comes in and limits the amount of the damages to those caused by the fruitless effort to prepare and try the case, and submit it to the arbitrators, so that they could pass upon it. We base our decision upon the agreement and the pledge made to secure performance of a part thereof, and the legal consequences resulting upon common-law principles from the disabling act of Dimick in preventing an award, giving effect to the statute as both sanctioning the action and limiting the amount of the recovery.

It is, however, insisted that none of the damages claimed are recoverable in any event, because the agreement of submission pre-

vents it. The items of damages were fixed as to amount by the stipulation of the parties, with no admission, however, of any liability; and the defendants duly objected to the allowance of anything for fees of arbitrators, counsel, or witnesses. This position is founded upon the provision of the agreement of submission that the fees of arbitrators and witnesses should be paid equally by the parties, and that no part of the costs of the arbitration or the expenses of witnesses should be recovered by the prevailing party, or entered in the judgment. This simply settled what should follow an award when made, and what should be included in the judgment to be entered upon the award. It does not deal with the consequences of revocation, nor prevent the recovery of expenses incurred in preparing for the arbitration, as allowed by statute, where an award is prevented by revocation. That wrongful act was not under contemplation by the parties when they provided that costs and expenses should not become part of the judgment, for they had all promised not to revoke in another part of the agreement. They were dealing simply with the award and the judgment to be rendered thereon; and, as was said by one of the learned justices below, "the stipulation relied upon was predicated upon a continuance and completed execution of the agreement. It was, in effect, inconsistent with revocation, and was therefore destroyed by revocation." In covenanting against the recovery of expenses, they proceeded upon the theory that the arbitration agreement was to be performed, and not revoked; and the argument already made as to breach of the condition through a deliberate act rendering performance impossible applies with equal force to the position taken by the appellants with reference to the allowance of these items of damage. The contingency of a revocation was not provided for by the agreement to submit, but the statute and the common law take care of it. The cause of action arises through the submission, the deposit, the act of revocation, and the statute. By revoking, Dimick prevented an award, and thereby broke his promise to pay the award. At common law he would have been liable for all damages resulting from the breach, including the amount for which an award should have been made; but the statute intervening prevents that result, and allows a recovery for the expenses of the arbitration, which it substitutes in the place of all other damages. By preventing an award, Dimick became liable for the expenses incurred in trying the case before the arbitrators, because the pledge made to secure the award was forfeited by the act that made an award impossible. By violating his agreement, he not only made himself liable, but also the property pledged for him. Instead of allowing an absolute forfeiture, however, the statute, which was a part of the contract, and is referred to therein, measures the damages as already mentioned. If an award had been made, the expenses could not have been recovered; but the plaintiffs would have had the value thereof in an award settling all

controversies between the parties. The agreement would then have been enforced as made, and any award in favor of the plaintiffs would have been paid out of the proceeds of the pledge, not exceeding the limit named. They incurred legitimate expenses in the effort to secure an award, but that effort was defeated by the act of a party, which, as the courts hold, was equivalent to a violation of the condition upon which the pledge was made. The pledge secured the award, and Dimick prevented an award, and thereby forfeited the pledge, and made it, under the statute, liable for the expenses incurred in trying to get an award, the same as it would have been liable for an award if made. Nonpayment of an award would have violated the condition of the pledge no more than a revocation of the submission violated it, and the pledge is liable for all the direct and natural consequences of such violation except as limited by the statute.

Without further discussion, we think *the judgment appealed from should be affirmed, with costs.*

All concur except **O'Brien, J.**, dissenting, and **Parker, Ch. J.**, not sitting.

O'Brien, J., dissenting:

The judgment in this case appropriates over \$50,000 of the defendant's property to satisfy a claim for damages by the plaintiff for the breach of an agreement by one Dimick to arbitrate certain claims, and to pay the award. It is admitted that the breach was the act of Dimick, and of him alone, in revoking the submission after the arbitration had been pending over two years. The plaintiff's claim is for the damages sustained by the payment of its expenses of the arbitration while pending, and nothing else. It is not claimed, or even suggested, that the defendant had any power or right to prevent Dimick from revoking the agreement, or that it had any control over his action in that regard. The decision contains another curious, but perfectly correct, admission, and that is that the defendant committed no breach of the agreement itself, and was not the surety of the one who did.

With these facts conceded at the outset, the mind is at once directed to the inquiry whether the judgment has any support in law, reason, or authority, since, if it has not, the decree which transfers such a large portion of the defendant's property to the plaintiff is but an arbitrary edict, and little better than downright confiscation. The discussion of the case up to this time has produced at least five judicial opinions by as many different judges, including the opinion of this court now before us. After reading them all, it is not too much to say that no two of them are at entire agreement upon any clear or definite theory of liability. This discord in opinion and theory is, perhaps, not at all surprising. While the case would be a very simple one, involving no difficulties whatever, if we would only aim to give effect to the plain and clear language of the agreement which the parties made, it becomes very difficult when we attempt to make a new one, based, not upon the lan-

guage which the parties employed, but upon reasoning processes so subtle and artificial that it is difficult for an ordinary mind to grasp them, and quite impossible for any two persons to state them in the same way. Courts are often astute to defeat fraud and prevent injustice, and sometimes go to the extreme limits of construction in order to compel a party to pay a claim which is just and which, in the forum of conscience, he ought to pay. With all that, there need be no complaint, but it would require a very acute mind to discover in the plaintiff's claim any such element of equity as would warrant any court in putting a strain upon law, or upon the language in which the parties have carefully expressed their mutual rights and obligations.

It appears upon the face of the agreement that, when it was executed, various suits at law, in behalf of the plaintiff, were pending in the courts, and, by the terms of the submission, these suits were to be discontinued, and the claims involved therein submitted to the arbitrators. When the arbitration was revoked by the sole act of Dimick, the right to prosecute these actions was revived, and it was admitted at the argument that they had been prosecuted, and the claims recovered, as we may assume, with the costs of prosecution. So that, while the plaintiff lost the right to have an award of arbitrators, it gained the right to have the judgment of the courts upon the claims. In legal theory, it could have lost nothing but the expenses of the arbitration, and, in fact, it may have gained more than that in the recovery. But nothing can more clearly reveal the want of any strong equity in the plaintiff's claim than the agreement itself. There the plaintiff expressly stipulates that it will pay all of its own expenses, and that the defendant shall not, under any circumstances, be liable for them, since they could not be made any part of the award, or included in it. The only purpose of this action is to collect from the defendant's property the very expenses which, by the agreement, the plaintiff was to bear itself, and which it is conceded the defendant never agreed to pay. The parties virtually stipulated with each other that, in the event of revocation by one, none of the others not participating in that act should claim damages as against each other, but should pay their own costs. They bound each other so far as words could do it, not to revoke and in any event, to pay their own costs. The railroad stock, which is the subject of this action, was pledged for one purpose, and one only, and that was to pay an award when made, and the expenses which the plaintiff now seeks to have declared a lien upon it could never by any possibility become a part of that award. It is conceded that, had the plaintiff recovered an award of \$10,000, it could not collect a dollar of the expenses of the arbitration from this property, although as large then as now, for the plain reason that it was not pledged for any such purpose. The plaintiff has no more right to appropriate this property for its expenses now than it would then, unless we

are to hold that the agreement under which the pledge was made means one thing in case an award was made and another thing in case it was not made, or one thing before revocation and something else after. We must hold that, although the purpose of the pledge was clearly expressed in writing, yet that purpose was subject to be enlarged and changed without the consent of the owner, by future events and contingencies not within the contemplation of the parties when the writing was made, and in which the owner was in no manner concerned. The plaintiff is seeking to do, now that there is no award, what it could not do if one had been made, thus profiting by the act of Dimick, since by that act it must have acquired some right against the defendant's property that it did not possess before; or, to state it in another way, the plaintiff's claim is and must be that by the act of Dimick it gained the right to demand costs against this property and the defendant lost the right to object to that demand. When the judgment in this case is carefully analyzed, it virtually declares that, during the two years that the arbitration was pending, the defendant's property was pledged to pay an award, since that is the only purpose expressed in the writing; but at the end of that period, by Dimick's act of revocation, it became pledged for something else,—that is to say, for the plaintiff's costs and expenses, although the plaintiff agreed to bear them itself, and the defendant who owned the pledge never gave its consent in any form that it should be devoted to any such purpose. When the terms of the instrument under which the defendant's property was deposited are placed in contrast with the provisions of the judgment, it will be difficult to resist the conclusion that the court must have made for the parties a new and different contract.

(1) By the terms of the instrument, there was no obligation upon the defendant to deposit its property in pledge for any purpose, but it volunteered to make the deposit for a particular purpose only, and that was to pay any award made against Dimick. There was no award made, and it is said that, at the end of two years, Dimick rendered it impossible by revoking the arbitration. The decision therefore is that the defendant's property pledged to pay an award which was never made is forfeited to the plaintiff for another purpose, namely, to pay the costs of the arbitration. But it is said that the plaintiff lost the right to procure an award, and should be compensated for that loss. The answer to that is that the loss of a prospective award is not, since the statute, a legitimate element in the estimation of damages for the breach of an agreement to arbitrate.

(2) Not only were these costs by the terms of the agreement to be excluded from the award, but the plaintiff stipulated to bear and pay them itself. The courts have discharged the plaintiff from the obligation of the agreement to pay its own costs, by ordering them to be paid out of the defendant's property.

(3) The most favorable award that the
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plaintiff could possibly obtain against Dimick was secured by the pledge of the 500 shares of stock, and nothing more. The claims that it had against Dimick, when reduced to the form of an award, were to be paid out of that as far as it would go; but, under the judgment, the plaintiff, without any award whatever, gets the stock or its proceeds, not to pay the claims, but to pay the costs of an arbitration, frustrated by the act of Dimick; and it has the judgment upon the claims and costs besides, or the money collected under them.

No review of this case would be fair or just that does not take careful note of the grounds upon which these conclusions rest, and the reasoning process from which they have been deduced. It has been often said, upon high authority, that law was the perfection of human reason, and that whatever is contrary to reason is generally contrary to law. If, therefore, it can be shown by any fair reasoning process that the defendant's property has been forfeited to the plaintiff by the act or default of Dimick, then any hasty views or impressions concerning the propositions above stated must at once disappear. It is claimed that these conclusions all rest upon sound reason and well-established legal principles.

1. In the first place, it is said that the judgment rests well upon a statute; that is upon § 2384 of the Code. The section provides that, where a party revokes an arbitration, any other party to the submission may maintain an action against him and his sureties upon the agreement, or any instrument collateral thereto, to recover the costs and damages incurred in preparing for the arbitration. Inasmuch as the defendant owning the stock in question did not revoke the arbitration, and was not surety for Dimick, who did, and since there is not any instrument collateral to the agreement of submission, it is very difficult to perceive how this statute can have any application to the case. Dimick was the only one who revoked, but he gave no sureties or collateral instrument. The plaintiff can doubtless proceed against him for breach of his agreement, and then the statute measures the damages. It is admitted on all sides that Dimick or his estate is liable. But the fact that one who broke his agreement is liable in damages for the breach does not prove that another, who kept the agreement to the letter, is also liable, or that his property can be taken to pay the costs preceding the revocation. It is quite impossible to say from the various opinions in the case how much or how little of a part this statute is supposed to play in the case. None of the learned judges who have discussed the questions have been willing to rest the case upon it, while it is equally apparent that none of them have felt entirely safe without it. But it is quite obvious that it can give the plaintiff no aid if the stock was not pledged for the damages arising from Dimick's revocation, then the statute cannot and does not enlarge or change the purpose of the pledge. On the other hand, if it was pledged for that purpose by the agreement, then the plaintiff

needs no statute, but may stand upon the instrument itself. The theory of the action is that the plaintiff has a lien upon the stock. Of course, it never got any lien except such as arises from the terms of the agreement. That agreement might confer a lien for an award, without costs, when made, but what the plaintiff now claims is a lien for costs alone, without any award whatever. Whatever lien the plaintiff had, attached immediately on the execution and delivery of the agreement; and the purpose of the pledge was specific and definite. The lien now claimed is one arising from the act of Dimick, committed two years afterwards, and which clearly was not within the contemplation of any of the parties. When and how a lien to pay an award without any costs was transmuted into a lien to pay costs alone, as damages for the act of Dimick, is a problem in the case that no one has yet attempted to solve. This is the critical point in the discussion, and, when we reach it, mere assertion and generalization will not answer. We must stop to inquire just how the plaintiff has acquired a lien on this property for the damages arising from Dimick's act in defeating an arbitration that might or might not result in an award against him. No man can get a lien upon or an interest in his neighbor's property except through some contract. Did the defendant ever agree to charge this property with the costs incurred by plaintiff in the arbitration? If so, how and in what language? When the defendant bound the plaintiff to bear these very costs, and excluded them entirely as an element in the controversy, did it intend or contemplate any such thing as making them a charge on its own property? When the plaintiff covenanted to bear these costs itself, did it then intend or contemplate any such thing as their collection out of the defendant's property? These questions admit of but one answer, and that must prove that agreement of the defendant, express or implied, a lien upon the property that the parties never created or intended to create. Obviously, the plaintiff got no lien from any agreement of the defendant, express or implied. It got no lien through Dimick, since he never owned it, or had it in his possession or under his control, or even made the deposit. There is no legal privity or connection of any kind between Dimick's act of revocation and the defendant, or the property in question; and so it seems to me that the plaintiff has no lien at all.

The only object of a bond in a submission to arbitration is to secure someone against damages arising from the exercise of the right of revocation, and there can now be no damages but the costs and expenses incurred. In all such cases there is, of course, a privity of contract between the sureties and the injured party. But here we have a wholly different situation, since the parties intended to make, and supposed they had made an irrevocable agreement of submission, in which damages would be impossible; and then they proceeded to covenant with each other that the costs—now the only element that can constitute damages—should be elim-

inated from the submission entirely, and each party should bear and pay its own costs, and, consequently, that neither party should claim damages of the other in case they were mistaken as to the irrevocable character of the contract. It is plain, therefore, that the lien for costs and expenses as damages which the plaintiff claims upon the property in question does not and cannot arise from any contract between the parties. It is a purely artificial development by reasoning processes upon principles derived from what are supposed to be analogous cases, but which really have no application to the special and peculiar agreement under which the defendant pledged its property. When it made the pledge for a single specified purpose, the appropriation of it to another and different purpose is a plain violation of its legal rights.

2. In the opinion of my learned associate now before us it is stated that the plaintiff's stipulation to pay its own costs did not contemplate a revocation of the arbitration, and, since that unexpected event happened, the stipulation is no longer in the plaintiff's way. That is a very candid admission that the stock in question is to be devoted by the judgment to a purpose not within the intention or contemplation of the parties when they made the agreement. It reveals the fundamental error that has pervaded the case from the beginning. It is perfectly true that the contingency of revocation was not contemplated. The parties were pledged and became bound hand and foot against the happening of any such event, and not until this court held that the binding was of no avail did anyone attempt to give to the agreement a construction which the parties never intended it should have. The construction now is that the defendant pledged its property to secure a claim by the plaintiff for damages arising from the act of Dimick in revoking the arbitration,—something that was not within their intention at all. Of course, if that act was not within the contemplation of the plaintiff when it agreed to pay its own costs, neither was it within the contemplation of the defendant when it pledged its property to pay the award. While the intention of the parties was, of course, the same, yet the decision in the case discharges the plaintiff from its stipulation as to costs, which now mean damages, and at the same time changes and enlarges that of the defendant in regard to the purpose for which it made the pledge, by imposing upon its property a lien for a purpose never contemplated.

3. But it is said that the defendant's stock is surety for Dimick, and can be proceeded against *in rem* upon breach by him of his agreement. There is nothing whatever in the agreement or the transaction that creates any relations of suretyship for Dimick. There is no legal privity between them, such as must always exist between principal and surety. The defendant voluntarily deposited the stock for a specific purpose, and that was to pay an award when made. When that event happened, the plaintiff could appropriate the stock for that purpose,

without any regard to Dimick, and as upon an original promise and pledge by the defendant. But, even if the property stood as surety to pay the award when made, then, surely, the owner may protect it by invoking all the rules of law applicable to the liability of sureties. The surety cannot be held beyond the very terms of his agreement, since it is *strictissimi juris*. His undertaking cannot be enlarged by construction or implication, and, when it is sought to make him answer for the act or default of another, it is sufficient for him to show that he has not expressly agreed to be answerable for such act or default. *Page v. Krekey*, 137 N. Y. 307, 21 L. R. A. 409; *Smith v. Molleson*, 148 N. Y. 241. The plaintiff can point to no agreement by which this property was to be devoted to the payment of damages arising from Dimick's act, but, on the contrary, it is conceded that no such purpose was in contemplation when the agreement was executed.

4. It is asserted that very ancient and some modern authorities sustain this judgment. The oldest case relied on is *Vynior's Case*, 8 Coke, 81b. That contains all that any of the others contains, and is quite as favorable to the plaintiff as any of them. All that case or any of the others holds that has any application to this case is that an agreement to perform an award is broken by a revocation of the arbitration. No one, I think, will question that. The cases are good authority against Dimick, the only one who committed the breach. They were all actions against the party who violated his covenant, and not, as in this case, against an innocent party that has kept it. None of them support or give any color of support to the proposition upon which this judgment rests. The right to maintain an action against the party guilty of a breach of his agreement to arbitrate, and who has rendered an award impossible by revocation, or against his sureties in legal privity with

him, upon written instruments, should not be confounded with the right which the plaintiff asserts in this case. That is nothing less than the right to maintain an action against one who has never revoked, and who is not a surety, or in legal privity with another who did revoke, to appropriate property voluntarily pledged only to pay an award, under an agreement which excludes the right to damages in the form of costs, and casts that burden on the party who complains. Moreover, the decisions in these cases are supported by an element of right and justice conspicuously absent in this case, since it is plain that in all of them the plaintiff lost by the revocation the right to collect his costs by including them in the award, whereas in this case the plaintiff lost no such right, it having been excluded by its own agreement. It is perfectly plain that, in the special and peculiar agreement now under consideration, the parties undertook to protect the property in question from all consequences of a revocation by Dimick. It was for that purpose and to that end that the pledge was restricted to the payment of an award when made; that all parties renounced the right to revoke; that the right to costs, and consequently to damages, was expressly excluded, and the burden of paying its own costs imposed upon the plaintiff. There is but one ground, as it seems to me, upon which this judgment can rest, and that is that it was legally impossible for the defendant, by any stipulation, or by the use of any form of words, to confine the pledge to the payment of an award, or to protect the property from a claim of damages arising out of the conduct of Dimick. If that proposition is not refuted by the bare statement of it, then it is quite evident that no reasoning, however persuasive, would avail. I think that the plaintiff has not shown that it has any claim or lien upon the property which is the subject of this action, and that the judgment should be reversed.

OREGON SUPREME COURT.

Andrew KERSHAW, Appt.,

v.

William M. LADD et al., Respts.

(.....Or.....)

1. A bank receiving for collection a check the proceeds of which it is to retain to the drawer's credit will be regarded as receiving sufficient compensation for its services to make it liable for negligence in attempting to make the collection.
2. A custom of banks to send a check direct to the drawee bank for collection and return is not unreasonable, at least as applied to the collection of a plain, undorsed check.

NOTE.—On the question of sending checks directly to a drawee bank, see note to *Anderson v. Rodgers* (Kan.) 27 L. R. A. 248.

It will be seen that the present case lays 44 L. R. A.

3. Usages are presumed to be reasonable, and the person attacking them has the burden of showing their unreasonableness.

4. The retention by a collecting bank of a dishonored check, until after the drawee bank has closed, does not create any liability to the sender, unless he was injured thereby.

(March 20, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County in favor of defendants in an action brought to recover damages for alleged negligence on the part of defendants in the attempted collection of a bank check. *Affirmed*.

much stress on the existence of a banking custom. As to such customs in general, see note to *Shaw v. Jacobs* (Iowa) 21 L. R. A. 440.

Statement by Wolverton, Ch. J.:

This is an action to recover damages for alleged negligence on the part of the defendants in the attempted collection of a check drawn by plaintiff in their favor upon the United States Banking Company. The defendants are bankers, located at Portland, and the United States Banking Company at Sheridan, 50 miles distant. The plaintiff resided at Grande Ronde, some 15 miles from Sheridan, and, on January 16, 1894, forwarded from there the check in question to the defendants at Portland, with instructions to collect, and remit a certificate of deposit for one year, bearing interest. The check was received by defendants January 16, and forwarded to the United States Banking Company the same day, for collection and return. The banking company received it the next day, and on the 23d drew a draft for the amount thereof upon the Merchants' National Bank, its correspondent at Portland, and on the 24th sent the same through the mail to defendants, who received it the same day, and presented it for payment, which was refused. They immediately notified plaintiff by letter at Grand Ronde, and asked for instructions. Plaintiff replied on the 27th, saying: "I am at a loss as to the best course to pursue in the matter. I understand that there has been no attachment issued on the bank at Sheridan. The prevailing opinion is that they will be able to make satisfactory arrangements as soon as J. M. Baldrige, the vice president of the U. S. Banking Co., returns from the East, which will take place in a few days. However, if you think best, hold the check; if not, return to me. Any advice you can give me will be greatly appreciated." Defendants received the reply on the 30th, and on the 31st sent a letter to plaintiff, of which the following is a copy: "We have written to the Bank of Sheridan that they return the check for \$1,500 which we sent to them for collection for you, as requested. They replied to us that the sheriff was in charge at present, and they could not do it. We herewith hand you the check for \$1,500 which they remitted for your check, and we think that you had better take it, as it is the evidence of your claim against the bank, and go to Sheridan, and see what you can do in the matter of getting your money." Plaintiff had \$1,717.71 on deposit with the banking company at the date of his check. The company closed its doors January 24. It had cash on hand, January 20, \$2,726.25; January 21, \$2,891.50; January 23, \$2,973.71; January 24, \$2,265.42. On February 3 plaintiff assigned his said deposit to Paul Fundinan for the purpose of collection, who thereupon sued the company, attached its property, and subsequently procured judgment; but, owing to prior attachments, the first of which was issued January 20, was unable to secure anything thereon. At the time the defendant forwarded the check to the banking company, it was in good standing, and had theretofore paid all demands promptly. The defendants had no correspondent at Sheridan, but a reliable express agency and another bank were located there, the latter of which

had been doing business but a short time, and defendants did not appear to have had any knowledge of its existence. The defense is set up that the check in question was a plain, ordinary one, without indorsements; that defendants undertook and agreed to collect the same in accordance with the custom and ordinary method by which such collections were made by banks; that there was no agreement by which they were to receive compensation for their services; that, in attempting to collect said check, they pursued the general and universal custom obtaining among banks in Portland and elsewhere, and that by reason thereof they were not chargeable with negligence. As a second defense, it is alleged that plaintiff ratified defendants' said acts by accepting the draft remitted to them by the banking company, and retaining the same for more than a year without making any claim for negligence against the defendants. Trial was had before the court, and, judgment being for defendants, plaintiff appeals.

Messrs. O. H. Irvine and O. P. Coshaw, for appellant:

Negligence *per se* can never be excused or avoided by custom.

16 Am. & Eng. Enc. Law, p. 462; 27 Am. & Eng. Enc. Law, p. 899; Morse, Banks & Banking, 3d ed. 19, § 9, note 9, 417, 425, 426, §§ 223, 231; *Davis v. First Nat. Bank*, 118 Cal. 600; *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321, and notes.

It was negligence *per se* to forward direct to the drawee and paying bank for collection the check delivered to respondents by appellant for collection.

1 Morse, Banks & Banking, 3d ed. § 236a, p. 432; 1 Dan. Neg. Inst. 4th ed. § 328a; *Drovers' Nat. Bank v. Anglo-American Pkg. & P. Co.* 117 Ill. 100, 57 Am. Rep. 555; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *Morris v. Eufaula Nat. Bank*, 106 Ala. 383; *First Nat. Bank v. City Nat. Bank*, 12 Tex. Civ. App. 318; *Baile v. Augusta Sav. Bank*, 95 Ga. 277; *German Nat. Bank v. Burns*, 12 Colo. 539; *Anderson v. Rodgers*, 53 Kan. 542, 27 L. R. A. 248; *First Nat. Bank v. Fourth Nat. Bank*, 16 U. S. App. 1, 56 Fed. Rep. 967, 6 C. C. A. 183; *Farwell v. Curtis*, 7 Biss. 160; *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105.

It was negligence *per se* for respondents to deliver to the drawee and paying bank the check of appellant, without receiving in return legal tender currency of the United States.

1 Morse, Banks & Banking, 3d ed. § 236c, p. 433, § 247, p. 443; *Pepperday v. Citizens' Nat. Bank*, 183 Pa. 519, 39 L. R. A. 529; 1 Dan. Neg. Inst. 4th ed. § 328a; *Whitney v. Esson*, 99 Mass. 311, 96 Am. Dec. 762; *Baile v. Augusta Sav. Bank*, 95 Ga. 277; 27 Am. & Eng. Enc. Law, p. 768.

The fact that respondents were to receive no special remuneration for collecting the check delivered to them for collection by appellant makes no difference as to their liability for loss sustained by reason of their negligence.

Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 288, 28 L. ed. 726; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588; 1 Morse, Banks & Banking, 3d ed. § 215, p. 410; *Bailie v. Augusta Sav. Bank*, 95 Ga. 277.

Banks should be held to as strict diligence and prudent management in collecting as other collecting agencies. Other collecting agencies are held responsible for the conduct of all subagents or persons through whom the actual collection is made.

Bailie v. Augusta Sav. Bank, 95 Ga. 277; *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276, 28 L. ed. 722; *First Nat. Bank v. Craig*, 3 Kan. App. 166; *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289; *St. Nicholas Bank v. States Nat. Bank*, 128 N. Y. 26, 13 L. R. A. 241; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588; *Tyson v. State Bank*, 6 Blackf. 225, 38 Am. Dec. 139; *American Exp. Co. v. Haire*, 21 Ind. 4, 83 Am. Dec. 334; *Reeves v. State Bank*, 8 Ohio St. 465; *Simpson v. Waldby*, 63 Mich. 439; *Streissguth v. National German American Bank*, 43 Minn. 50, 7 L. R. A. 363; *Power v. First Nat. Bank*, 6 Mont. 255; *Mackersy v. Ramsay*, 9 Clark & F. 818, 3 English Ruling Cases, 762; *Anderson v. Alton Nat. Bank*, 59 Ill. App. 587.

Where the facts are undisputed the question as to whether such facts constitute negligence is a question of law, and not of fact. 16 Am. & Eng. Enc. Law, p. 466, and cases cited in note 1, p. 467.

The admission of the testimony, including the stipulations, relied upon by respondents to prove custom or usage, was error.

27 Am. & Eng. Enc. Law, p. 899.

It is only the manner of the doing, not the doing itself, that can be the proper subject of a custom.

Morse, Banks & Banking, 3d ed. 417; *Borup v. Nininger*, 5 Minn. 523.

Messrs. Williams, Wood, & Linthicum for respondents.

Wolverton, Ch. J., delivered the opinion of the court:

The question presented is whether the defendants were guilty of negligence in forwarding plaintiff's check direct to the bank upon which it was drawn, and in retaining the evidence of indebtedness until it had closed its doors, and its property had been seized on attachment. The instrument was a plain, ordinary check, undorsed, save as it may have been indorsed by the defendants prior to forwarding the same for collection and return. The engagement of the defendants was to collect and issue a certificate of deposit for the proceeds drawing interest. There is some controversy as to whether the defendants were to receive any compensation for their services; but the very terms in pursuance of which they undertook the collection would indicate that they were to receive a sufficient consideration to make them liable for neglect of the duty enjoined upon them. They were to have the use of the money when collected, upon which they intended to pay the plaintiff interest; and this, we are impelled to believe, would be sufficient within itself. Generally speaking, it can make no 44 L. R. A.

difference that a bank makes no direct charge for its services in collecting, for the benefits which it ordinarily and usually derives from the use of the funds while in its custody, and the advantages which may arise from business associations, are held and deemed to be adequate consideration for the undertaking, and quite sufficient upon which to predicate the liability incident thereto. *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *Bailie v. Augusta Sav. Bank*, 95 Ga. 277; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588. In the ordinary transaction, where a check is given and received in payment of a demand, the discharge of the demand is conditional upon the honor and payment of the check when presented in due course of established business usages, sanctioned by law; but failure to present it to the drawee for payment within the proper time, depending upon the proximity of the payee and the drawee to each other, and to notify the drawer of nonpayment, will discharge the drawer's obligation to the extent of his loss by reason of such failure of demand and notice. *Gregg v. George*, 16 Kan. 546. It is said: "A check differs from a bill of exchange in several particulars. It has no days of grace, and requires no acceptance distinct from prompt payment. The drawer of the check is not a surety, but the principal debtor, as much as the maker of a promissory note. It is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for, and the drawer has no reason to complain of delay, unless upon the intermediate failure of his banker. By unreasonable delay in such a case the holder takes the risk of the failure of the person or bank on which the check is drawn." 3 Kent, Com. *104, note 2. The rule governing the time in which the holder is required to present a check in order to relieve himself from the risk of loss by failure of the drawee may be stated as follows: If the payee receives the check in the same place where the bank upon which it is drawn is located, he may present it for payment at any time before the close of banking hours of the next secular day, and thereby maintain recourse against the drawer. If, in the meantime, the bank fails, the loss will be the drawer's. The term "secular day" is used to exclude Sunday, so that, if the check be received on Saturday, the payee would have all day on the Monday following in which to make the presentment. But, if the payee receives the check in a place distant from where the drawee bank is situated, it will be sufficient for him to forward it by post, on the next secular day after it is received, to some person at the latter place, who is required to present it for payment on or before the next day after it reaches him in due course of mail. These periods, depending upon the location of the respective participants, which are declared requisite for the convenient presentment of a check, are deemed to have been contemplated by the drawer, and he remains absolutely liable, although the bank might fail pending their duration. 2 Dan. Neg.

Inst. §§ 1590, 1592; *Farwell v. Curtis*, 7 Biss. 160. The allowance of a day, however, in which to present the check, does not extend to an agent who receives one for the debt of his principal. Such a check must be presented with due and proper diligence; otherwise, it is at the peril of the party retaining it and postponing presentment as between him and the person in whose interest he is acting. *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690; *Anderson v. Gill*, 7 Md. 312, 25 L. R. A. 200. The rules in respect to giving notice of the dishonor of a check are the same as where a bill of exchange or promissory note is involved. If anything, however, by reason of the intention of the parties to the instrument that the payment should be immediate, and of the fact that it is drawn against a deposit, they are to be more strictly construed and enforced in the case of a check than of other commercial paper. *Tiedeman, Com. Paper*, § 442.

The parties agree that at the time the transactions which form the basis of the present controversy took place there existed and still exists, among the banks in Portland and elsewhere, a general and well-established custom to the effect that when a bank or banker receives for collection an ordinary check against an account with a bank or banker situated and doing business at a place distant from where the collecting bank is located, and such collecting bank has no agent or correspondent at the place of the drawee bank, for the collecting bank to forward the check by mail directly to the drawee bank for collection and returns; and that it is also a general and well-established custom among such banks that when a bank or banker receives, from a bank or person at a distance, for collection and return, an ordinary check, drawn upon a bank situated at the same place as the receiving bank, for the receiving bank not to remit cash to the bank or person from whom such check was received, but to remit the check or draft, either of the receiving or drawee bank, drawn upon the correspondent of such receiving or drawee bank at the place from which the original check was forwarded, payable to the order of the bank or person from whom the check was received. It is contended by the respondents that these customs are to be considered the law of the case, and are controlling for the government of the parties; and that, measured thereby, the defendants are not chargeable with negligence for pursuing the course adopted in endeavoring to make the collection. Upon the other hand, it is maintained that the custom of sending the check direct to the drawee bank for collection and return is unreasonable, and therefore that it does not and cannot obtain the sanction of law, and that such an act is negligence *per se*, which will, in case loss should occur by reason thereof, render the collecting bank liable therefor. The reason assigned is that the collecting bank thereby makes the drawee bank its agent for presentment, demand, protest, and giving notice of nonpayment to the indorsers, if any, and the drawer; and that the duties thus devolving upon such an agent are inconsistent and in- 44 L. R. A.

capable of being performed by the drawee of the check, as it is said he cannot present a demand to himself, or demand payment of himself, much less protest his own paper, and give notice to the proper parties that he has refused payment. There exist two different theories among the courts of this country touching the responsibility of banks undertaking collections on commercial paper at a distance. One line of authorities holds to the rule that the forwarding bank is liable only for the selection of a suitable local agent with whom to intrust the collection, and that the agent so selected becomes the agent of the owner of the paper; while, on the other hand, it is held that the forwarding bank makes the local agent its own sub-agent, and is liable for any neglect on the part of such subagent. But it is argued that in either event the defendants are liable, as, under the latter rule, they became absolutely responsible for the conduct of the Sheridan Bank, while, under the former, it was negligence *per se* to have selected the Sheridan Bank as agent for the purpose of consummating the collection. It does not appear to us, however, to be necessary to the determination of the present controversy that either rule should be adopted or applied. The check in question was drawn payable to the defendants, and was undorsed by anyone, so that there were no indorsers or third parties in the transaction to be subserved, and protest and notice thereof were unnecessary, and not required. The defendants, therefore, assumed the simple duty of presenting the check for payment, under the rules of law obtaining, and, if not paid, or payment was refused, of notifying the drawer, so that he might not suffer loss by reason of the failure of the drawee bank.

In *Prideaux v. Oridle*, L. R. 4 Q. B. 455, it is said: "A presentment through the postoffice is a reasonable mode of presentment; it is a very common mode, and having regard to the commercial business of this country, it may be said to be a proper mode of presentment. If the drawee dishonors the check, and the holder sends a notice of dishonor to the person from whom he received the check on the day following that on which the check was dishonored, each previous transferrer has one day in which to give notice of dishonor." In *Bailly v. Bodenham*, 16 C. B. N. S. 288, Erle, Ch. J., was inclined to think that a check sent through the post to the drawee was a good presentment, and he says: "But, unless the money was remitted by return of post the absence of an answer should have been considered as a dishonor, and notice of such dishonor should have been given promptly." In *Heywood v. Pickering*, L. R. 9 Q. B. 428, where the check was sent to the drawees direct, with demand for payment, Blackburn, J., thought it to be a good presentment for payment, and that the refusal to remit constituted an actual dishonor of the check. Quain, J., in the same case, says: "There is ample evidence that, according to the custom of bankers, when a foreign check is paid to a banker by a customer, that is the usual mode of trans-

mitting checks. Is that a good presentment? In *Bailey v. Bodenham*, Erle, Ch. J., and Byles, J., thought that sending a check by post to a banker might be a good presentment of a check; and in *Prideaux v. Criddle*, Lush, J., was of opinion that a presentment through the postoffice was a reasonable mode of presentment. Therefore we have it that, in the present case, there was a due presentment of the check according to these authorities." As supporting this position, see also 2 Dan. Neg. Inst. § 1559. These are English cases, it is true, but a like manner of presentment seems to have received recognition in this country. In the case of *Indig v. National City Bank*, 80 N. Y. 100, a note, undorsed, payable at the Bank of Lowville, was placed in the hands of defendant for collection, who, instead of sending it to an agent or correspondent at Lowville for presentment, sent it by mail directly to the Lowville Bank. It was remarked that such a method appeared to be the ordinary one for the transaction of such business, and the defendant was bound only to adopt the ordinary mode, and that the practice was sanctioned by the English cases. It was there contended that by sending the note direct to the Lowville Bank the collecting bank thereby constituted the Lowville Bank its agent; but it was held that, in so far as it related to the presentment of the note at the bank, and the duties of the bank in respect to it, it was equivalent to a check drawn by the maker upon the bank where the note was payable. As the case bears some analogy to the one at bar, we may be pardoned if we quote somewhat at length from the opinion of Rapallo, J. He says: "The bank owed a duty to its customer to pay it on presentation, if in funds. The defendant used the United States mail to make the presentment, and by this means caused it to be presented to the bank for payment on the day when due. It did not deposit it there for collection. If there had been indorsers, it might be argued that the defendant constituted the Bank of Lowville its agent to notify the indorsers of nonpayment; but even this is very questionable, for it was held in a similar case that, if the proceeds were not remitted, the paper should be deemed dishonored, and notice of nonpayment should be given by the bank which had sent it. *Bailey v. Bodenham*, 10 C. B. N. S. 288. No such question arises, however, in the present case, for there were no indorsers. The defendant, by sending the note to the Bank of Lowville, requested it to pay it, not to receive the proceeds. The object of sending was to extract money from the bank, as agent of the maker of the note, not to put money in the bank as agent of the defendant, or to the credit of the defendant. There is nothing in the nature of the transaction which should render the defendant guarantor of the solvency of the Bank of Lowville. . . . The bank on which the note is drawn has nothing to do but to pay the note if in funds, and, if not, to refuse to pay. If it pays, it does so on behalf of the maker, and no relation is created between it and one who presents it by mail, different from 44 L. R. A.

that which would exist if presented through any other agency, unless accompanied by a request to do some further act in behalf of the sender beyond complying with its duty to its own customer." And in *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 283, the same learned judge, in explanation of the opinion rendered in the *Indig Case*, says: "The point of the decision is that the mere act of presenting the paper for payment by mail, instead of employing a messenger to present it, does not constitute the drawee agent of the sender to receive or hold the proceeds." To the same effect, see also *People v. Merchants' & M. Bank*, 78 N. Y. 269, 34 Am. Rep. 532. It will be noted that the presentment in the case of *Heywood v. Pickering* was in accordance with the custom then prevailing, and the one in the *Indig Case* was in pursuance of the ordinary method; and the custom in the one case and the method in the other were very similar to the one which it is agreed by the parties exists among the banks of Portland and elsewhere, and they seem to have been considered as controlling, and as legalizing the presentment in the respective manners there adopted. Mr. Tiedeman, in his work on Commercial Paper (§ 444), says: "A custom has grown up of late to send the check direct to the bank on which it is drawn; in other words, to make presentment by mail. The sufficiency of this method of presentment has been doubted, but it seems that this method is more or less commonly adopted, and the weight of authority is in favor of its sufficiency."

In the light of these authorities, we are constrained to hold that the transmission of the check in question by the defendants direct to the Sheridan Bank, through the post, for collection and return, operated as a good presentment for payment. A custom which obtains so generally and universally among men of the highest order of business sagacity appeals strongly to the understanding for recognition, and, unless demonstrated to be clearly and palpably unreasonable and unjust, it ought to be adopted as the law of the case. It is true, the admittedly prevailing custom or usage exists and applies as well to certified checks, certificates of deposit, and notes payable at the banks; but we are here dealing with a simple, undorsed check, and are only called upon at this time to sanction the custom or usage in so far as it may be potent as affecting the present exigencies. However, there is authority for the sanction of it to the full extent prevailing, as denoted by the agreement of the parties here. *Farmers' Bank & T. Co. v. Newland*, 97 Ky. 464; *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337. Usages are presumed to be reasonable, and in considering them the courts do not so much determine whether they are supported by satisfactory grounds as whether they are necessarily unreasonable. The party attacking the usage or custom has, therefore, the burden of the controversy, as the question to be decided in a particular case is not whether the usage is reasonable,

but whether it is unreasonable. 27 Am. & Eng. Enc. Law, p. 766.

Cases are cited and relied upon by the appellant, wherein it is held to constitute an act of negligence and even negligence *per se*, for the collecting bank to send paper direct to the drawee bank, located at a distant place, for collection and return. The most conspicuous of these are: *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *German Nat. Bank v. Burns*, 12 Colo. 539; *Anderson v. Rodgers*, 53 Kan. 542, 27 L. R. A. 248; *Drovers' Nat. Bank v. Anglo-American Pkg. & P. Co.* 117 Ill. 100, 57 Am. Rep. 855; *Farwell v. Curtis*, 7 Biss. 160; *Whitney v. Esson*, 99 Mass. 308, 96 Am. Dec. 762; *First Nat. Bank v. City Nat. Bank*, 12 Tex. Civ. App. 318; *First Nat. Bank v. Fourth Nat. Bank*, 16 U. S. App. 1, 56 Fed. Rep. 967, 6 C. C. A. 183; *Bailie v. Augusta Sav. Bank*, 95 Ga. 277. But in no one of these cases was there a general and universal custom relied upon to support the act of the collecting bank as there is here. The case of *Whitney v. Esson*, 99 Mass. 308, comes the nearest. The paper involved was a draft, and it is there said: "It is not a reasonable usage that one who collects a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check, which may turn out to be worthless." But this must be read in connection with the agreement of the parties in that case, which was that it was a common practice for holders of drafts or checks to accept the check of the drawee in exchange for the draft, but it was not claimed to be a generally established usage. In *Farwell v. Curtis*, 7 Biss. 160, it was said the practice of sending checks by mail to the drawee was not usual, thereby indicating that no such custom or usage was there established or relied upon. In *Drovers' Nat. Bank v. Anglo-American Pkg. & P. Co.* 117 Ill. 100, 57 Am. Rep. 855, a custom was sought to be established, but it was not broad enough, as remarked by the court, to include the certified check which formed the basis of the action. And in *First Nat. Bank v. City Nat. Bank*, 12 Tex. Civ. App. 318, the statement of the case shows it did not appear that the owners of the paper, by consent or usage, authorized the forwarding of their draft direct to the drawee. These cases involve, indiscriminately, ordinary checks, certificates of deposit, certified checks, and drafts. Upon principle it would seem that the usage is not an unreasonable one, in so far, at least, as it may apply to the collection of a plain, unindorsed check. If payment of such check is refused, the payee may sue the drawer for breach of contract; but the drawer only can sue the drawee, and this upon the implied contract to pay upon demand. The bank of deposit has but a simple duty to perform when the paper is presented for payment only, and that is to honor it by compliance with the

demand; so that the manner of presentment and demand for payment, whether over the counter or through the post, cannot affect the discharge of such duty. In no sense can it become the agent of the party presenting it, or of the drawer, by acting in the discharge of its duty in honoring it, and making payment. Where a party employs a bank to make a collection at a place distant from where the bank is located, and nothing is said touching the specific manner of making the same, it must be presumed it was intended by the customer of the bank that the collection would be made in the usual and ordinary manner, and in accordance with the general usage and custom prevailing among banks. If the collection is made in accordance therewith the bank has performed its undertaking. *Farmers' Bank & T. Co. v. Newland*, 97 Ky. 464; *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337.

Now, to recur to the facts; The plaintiff had on deposit with the Sheridan Bank \$1,717.71. Of this fund he proposed sending \$1,500 to the defendants, in Portland, for the purpose of making a time deposit with them, drawing interest. He informed the Sheridan Bank of his intention to draw upon it for that amount, and, as a means of having the money transmitted to Portland, he drew his check in favor of the defendants. They, in pursuance of the custom, sent it by mail to the Sheridan Bank for collection and return. This must be considered a demand upon that bank for payment, and it had but a simple duty to perform, which was to pay; and this it should have done, not as the act of either the defendants or the plaintiff, but for itself; and therefore it could not have been the agent of either in the performance of such duty. The failure to pay upon presentment and demand was a refusal to pay, and a dishonor of the check, and the defendants, not having received payment thereof by return mail (having regard for the business hours of the banking company and the arrival and departure of the mails), should have so treated it, and notified the plaintiff thereof by the following mail, or, at least, by the mail of the following day. It was the duty of the defendants, they not being in a condition to sue the drawee, to notify the plaintiff at once of the dishonor of his paper, so that he could have brought an action against it, if he so desired, for the recovery of his deposit. But the case was not presented upon the theory that the loss to plaintiff was caused by the negligence of defendants in failing to notify him of the dishonor of his paper. By this, however, we do not intimate that the facts as disclosed by the record would support such theory.

The specific charges of negligence are that defendants sent the check direct to the drawee bank for collection, and retained the evidence of indebtedness until after the bank had closed. Upon the first ground we have seen that the act of sending the check direct

to the drawee for collection was not negligence, under the usage and custom prevailing, and in the light of defendants' undertaking; and, upon the second ground, it is plain that plaintiff could not have been injured by the retention of the check, as he

was enabled to and did sue without it. In this view the question of ratification becomes unimportant. The findings of fact are full upon all the issues made, and amply support the conclusions of law.

The judgment will therefore be affirmed.

MICHIGAN SUPREME COURT.

John KEYES

v.

Xavier B. KONKEL *et al.*, *Plffs. in Err.*

(.....Mich.....)

An action of replevin will not lie for a corpse under statutes requiring an affidavit in replevin to state the unlawful taking or detention of "personal goods and chattels," and providing that a judgment for defendant shall be for a return of the property or for its value.

(March 23, 1899.)

ERROR to the Circuit Court for Saginaw County to review a judgment in favor of plaintiff in an action brought to recover the body of plaintiff's deceased brother from possession of defendants to whom it had been delivered as undertakers by the authorities of the hospital at which deceased died. *Action dismissed.*

The facts are stated in the opinion.

Mr. James H. Davitt, for plaintiff in error:

Replevin is a statutory remedy in this state.

Would it not be absurd to swear appraisers to fix a money value upon a human corpse?

It is the right of burial which the law protects, and this it protects, not because the corpse is a chattel, but because the relatives have an interest in its decent protection and proper interment.

There can be no property in a human corpse.

Williams v. Williams, L. R. 20 Ch. Div. 659, 21 Am. L. Reg. N. S. 512, note; *Cooley*, Torts, 2d ed. p. 281; 8 Am. & Eng. Enc. Law, 2d ed. p. 834; *Meagher v. Driscoll*, 99 Mass. 284, 90 Am. Dec. 759; 19 Am. L. Rev. 264; *Weid v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Griffith v. Charlotte, C. & A. R. Co.* 23 S. C. 25, 55 Am. Rep. 1, note; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667.

A contract for the sale of a human corpse cannot be enforced.

6 Am. L. Rev. 182; 8 Am. & Eng. Enc. Law, 2d ed. note, p. 834.

Dead human bodies are not property, therefore larceny cannot be committed of them.

2 Bishop, New Crim. Law, § 780; 4 Cooley's Bl. Com. p. 236.

Trover will not lie.

NOTE.—As to disposal and control of corpse, see also O'Donnell v. Slack (Cal.) 43 L. R. A. 388, and cases there cited, especially *Larson v. Chase* (Minn.) 14 L. R. A. 85, and note. 44 L. R. A.

See also 45 L. R. A. 535.

Dr. Handyside's Case, 2 East, P. C. C. chap. 16, § 89; Ewell's note to *Williams v. Williams*, 21 Am. L. Reg. N. S. 514.

Replevin will not lie.

Guthrie v. Weaver, 1 Mo. App. 141; Ewell's note to 21 Am. L. Reg. N. S. 514.

Courts of equity alone are competent to dispose of these controversies, and the fact that the body is not property in the commercial sense, and has no money value, is of no consequence as affecting their jurisdiction.

8 Am. & Eng. Enc. Law, 2d ed. p. 836, and notes, p. 837, note 1; *Weid v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; 19 Am. L. Rev. 264.

As to whether or not a human corpse is property, the holding of the Indiana courts is opposed to the English and American doctrine.

19 Am. L. Rev. 264; *Cooley*, Torts, 2d ed. p. 281; 21 Am. L. Reg. N. S. 513, note; note to 8 Am. & Eng. Enc. Law, 2d ed. p. 835.

Messrs. Harris & Kendrick, for defendant in error:

The common-law doctrine that a corpse is not property had its origin in the dictum of Lord Coke (3 Co. Inst. 203). There Lord Coke was asserting the authority of the church only.

We have no ecclesiastical courts.

In Michigan the common law is made to conform to our changed condition. The court is to administer justice according to the promptings of reason and common sense, which are the cardinal principles of common law, and in harmony with our Constitution, statute laws, and advanced condition.

Note to *McKennon v. Winn* (Okla.) 22 L. R. A. 501; *Wallworth v. Holt*, 4 Myl. & C. 619.

Those who are entitled to the possession and custody of a corpse for the purposes of decent burial have certain legal rights to and in it which the law will recognize and will protect.

Larson v. Chase, 14 L. R. A. 85, 47 Minn. 307; *Renihan v. Wright*, 9 L. R. A. 514, 125 Ind. 536; *Re Beekman Street*, 4 Bradf. 503.

The bodies of the dead belong to the surviving relatives in the order of inheritance as other property.

Bogert v. Indianapolis, 12 Ind. 134.

An action at law will lie for interfering with this right of possession.

Barney v. Children's Hospital, 38 L. R. A. 413, 169 Mass. 57.

At common law replevin could be maintained only where the original taking was unlawful.

3 Bl. Com. pp. 13-146; *Geldas v. Crosby*, 61 Mich. 416.

In this state the action of replevin has been greatly extended, and includes the action of detinue.

2 How. Stat. § 8315, and note; *Woolston v. Smead*, 42 Mich. 57; *Van Baalen v. Dean*, 27 Mich. 104. See *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 681.

Montgomery, J., delivered the opinion of the court:

This is an action of replevin to recover the dead body of plaintiff's brother. The deceased died at a hospital, and defendants, who are undertakers, took charge of the corpse by request of the hospital authorities. The plaintiff, after the defendants had performed some services in fitting the body for burial, demanded possession of the body, and defendants refused to deliver the body up unless paid for their services. Thereupon plaintiff instituted this suit.

The question presented is whether replevin will lie in this state for a human corpse. The question is happily more novel than difficult. The statute (How. Anno. Stat. § 6856) provides for the proceeding of replevin in the justice court, and requires an affidavit by the plaintiff setting forth that his "personal goods and chattels" have been unlawfully taken or are unlawfully detained. The replevin statutes (§§ 8346, 8347) provide for a judgment for defendant, when the plaintiff fails in his case, for a return of the property or for its value. It is apparent that no return of the property can be ordered in case of the replevin of a dead body, and it is equally true that its value in money can neither be appraised nor ascertained by a jury. It was formerly held in England that there can be no property in a human body. *Williams v. Williams*, L. R. 20 Ch. Div. 659, also reported in 21 Am. L.

Reg. N. S. 508; *Guthrie v. Weaver*, 1 Mo. App. 141; *Meagher v. Driscoll*, 99 Mass. 284, 96 Am. Dec. 759; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465. In certain modern American cases, a dead body has been said to be a quasi property, and the right to control and bury it, and to recover against one who mutilates the corpse, has been maintained. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Burney v. Children's Hospital*, 169 Mass. 57, 38 L. R. A. 413; *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85; *Foley v. Phelps*, 1 App. Div. 551. Recovery for the refusal of the right to bury or for mutilation of the body is rather based upon an infringement of a right than upon the notion that the property of plaintiff has been interfered with. The recovery in such cases is not for the damage to the corpse as property, but damage to the next of kin by infringement of his right to have the body delivered to him for burial without mutilation. In numerous cases equity has taken jurisdiction to prevent interference with the control of the dead body by persons entitled to control it. See *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667. And in *Reg. v. Fox*, 2 Q. B. 246, the remedy by mandamus to a jailer was granted. But on every consideration we are of the opinion that the replevin cannot be maintained. It is not contended that the defendants are entitled to maintain a lien. It is obvious that return cannot be adjudged.

The only proper judgment is one dismissing the proceeding, with costs of all the courts to the defendants. It is so ordered.

The other Justices concur.

MONTANA SUPREME COURT.

YELLOWSTONE NATIONAL BANK,
Respt.,

v.

E. H. GAGNON, Appt.

(19 Mont. 402.)

I. The pledgee of a promissory note as collateral security can enforce it against the maker only to the extent of his

claim against the pledgeor,—at least where the maker has a valid defense against the enforcement of the note by the pledgeor.

2. The payee of a note should be made a party to a suit against the maker by one to whom it was pledged as collateral security for a debt less than its value, where the maker has a defense against the enforcement of the note by the payee.

(April 26, 1897.)

NOTE.—Extent of recovery by pledgee on negotiable paper which pledgeor could not collect.

- I. *The general rule.*
- II. *Limitation to unpaid advances made without notice.*
- III. *Application to accommodation paper.*
- IV. *Matters of procedure.*

I. *The general rule.*

The general, if not the universal, rule, varied only by the conflict of authority hereinafter noted on the question whether a pledgee or 44 L. R. A.

holder as collateral security for a precedent debt is to be regarded as a bona fide holder, is that laid down in *Curtis v. Mohr*, 18 Wis. 616, to the effect that where money is advanced on the credit of the note used as collateral security the pledgee, if he is an innocent holder, may recover of the maker of the note to the amount for which the paper was pledged, though the maker has a defense as against the payee.

One holding a note as collateral security or as a pledge is the owner of the obligation for all practical purposes to the extent of his debt, especially where it is not shown that the debt

APPEAL by defendant from a judgment of the District Court for Yellowstone County in favor of plaintiff in an action brought to enforce payment of certain promissory notes. *Reversed.*

Mr. O. F. Goddard for appellant.

Mr. Gib S. Lane for respondent.

Statement by Hunt, J.:

The plaintiff and respondent bank sued the defendant and appellant to recover upon three promissory notes made by the defendant. One of the notes was dated April 25, 1895, for the sum of \$750. Another note was dated October 9, 1894, was due one year after date, and made to the order of J. J. Nickey, for \$2,392.75. The complaint alleged that Nickey, the payee named in the note, before maturity, duly indorsed, assigned, and delivered the said note to the plaintiff who was at the time of the commencement of this suit the holder and owner thereof. The third note was a joint and sev-

eral one for \$500, made by F. H. Nickey and the defendant. The plaintiff demanded judgment against the defendant for the amount of the three promissory notes. The defendant filed a special and general demurrer, which was overruled. The defendant then answered, admitting the execution of the note for \$2,392.75, and admitting its delivery to Nickey, as alleged in the complaint, but set up that the plaintiff was not the owner or holder thereof, except as set forth in the answer. It is then alleged: "That the said J. J. Nickey, as this defendant is informed and believes, at the time he delivered said note to the plaintiff, was indebted to the plaintiff in the sum of \$1,200 with interest then accrued thereon which indebtedness was evidenced by a promissory note of the said Nickey, which the plaintiff held against said Nickey; and that to secure the payment of said promissory note of \$1,200, held by the plaintiff against said Nickey, the said Nickey indorsed and delivered to and

to be secured is less than the amount of the note. *Gardner v. Maxwell*, 27 La. Ann. 561.

And an innocent bona fide holder of promissory notes as collateral security for an indebtedness existing between the payee and indorsee is entitled to recover thereon at least to the extent of the debt for which they are held as collateral, without regard to any defenses that may exist between the original parties to the notes. *Farmers' State Bank v. Blevins*, 46 Kan. 536; *Gammon v. Huse*, 9 Ill. App. 557; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95; *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934.

Thus pledgees of a negotiable note as security for a debt due them of a less amount than the face of the note, who took it without notice of the fact that it was without consideration as between the original parties, are bona fide holders for value, and are therefore entitled to recover thereon to the extent of their debt for which the note was pledged as security. *Fisher v. Fisher*, 98 Mass. 303; *Exchange Bank v. Butner*, 60 Ga. 654.

And a transfer of a promissory note by the maker thereof before due as collateral security for an extension of ten days from the time of payment of a protested draft for a less amount, in violation of an agreement between them and a surety thereon, does not invalidate the title of the pledgee where he acted in good faith and without notice of such agreement, and he may recover thereon as against the maker to the extent of the draft. *First Nat. Bank v. Fowler*, 36 Ohio St. 524, 38 Am. Rep. 610.

And where brokers are employed to sell a note, and instead of selling it they pledge it, together with a large number of other notes, for a loan to themselves, the pledgee accepting the same in ignorance of the circumstances under which it was held, becomes a good-faith holder to the extent of the money advanced by him on the faith of the note. *Farwell v. Importers & T. Nat. Bank*, 90 N. Y. 483.

So, where a note is given upon an express agreement between the parties that it should be negotiated and its proceeds applied for a particular purpose, and the payee before maturity of the note borrows money thereon using it as collateral security, the pledgee taking without notice of the agreement becomes a purchaser for value to the extent of the loan made by him, and cannot be enjoined from selling the note on the ground of the equities between the original parties. *Bond v. Wiltzie*, 12 Wis. 612.

And one who takes the note of a third person

as collateral security, not for a pre-existing debt, but for a debt created at the time, and on the faith thereof with no notice of equities, becomes a bona fide holder for value, and may recover the amount of his debt from the maker. *Logan v. Smith*, 62 Mo. 455; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95.

So, an indorsee of a note before maturity as collateral security for moneys advanced or agreed to be advanced occupies the position of a bona fide holder, and is entitled to the protection of a purchaser of commercial paper in the usual course of business to the extent of the moneys paid or advanced on the pledge, though the instrument was of no binding force as between the original parties. *Gammon v. Huse*, 9 Ill. App. 557.

And one who takes a note as security for an antecedent debt, which note was made without consideration and for the accommodation of the payee and delivered to him by the maker without any restriction as to its use, can recover of the maker thereon, at least to the amount of the debt it was transferred to secure, where in consideration thereof he surrendered to the payee other securities theretofore held for the same indebtedness. *Robbins v. Richardson*, 2 Bosw. 248.

And the holder of a note assigned before maturity as collateral to secure a pre-existing debt may recover from the maker the amount of such debt if it does not exceed the amount of the note, though the maker may have paid the note of the payee. *Vanliew v. Second Nat. Bank*, 21 Ill. App. 126.

If a promissory note before its maturity is pledged as collateral security for a particular debt, and such debt is afterwards paid, the holder of the collateral note has then no right to collect it if the person liable for its payment has already paid it to the pledgee who was the original payee; but so long as any portion of the debt secured by the collateral remains unpaid, the holder of the latter may collect the same, or at least enough thereof to satisfy whatever may remain due of the claim secured. *Bank of the University v. Tuck*, 96 Ga. 456.

So, a note given for the premium upon a policy of insurance issued in violation of a statute which expressly provides that the company making the insurance shall not recover any premium or assessment upon it, is invalid in the hands of the payee, and one who takes it as collateral security for a debt which had been paid

pledged the said note of this defendant for the said sum of \$2,392.75 to said plaintiff, as collateral security, and not otherwise; and that the same was taken by the plaintiff as collateral security for the said note of \$1,200 of the said Nickey, and for no other purpose or use; and that, as this defendant is informed and believes, the said Nickey was not indebted to the plaintiff at the time of the commencement of this action in any other or greater sum than the said \$1,200, with the accrued interest thereon, as evidenced by the said promissory note, for which the said note of this defendant to said Nickey was pledged as collateral security as aforesaid, or otherwise. Further answering the complaint, the defendant alleges that, at the same time said note was made and delivered by this defendant to said Nickey, the defendant and said Nickey were copartners in certain mining and other interests; and that said copartnership still exists; and that no settlement thereof has been made between

the defendant and said Nickey; and that the defendant has a good and valid defense against said note of \$2,392.75 to the extent of about \$1,200; and that, therefore, this plaintiff is not entitled to recover from this defendant, on said alleged second cause of action, only the amount of said \$1,200 note of said Nickey, with the interest accrued thereon." No replication was filed. The plaintiff bank moved for judgment on the pleadings for the amount claimed in the complaint, on the ground that the answer did not state a defense to any cause of action in the complaint. This motion was granted by the court, and the judgment entered in favor of plaintiff, and against the defendant, for \$4,493.25, together with costs. The appeal of the defendant is from the judgment.

Hunt, J., delivered the opinion of the court:

In considering the question presented by this appeal, it must be remembered through-

obtains no greater rights than the payee had. *Roche v. Ladd*, 1 Allen, 436.

And the fact that the maker of a note was paying usurious interest to the payee does not render title of the holder of the note as collateral security void, or destroy his right to collect the collateral to the extent of the principal and the legal interest of the principal debt. *Partidge v. Williams Sons*, 72 Ga. 807. And see *Saylor v. Daniels*, 37 Ill. 331, 87 Am. Dec. 250, *infra*, II.

And a note based upon a wager contract is not void, under Mo. Rev. Stat. §§ 5721-23, 5726, providing that all notes where the consideration is money or property won at any gaming or gambling device or by bets or wagers, shall be void, where the note is in the hands of a bona fide indorsee for value as collateral security, so as to prevent him from enforcing it to the extent of the amount of the debt due him. *Crawford v. Spencer*, 92 Mo. 408.

Nor will the fact that a note was transferred in violation of the Massachusetts statute prohibiting the disposal of collateral security before maturity of the debt secured without authority, defeat an action against the maker and indorser. *Gardner v. Gager*, 1 Allen, 502.

This note is confined to the question of the extent of the recovery of a pledgee on negotiable paper which the pledgee could not collect, and the general question of the right to recover at all is not intended to be treated. Decisions as to whether one who takes negotiable paper as collateral security for a pre-existing debt is a bona fide holder or not pertain to the right of recovery rather than the extent of the recovery, and have therefore been omitted. It is to be observed, however, that there is a conflict of authority on the question whether one who takes negotiable paper as collateral security for a pre-existing debt advancing no new consideration and surrendering no rights or securities, is a bona fide holder, the courts of a number of the states, headed perhaps by New York and Missouri, having taken the position that he is not, and under this doctrine it will be seen that if the security was taken for a pre-existing debt, and no new consideration was furnished or rights or securities surrendered, the doctrine set forth in this note would not apply as the pledgee would not be a bona fide holder and could not recover, either the unpaid amount advanced before notice, or anything at all.

44 L. R. A.

II. Limitation to unpaid advances made without notice.

While in general the holder of a negotiable note as collateral may recover the entire amount thereof, holding the excess if it is greater than the debt secured for the use of the pledgee, where the maker of the instrument has a good defense against the pledgee, the pledgee, having no notice of such defense, can recover the amount of the principal debt only. *Union Nat. Bank v. Roberts*, 45 Wis. 373. And see *YELLOWSTONE NAT. BANK V. GAGNON*.

A party receiving negotiable paper as collateral security is entitled to be protected as a bona fide holder to the same extent as one who becomes the absolute owner, the only difference being that the holder as collateral security is restricted in his recovery to his advances if there are equities between the original parties. *Haydon v. Nicoletti*, 18 Nev. 290; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95; *Gammon v. Huse*, 9 Ill. App. 557.

The rule affording full protection to an innocent holder of negotiable paper for value before maturity is modified in its application to paper transferred as collateral security, and in such case, if as between the original parties there is a defense on the merits, the transferee is protected only to the extent of the amount of the debt secured. *Gammon v. Huse*, 9 Ill. App. 557.

And as against the maker of a note who has a valid equitable defense to it in the hands of the payee, if the latter pledges it as security for a debt, the pledgee can only be regarded as a bona fide holder to the extent of his interest at the time he acquires the pledge or receives notice of a defense to it. *Second Nat. Bank v. Hemingray*, 34 Ohio St. 381; *Hatcher v. Independence Nat. Bank*, 79 Ga. 547.

And a pledgee of a note as collateral security can recover no more against the maker who has a valid defense as against the payee than he has paid value for, unless he would be liable over for the difference between what he has thus paid and the original amount of the note. *Bond v. Fitzpatrick*, 8 Grav. 536.

The defense in an action by the holder of a note as collateral security against the maker thereof that the maker had a good defense against the payee and that the holder is therefore entitled to recover only the amount for which he held it as security, is allowed to pre-

out that the single note over which this controversy arises—that is, the note for \$2,392.75—was indorsed to the plaintiff by Nickey simply as collateral security for a debt of \$1,200, due the bank by Nickey. It is upon this note that the plaintiff maintains a right to recover for the face thereof unconditionally and in all events, without reference to the debt of Nickey intended to be secured thereby. Much space in the brief and argument of the respondent's counsel is devoted to supporting the proposition that an indorsee of a negotiable promissory note, taking the note in good faith, as collateral security for an antecedent debt, and with no other consideration, is entitled to be regarded as a holder of such paper for value, and consequently unaffected by an equitable and valid defense of the maker against the payee. But we do not understand that the appellant disputes that general proposition of law. Ever since the decision of the Supreme Court of the United States in the case of *Brooklyn City & N. R.*

Co. v. National Bank of the Republic, 102 U. S. 14, 26 L. ed. 61, reaffirming the doctrine established by that court in *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865, and reviewing the English and American authorities at length, it may be affirmed as a result of the best cases that the transfer of negotiable paper before maturity as collateral for a pre-existing debt merely, without other circumstances, "if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence," is within the usual course of commercial business, as much as would be its transfer in payment of such debt. "In either case," said Justice Harlan, "the bona fide holder is unaffected by equities or defenses between prior parties, of which he had no notice." Applying the principle just stated to the pleadings in the case before us, we find that the indorsement of the note by Nickey to the bank, as a collateral security for his own pre-existing

vent circuitry of action. *Steere v. Benson*, 2 Ill. App. 560.

And the recovery in an action by a holder of a note as collateral security for moneys advanced against the maker thereof who had a good defense as against the payee is limited to the amount of the indebtedness which the note is held to secure. *Steere v. Benson*, 2 Ill. App. 560; *Brown v. Callaway*, 41 Ark. 418; *Hatcher v. Independence Nat. Bank*, 79 Ga. 547; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620; *New England Trust Co. v. New York Belting & Pkg. Co.* 166 Mass. 42; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95; *Grant v. Kidwell*, 30 Mo. 455; *Barmy v. Wolfe*, 44 Neb. 77; *Haas v. Bank of Commerce*, 41 Neb. 754; *Kelly v. Ferguson*, 46 How. Pr. 411; *Farmers' State Bank v. Blevins*, 46 Kan. 538.

Thus, one who holds promissory notes assigned to him as collateral security is a holder for a valuable consideration, but can recover thereon against the maker no more than the debt actually due him, where payment had previously been made to the payee. *Valette v. Mason*, 1 Ind. 289; *Mayo v. Moore*, 28 Ill. 428.

And a plea by the defendant in an action upon a note by a holder thereof as collateral security against the maker thereof, alleging that the plaintiff took the note sued on as collateral security for an indebtedness of the payee, all of which had been paid off except a stated amount, should not be stricken out, where there are other allegations setting up a good defense as against the original payee. *Hatcher v. Independence Nat. Bank*, 79 Ga. 547.

And proof that an assignor of a note as collateral security, while the holder thereof, had received moneys applicable to its payment, and that after he assigned the note he declared that the note was fully paid, is strong, if not conclusive, evidence against him in an action by the pledgee against the maker, that he had no longer any interest in the note, and could claim no surplus of the pledgee so as to warrant the pledgee in recovering a greater amount than his own debt. *Bond v. Fitzpatrick*, 8 Gray, 536.

So, a creditor to whom a note tainted with usury is assigned by the payee as collateral security for a pre-existing debt is a holder for a valuable consideration, and may recover thereon, but only to the extent of the debt due him; as to the residue the same defense may be made as though the note had not been assigned. *Saylor v. Daniels*, 87 Am. Dec. 250, 37 Ill. 331.

And a note given under threats of prosecution

in settlement of a pretended claim for damages when no real claim existed, and which was in reality without any consideration whatever to support it, is invalid as between the parties thereto, and where afterwards and before maturity it is pledged as security for a debt of the pledgee, the recovery thereon will be limited to the amount of the indebtedness of the innocent pledgee with interest. *Bell v. Bean*, 75 Cal. 86.

So, one who takes a note as collateral security for a larger indebtedness with knowledge that the pledgee had received it from the maker with authority to use it as collateral for a specified indebtedness, but that he exceeded his authority by the pledge, can only recover thereon to the extent that the pledgee was authorized to pledge the note. *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620.

And while the fact that a note was indorsed for the accommodation of the maker and entrusted to him for a special purpose, and that in violation of that trust it was negotiated to another who gave no value and knew of its fraudulent use, is no defense in an action thereon by one to whom it was afterwards indorsed for value as collateral security, such indorsee can only recover thereon the amount for which he took the note as collateral security. *Chicopee Bank v. Chapin*, 8 Met. 40.

So, the plaintiff in an action on a negotiable note which he holds by assignment before due as collateral security for a loan made by him to an insolvent payee against whom the maker holds an equitable set-off to the note will be limited in his recovery against the maker to the amount of the debt which the note secures. *Second Nat. Bank v. Hemingray*, 34 Ohio St. 381.

And one to whom notes on which the payee could maintain no action are indorsed without notice in trust as collateral security for the payment of certain debts of the payee can recover in a suit upon the notes only the amount actually due from the payee to such creditors after deducting any debts due from them to him. *Williams v. Cheney*, 3 Gray, 215.

And a bank taking a note from another bank as collateral security for an indebtedness due it is only entitled to recover of the maker of the note thereon to the extent of the unpaid portion of the indebtedness for which the note was pledged, where the payee bank obtained it from the maker by fraud. *Haas v. Bank of Commerce*, 41 Neb. 754.

debt, was upon a sufficiently valuable consideration for the transfer to bring the case within the rule which protects the holder of negotiable paper, and entitles the bank to the full benefit of the security. And we now are brought to the real question raised by the appellant, but which has to some extent been lost sight of by the respondent.

The facts pleaded show that Nickey only owed the bank \$1,200 and interest at the time he transferred the Gagnon note for \$2,392.75 to it as collateral security, and that the defendant, who was the original maker of the note, has an equitable claim against Nickey, growing out of some partnership relations that existed between them. The question, therefore, is not whether the bank is a bona fide holder at all, but to what extent is it to be regarded as a bona fide holder for value, and how much may it recover upon such note delivered to it as collateral security only? The degree of protection to which the bank is justly entitled is,

in our opinion, controlled by the amount of the pre-existing debt of the payee of the note to the bank, or the extent of the obligation to secure which the note was passed as collateral. Daniel on Negotiable Instruments, § 832a, expresses the rule in this language: "When it appears that the bill or note was acquired by the holder as collateral security for a debt, and he is deemed entitled to recover upon it, he is still limited to the amount of the debt which it secures, if there be a valid defense against his transfer being regarded as, at all events, a bona fide holder, and entitled to stand upon a better footing only *pro tanto*. Thus, such a holder could recover against an accommodation party no more than the consideration actually advanced; but, in the absence of proof, he will be deemed to have advanced the full amount of the paper." The pledgee of the note is fully protected against loss by its right to recover the full amount of the debt due to it by the payee. Its rights are

And a bank which in good faith and without notice takes from a broker as collateral security for his indebtedness an unmatured promissory note delivered to him by the maker, when it holds other notes pledged to it by the broker, and afterwards receives from a payment of most of such notes a sum more than sufficient to pay the broker's debt to the bank, cannot maintain an action against the maker for the benefit of the makers of the other notes, where they had not requested or consented to the bringing of such action, the remedy being by a bill in equity for contribution. *New England Trust Co. v. New York Belting & Pkg. Co.* 166 Mass. 42.

So, a bank taking a note from the payee as collateral security for an indebtedness without knowledge of any defense thereto, but to which the makers had a good and valid defense as against the payee, is entitled to recover thereon the amount of the balance for which the note was delivered as security, but the makers of the note are entitled to the balance of the amount due thereon. *Bank of Clafin v. Bowlinson*, 2 Kan. App. 82.

And a note given for an indebtedness which the payee had expressly covenanted to assume and to protect the maker against can be recovered upon by one who takes it from the payee before maturity as collateral for money advanced and agreed to be advanced only to the extent or the moneys paid or advanced thereon. *Gammon v. Huse*, 9 Ill. App. 557.

And while one to whom a promissory note has been transferred before due as collateral security for indorsements to be made by him, which are afterwards made, and who takes it without notice of a defense existing against it in the hands of the person from whom he received it, is entitled to be treated as a bona fide holder in the commercial sense, where such a defense exists, he can recover only what is due on the indorsements against which it was designed to secure him. *Williams v. Smith*, 2 Ill. 301.

And a pledgee of a note which was community property of a husband and wife, which was transferred by the husband to the wife for a purpose not authorized by law and pledged by the wife for an amount less than half of that for which the note was given, cannot deprive the maker of all equitable defenses against the payee who would remain a part owner thereof. *Lacroix v. Derbigny*, 18 La. Ann. 27.

One who takes a negotiable note by indorse-
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ment before maturity as collateral security in consideration of a new credit given takes it free from all equitable defenses between the original parties, and a payment afterwards made by the maker to the payee is no defense to a suit by the pledgee; he is entitled nevertheless to recover to the extent of the balance due him with interest, but no more, the payments made to the payee who would be entitled to the surplus being good as against him. *Sawyer v. Moran*, 8 Tenn. Ch. 35.

So, evidence tending to show that the maker of a note is not liable thereon to the payee is admissible in an action brought by a holder thereof as collateral security against the maker, as such holder is not protected except as to the amount of the debt secured. *Gammon v. Huse*, 9 Ill. App. 557; *Steere v. Benson*, 2 Ill. App. 580.

And evidence that the assignor of a note as collateral security while holding it received money towards its payment and after assigning it declared that it was paid is competent in an action by the pledgee against the maker to prevent a recovery of a greater amount than the pledgee's own debt. *Bond v. Fitzpatrick*, 8 Gray, 536, 4 Gray, 89.

And the true consideration, and the identity, and nature, and amount of a promissory note given as collateral security, are admissible in evidence in an action thereon, where the note contains on its face a memorandum that it is to be used as collateral security to other debts, and it is competent in an action thereon to show the true consideration, and the identity, nature, and amount of the demand to which it is collateral. *Garton v. Union City Nat. Bank*, 34 Mich. 279.

So, a pledgee of a note taken before due as collateral security for a loan made by him to the insolvent payees against whom the maker holds an equitable set-off to the note cannot recover in addition to the amount of the debt secured by the note, the attorney's fees for prosecuting the action. *Second Nat. Bank v. Hemingray*, 84 Ohio St. 381.

And one who takes a note as collateral security, and has advanced only a part of the agreed amount thereon when he learns of its invalidity as between the original parties, cannot recover for any further payments or advances made after acquiring such knowledge. *New England Trust Co. v. New York Belting & Pkg. Co.* 166 Mass. 42.

And where a note is indorsed by the payee

preserved, which is all it may reasonably ask.

This general principle was recognized over fifty years ago in the case of *Williams v. Smith*, 2 Hill, 301, where the court, after declaring that a person to whom a promissory note was transferred before due as collateral security for indorsements to be made to him, which were afterwards made, and who took the note without notice of a defense existing against it in the hands of the person from whom he received it, was entitled to be treated as a bona fide holder, decided, however, that, inasmuch as the person who took the note received it as collateral security, he could recover no more than the amount remaining due on the principal demand. This doctrine was followed in the early case of *Valette v. Mason*, Smith (Ind.) 89. That was an action in assumpsit by an assignee against the makers of a promissory note. The defendants pleaded that the note was assigned to the plaintiff only as collateral se-

curity for certain money lent and advanced to the payee. It was decided, as in the case of *Williams v. Smith*, cited above, that the holder of commercial paper assigned as collateral security is entitled to be regarded as a holder for a valuable consideration, and is not bound by equities existing between the payee and the makers which would interfere with the collection of his debt, but that in a suit on such paper the holder is not entitled to recover more than the debt actually due to him, if any part of it has been previously paid, or if there is no good consideration as between the original parties. Chief Justice Shaw, in *Stoddard v. Kimball*, 6 Cush. 469, briefly discussed the question of what amount the holder of a promissory note, as indorsee, had a right to recover of the maker where the note was negotiated to the plaintiff as collateral security for a debt due to him. He was of the opinion that the plaintiff, having taken the note to secure a pre-existing debt of a less amount, was holder for value in his

note to another as security for advances, and the pledgee makes advances, some before and some after receiving notice that the maker of the note had an equitable set-off to it, it will stand as security for, and the pledgee can recover, only the advances made before the notice. *Kerr v. Cowen*, 17 N. C. (2 Dev. Eq.) 356.

So, one with whom bills of exchange accepted by a bankrupt are deposited as collateral security for a debt due him from the drawer of the bills may prove the whole amount of the bills against the bankrupt, but cannot receive more than is due. *Ex parte Philipps*, 1 Mont. D. & DeG. 232.

And a pledgee of bonds of a railroad company pledged by the company who still holds them, is entitled to recover of the company thereon no more than the amount secured by the pledge. *Jesup v. City Bank*, 14 Wis. 332.

And the fact that the declaration in an action by the holder of a note as collateral security against the maker claimed the whole of the note, does not prevent a recovery *pro tanto* for so much as the holder is entitled to receive, where the maker had a valid defense as against the payee. *Vanlew v. Second Nat. Bank*, 21 Ill. App. 126.

So, a sub-pledgee of commercial paper with knowledge that the party through whom he received it held it simply as a pledge can only recover, in an action against the maker thereof in which fraud and failure of consideration as between the original parties is claimed, the amount due from the pledgor to the original pledgee, even though the evidence establish authority on the part of such pledgee to indorse the notes in the corporate name of the pledgor. *Security Bank v. Kingsland*, 5 N. Dak. 263.

But one who purchases negotiable bonds from a bank to which they had been pledged as collateral security for a loan by paying the loan to the bank and applying the excess of the amount in satisfaction of a precedent debt due the purchaser from the pledgor before maturity can recover the full amount of the security against the maker, unless personally chargeable with fraud in the purchase though he may have paid less than their proper value whatever may have been their original infirmities. *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681.

And an instruction in an action by the holder of a note which had been transferred to him by the pledgee thereof to find a verdict for the amount appearing to be due on the note, is not error where the execution and transfer of the

note were admitted, and there was no evidence of notice on the part of the holder of any defense of the maker as against the payee or pledgee. *Cook v. Norwood*, 106 Ill. 558.

It is only where the plaintiff in an action on a note transferred as collateral security prevails merely because he is an innocent holder that he recovers simply the amount pledged, and where he recovers because a defense against the original payee is not established he recovers the full amount of the note. *Barmby v. Wolfe*, 44 Neb. 77; *Haas v. Bank of Commerce*, 41 Neb. 754.

And a bank taking a negotiable note as collateral security is not obliged to notify the maker of the assignment in order to protect itself from any payment or equities existing or subsequently arising in his favor against the payee, but if payments are made to the payees beyond the bank's loan they will be operative to prevent any recovery by the bank against the maker beyond the amount of such loan with interest. *Haydon v. Nicoletti*, 18 Nev. 290.

So, a pledgee of a promissory note who acquiesces in the prosecution of an action by the pledgor against the maker to recover on the note, and lends his aid by voluntarily allowing the pledgor to produce the note at the trial as evidence of his right to recover, will be concluded by the result of the action, so that if the defense of payment is successfully made the payee cannot subsequently recover against the maker in an action prosecuted by him. *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95.

A pledgee of a note as collateral security is not bound to make inquiry as to the extent of authority of the pledgor to pledge, however, and mere negligence, however gross, not amounting to wilful or fraudulent blindness, will not reduce the amount of his recovery to the amount authorized, where the authority was to pledge for a specified indebtedness, and the pledgor exceeded his authority. *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620.

To justify the reduction of the recovery by a pledgee of a note as collateral security which was pledged to him for a larger amount than was authorized by the maker thereof to the amount authorized, the proof should be such as would justify the conclusion that the pledgee had actual knowledge of the limited authority given. *Ibid*.

And the question whether the pledgee of a note as collateral security had knowledge that

own right only to the amount of the debt due him. In *Youngs v. Lee*, 18 Barb. 187, it was also decided that the bona fide purchaser and holder of a note was entitled to recover the amount paid for it, "with interest and no more." Colebrooke, Collateral Securities, § 92, cited several of the cases just referred to, and deduces the following text from them: "Where negotiable promissory notes, pledged as collateral security, are accommodation paper, without consideration, or subject to an equitable set-off, or, in cases of misappropriation as between the makers and payees and indorsers thereof, and the collateral securities are of greater amount than the loan represented by the principal evidence of indebtedness, the recovery of the pledgee against the makers upon an action thereon is limited to the amount of his advances. The pledgee in such cases of fraud is a holder for value of the collateral note, as against the makers of such paper, to the extent only of his interest at the time he acquires the title

or has notice of the defenses to it." This doctrine is also followed in *Mechanics' & T. Bank v. Barnett*, 27 La. Ann. 177. In *Fisher v. Fisher*, 98 Mass. 303, the court affirmed the case of *Stoddard v. Kimball*, heretofore cited, and held that where the evidence established the fact that the plaintiffs received the note from the holder before its maturity without any knowledge of the circumstances under which the defendants had delivered it to the payee, or the purpose for which the latter delivered it to the holder, and where it was shown that it was held by the plaintiffs as collateral security for a valid debt due from the holder to them, plaintiffs, as bona fide holders for value and without notice, could recover "to the extent of their debt for which the note was pledged as collateral security. In *Huff v. Wagner*, 63 Barb. 215, the court sustained the principle that "a bona fide holder of commercial paper, to which, as between the maker and payee, there is a good defense, is entitled to be pro-

the pledgee was only authorized to pledge it for a smaller amount which would limit his recovery thereon to the amount authorized, is one of fact for the jury. *Ibid*.

So, a pledgee of a promissory note payable to a bank, which the payee agreed to use only for the purpose of showing its assets, but which was pledged, with a number of other notes, as collateral security, after which the bank failed, may sue the maker thereon notwithstanding the fact that a receiver of the bank had paid a part of its indebtedness to the pledgee, and the amount which would be recovered by the pledgee over and above the sum necessary to discharge the indebtedness due it would be held in trust for the receiver. *Jackson v. Chemical Nat. Bank* (Tex. Civ. App.) 46 S. W. 295.

III. Application to accommodation paper.

The rules above laid down have usually been applied to pledges of accommodation paper, though there seem to have been some exceptions.

Thus, where one man gives to another an accommodation note it will be good against the maker in the hands of a third person though passed to him as security for a pre-existing debt, and though it was procured in bad faith, the recovery being at least the amount he actually paid or pledged to the payee on the faith of the paper. *Beckhaus v. Commercial Nat. Bank* (Pa.) 12 Atl. 72.

Though accommodation paper pledged by the payee as collateral security cannot be enforced against the accommodation maker for any amount beyond that for which it was pledged. *Mechanics' & T. Bank v. Livingston*, 4 Misc. 257; *Duncan v. Gilbert*, 29 N. J. L. 521; *Allaire v. Hartshorne*, 21 N. J. L. 665, 47 Am. Dec. 175; *Handy v. Sibley*, 46 Ohio St. 9; *Wixen v. Roberts*, 1 Esp. 261.

In *Allaire v. Hartshorne*, 21 N. J. L. 665, 47 Am. Dec. 175, *supra*. *Williams v. Smith*, 2 Hill, 301, *supra*, II., was distinguished upon the ground that in that case the action was brought both against the makers and indorsers, while in this the payee is not a party to the suit, and it is objected that his rights as against the maker should not be concluded in a suit to which he was not a party.

So, the fact that a note was indorsed for the accommodation of the maker, and delivered to him for the sole purpose of taking up another note made by the same parties, also indorsed for accommodation, is not a defense in an action

by one who took it for value and before maturity as collateral security for a pre-existing debt, but he can be considered as a holder for value and as entitled to recover only to the amount necessary to reimburse him for his advances on it. *Stoddard v. Kimball*, 4 Cush. 604, 6 Cush. 469.

And a bank taking an accommodation note as a pledge with knowledge that it was an accommodation note can recover thereon against the maker of the note no more than the amount for which the pledge was given, and it will not be deemed to cover over-drafts by the pledgee in the absence of an express agreement to that effect. *Mechanics' & T. Bank v. Barnett*, 27 La. Ann. 177.

And while a pledgee in good faith and for value of promissory notes transferred to him before maturity can prove them for their full amount against the assets in bankruptcy of the promisors, though the pledgee had only borrowed the name, in such case the pledgee proves for the whole amount but receives dividends only to the extent of the debts for which he holds the security. *Ex parte Keity*, 1 Low. Dec. 394.

And the same rule was applied to the holder of a bill of exchange accepted for the accommodation of the drawer pledged to him as security for a debt due him, less in amount than the bill, in *Ex parte Newton*, L. R. 16 Ch. Div. 330.

So, bankers taking a bill from the drawer for value which had been accepted for his accommodation of which the bank had knowledge, after which the drawer becomes bankrupt, cannot recover of the acceptor more than the amount of the balance as between them and the drawer at the time of the bankruptcy. *Jones v. Hibbert*, 2 Starkie, 351.

And an accommodation note executed for the purpose of being used by the payee as collateral security and indorsed by him for that purpose after maturity, which was afterwards sold by an indorsee to satisfy an unpaid balance of his debts, can be enforced by the purchaser only to the extent that the first indorser could have enforced it, the recovery being limited to the unpaid portion of the debt which it was executed to secure. *First Nat. Bank v. West*, 52 Iowa, 684.

And where a note is loaned by one person to another for his accommodation, and the latter pledges it as security for a smaller sum, and the pledgee obtains a judgment against the maker for the whole amount of the note, which he

ted only to the extent of the value which he has paid." The court there further said: "The protection of the holder for value in such cases, as in other cases where the law protects bona fide purchasers against latent claims, is founded upon the idea of protecting such bona fide purchaser for value against any possible loss. And this is the precise reason why a bona fide holder of such paper, which has been transferred to him to secure an antecedent debt, cannot recover against the party who has been defrauded; namely, that he has lost nothing by his reliance upon the face of the paper." The supreme court of New Jersey, in *Dnuan v. Gilbert*, 29 N. J. L. 521, followed a like doctrine, and said: "It is certainly true that the holders of accommodation paper, assigned as collateral security, can recover against the accommodation maker and indorser no more than the consideration actually advanced."

In a very able review of the decisions upon the question of whether a person situated as was the plaintiff in the case at bar is entitled to the position of a holder of negotiable paper for value, and therefore not affected by the defense of want of consideration to the maker, the court of appeals of Maryland, through Chief Justice Alvey, also decided that all the plaintiff in such a case can recover is the amount due on the debt for which the note has been taken as collateral security. "In such case," said the chief justice, "while the plaintiff is entitled to be treated as a holder for value, it is only so to the extent necessary to protect the debts intended to be secured." *Maitland v. Citizens'*

Nat. Bank, 40 Md. 540, 17 Am. Rep. 620. Tiedeman on Commercial Paper, § 304, states that, where the pledge of a negotiable note is made for the purpose of securing the payment of a debt, the better rule is that the pledgee can recover the whole of the face value of the note, and hold the balance over and above the amount of his own claim as a trustee for the pledgeor. It would seem, therefore, as if he took a different view of the law from that taken by Daniel, although he expressly states in a subsequent part of his text that the pledgee in such a case is a bona fide holder only in respect to the amount of his claim against the pledgeor; and, if there be a good defense to an action on the collateral by the pledgeor, the recovery of the pledgee is limited to the amount of his claim against the pledgeor. But we think that if the pledgee is to be regarded in such a case (as he undoubtedly should be) as a bona fide holder only to the amount of his claim against the pledgeor, and if he be limited in his recovery to the amount of his claim, it is most reasonable that the controversy over the balance be litigated by those directly interested, and that ordinarily the pledgee is not to be held as a trustee for the pledgeor.

We are aware that there is a contradiction of opinion as to the attitude of the pledgee who seeks to recover the full amount of the collateral where such amount is in excess of the debt secured to him; but we are content to adopt the rule sustained by the decisions already cited, which limit his recovery to the amount due to him. In addition to the cases above cited, we may include *Steere v. Benson*, 2 Ill. App. 560, and

assigns to a third person, who in consideration thereof reimburses the pledgee, inasmuch as the pledgeor could have recovered nothing against the maker of the note the assignee stands in no better position, and can enforce it only to the extent of the sum advanced to reimburse the pledgee. *Blydenburgh v. Thayer*, 1 Abb. App. Dec. 156.

So, a pledgee of a promissory note and mortgage given to secure it who sells them under special power of sale, and purchases them himself, does not thereby entitle himself to recover upon a foreclosure of the equity of redemption, a sum in excess of the debt for which the note and mortgage were pledged as collateral security, where the paper was accommodation paper. *Handy v. Sibley*, 46 Ohio St. 9.

The question whether the whole or only the amount advanced can be recovered, however, has been treated in some of the cases as depending upon whether or not the pledgee had notice that the paper was accommodation paper.

Thus, while a pledgee of a negotiable note can generally collect the whole amount and account to the pledgeor for the surplus over his debt, where it is known to be accommodation paper, he can recover of the maker only the amount of the debt due him from the pledgeor. *Atlas Bank v. Doyle*, 9 R. I. 76, 11 Am. Rep. 219, 98 Am. Dec. 868.

The maker of an accommodation note which was pledged by the payee to a bank that had knowledge that it was an accommodation note, who offers to pay the amount of the pledge but refuses payment of the amount of the note pledged, cannot be exonerated from interest and costs where he does not make a formal tender

of the money as required by law. *Mechanics' & T. Bank v. Barnett*, 27 La. Ann. 177.

And evidence in an action upon a note showing a defense as against the payee and the first assignee, is not admissible in an action by the last assignee where the note which was accommodation paper was assigned as collateral security to a creditor with notice, and such creditor again assigned it before maturity to another without notice for a sufficient consideration. *Cock v. Norwood*, 106 Ill. 558.

In *Berenbroick v. Stephens*, 8 N. Y. Week. Dig. 163, however, it was held that a pledgee who takes a mere accommodation note given for the purpose of being used as collateral security for a loan and made payable to the party for whose accommodation it was given, may bring suit thereon whenever by its terms it is due, whether the money loaned had become due and payable or not, and may recover the whole amount thereof, though it exceeds the amount loaned.

And a promise by a bank to furnish one who indorsed negotiable paper to it with credit of an equal amount in Europe, and the issuing of letters of credit therefor, is a sufficient consideration to render the bank a bona fide holder, and entitle it to recover the face of the note though it was an accommodation note and not enforceable as between the original parties, and the bank need not prove that it had actually paid the amount for which the letters were issued. *Duncan v. Gilbert*, 29 N. J. L. 521.

IV. Matters of procedure.

That the maker of a note had a valid defense against the payee is matter of defense in an ac-

Second Nat. Bank v. Hemingray, 34 Ohio St. 381. A recent case upon this subject is that of *Farmers' State Bank v. Blevins*, 46 Kan. 536. There the court stated the question substantially as follows: In an action against the maker of the notes which had been transferred before maturity to an innocent and bona fide holder as collateral security for an indebtedness existing between the payee of such notes and the indorsee, is the indorsee entitled to recover against the maker to the full amount of such collateral notes, where such amount exceeds the indebtedness which they were transferred to secure, without regard to any defenses that may exist between the original parties to such notes, or is in such case the right of the plaintiff to recover limited to the amount of the principal debt? In that case, as in the one before us, equitable defenses were made by the pleadings; and it appeared that there was a controversy between the maker and the payee of the notes, by which it appeared that the paper was subject to equitable set-offs between the maker and payee. The court answered the question by holding "that the doctrine that the pledgee cannot recover more than the amount of the debt of the pledgeor is in accord with natural justice," and that, while it hesitated to state that as a rule, yet it did not think that any other rule ought to be applied without great caution. We are impressed with the reasoning in the Kansas case, and believe it correct in principle, as well as more practical, and well founded by the several decisions relied upon in the opinion of that court and the additional authorities above referred to by us.

tion by a holder as collateral security for a debt against the maker in which it is claimed that he is only entitled to recover the amount of the claim secured, and special averments in the declaration as to the amount are not required. *Vanilew v. Second Nat. Bank*, 21 Ill. App. 126.

And a complaint in an action by a pledgee of a negotiable note to which a defense existed as between the original parties for the recovery of the advance thereon need not aver that the note was received as collateral security, and is sufficient where it alleges that the pledgee was the owner. *Curtis v. Mohr*, 18 Wis. 616.

So, the pledgee of a note to which a defense exists as between the original parties may maintain an action for the amount advanced by him thereon in his own name without making the pledgeor a party. *Ibid*.

But see *YELLOWSTONE NAT. BANK V. GAGNON*.

And the order of proof to establish the amount of advances in an action by the holder of a note as collateral security for advances against the maker thereof, upon which the maker had a good defense as against the payee, is not material. *Gammon v. Huse*, 9 Ill. App. 557.

The presumption is that a holder of negotiable paper as collateral security gave full consideration therefor and the burden of overcoming this presumption rests with the defendant in an action by such holder against the maker on the note. *Duncan v. Gilbert*, 29 N. J. L. 521.

And the burden of proof rests with the maker of negotiable paper in an action thereon by one who had taken it from the payee as collateral
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There is another point made by the supreme court of Kansas in their decision which is applicable in this case as well. We think that the payee of the note, Nickey, ought to have been made a party to this litigation. Although the bank, under the views that we have taken of the law applicable to its rights, really has no interest in the controversy between Nickey and Gagnon, yet it would be eminently proper that the whole controversy be settled in this one action, and that the rights of all parties be determined. As was said by the supreme court of Kansas in the case above cited: "At the commencement of this action to recover on the notes as pledgee, the bank ought to have made Brady a party. He was the payee of the notes sued upon. He had transferred them by indorsement to the bank, who claims to be an innocent holder for value. Even after Blevins filed his answer setting up his various defenses as against Brady, and the knowledge of the bank of these equitable defenses, the bank, for protection against Brady, ought to have made Brady a party, as it now insists upon a recovery for the full amount of the notes; and yet it is shown that Brady's pre-existing indebtedness to the bank is less than the face of the notes and interest. As Brady was not a party then, and is not now, he will not be bound by the decision of this court on the question presented."

We think the case at bar is one where the court might properly order the payee of the note to be made a party, and that in the further conduct of the case this ought to be done, provided the pleadings remain as they are. It follows, therefore, that the motion

security for advances to show the amount of such advances. *Gammon v. Huse*, 9 Ill. App. 557.

So, the burden of proof rests with the maker of a note who had authorized the payee to pledge it as collateral security for a specified indebtedness, seeking to reduce the recovery thereon by a pledgee to the amount authorized to establish that the payee had pledged it for a larger amount, and that the pledgeor had knowledge of the extent of his authority. *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620.

And where a note was given in consideration of the postponement of the sale of mortgaged premises for four months and as collateral security for the mortgage debt under an agreement that if the debt should be paid during that time, or if the premises should sell for an amount sufficient to pay it with costs, the note should be void or if it should sell for a less sum only so much of the note should be collected as would make up the difference, and the land was sold, it is the duty of the maker to show it and that by reason thereof only a portion of the note ought to be collected, and in case of his failure to do so the pledgee would be entitled to recover the full amount thereof. *Hancock v. Hodgson*, 4 Ill. 329.

But the burden rests with the plaintiff in an action by a pledgee of notes as collateral security against the maker thereof to show what debts were intended to be secured thereby and the amount remaining due thereon. *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620.
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for judgment on the pleadings was improperly granted.

The judgment is therefore reversed, and the cause is remanded to the District Court, with direction to overrule said motion, and

to proceed according to the views expressed herein.

Pemberton, Ch. J., and Buck, J., concur.

NORTH CAROLINA SUPREME COURT.

Board of Commissioners of WILKES COUNTY *et al.*
v.

Clarence CALL, Sheriff, etc.,
and

J. M. TURNER *et al.*, Appts.

(123 N. C. 808.)

1. County bonds issued under authority of a statute passed in violation of the state Constitution are null and void.
2. There can be no bona fide holder of county bonds issued under authority of an unconstitutional statute.
3. A provision of an ordinance of a constitutional convention, that all counties subscribing to stock of railroads shall do so subject to the same rules, regulations, and restrictions set forth in the charter of a particular company, confers no affirmative authority to make such subscriptions.
4. A general provision of an ordinance of a constitutional convention that capital stock of a railroad company may be created by subscriptions on the part of counties will not of itself authorize a subscription by a particular county.
5. Statutes procured by a railroad company for its own benefit will be strictly construed against it.
6. Recitals in a county bond will not estop the county from denying its validity if they point to an unconstitutional statute as the authority under which the bond was issued.
7. The holder of a county bond which recites that it was issued under a particular statute which is adjudged unconstitutional will be estopped from contending that it was issued under another statute.
8. Mere legislative authority given a railroad to receive subscriptions to stock from municipal corporations, for which no consideration is given and which there has been no attempt to exercise, is not a contract, but may be revoked at any time.
9. A constitutional requirement that no bills of a certain kind shall be passed unless the yeas and nays on the second and third reading shall have been entered on the journal is mandatory, and invalidates all statutes of the kind referred to not so passed.
10. The legislature cannot by a sweeping statute give all counties in the state the right to issue railroad aid bonds without regard to the restrictions imposed by the Constitution thereon.

11. An issue of county bonds may be declared void at the suit of the county commissioners, although only one bond is represented before the court, if a full defense was made and other bondholders had an opportunity to come in and be heard.

(*Furches, J., and Faircloth, Ch. J., dissent.*)

(November 9, 1898.)

APPEAL by defendants Turner *et al.* from a judgment of the Superior Court for Wilkes County in favor of plaintiffs in an action brought to enjoin the payment of certain county bonds. *Affirmed.*

The facts are stated in the opinion.

Mr. E. N. Hackett for appellants.

Mr. A. C. Avery for appellees.

Douglas, J., delivered the opinion of the court:

This is an action brought to test the validity of certain bonds issued by Wilkes county in payment of its subscription to the stock of the Northwestern North Carolina Railroad Company. The suit was brought by the commissioners of the county of Wilkes against the county treasurer. The defendants Turner and Wellborn, who had become the owners of one of the bonds after the bringing of this action, by leave of the court, became parties defendant, and invited all other bondholders to come in and join them in resisting the action.

On the face of each bond, dated October 1, 1889, appears the explicit statement that "this bond is one of a series of one hundred bonds, of the denomination of \$1,000 each, issued by authority of an act of the general assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled 'An Act to Amend the Charter of the Northwestern North Carolina Railroad for the Construction of a Second Division from the Towns of Winston and Salem in Forsyth County, up the Yadkin Valley, by Wilkesboro, to Patterson's Factory, Caldwell County,'" etc. The bond does not allude in any way to any other legislative act, nor does it profess to claim further validity than that derived from the recited act. It is admitted, as well as clearly shown by the evidence, that this act of February 20, 1879, was not passed in accordance with the mandatory provisions of the Constitution of this state, as construed by this court, inasmuch as upon the

NOTE.—For unauthorized issue of bonds, see also *Baltimore & E. S. R. Co. v. Spring* (Md.) 27 L. R. A. 72; and *Rathbone v. Hopper* (Kan.) 34 L. R. A. 674.

As to rights of bona fide purchaser of municipal bonds, see also *Suffolk Sav. Bank for Sea-* 44 L. R. A.

See also 45 L. R. A. 772.

men v. Boston (Mass.) 4 L. R. A. 516; *Rainburg v. Fyan* (Pa.) 4 L. R. A. 336; *Brownell v. Greenwich* (N. Y.) 4 L. R. A. 685; *Flagg v. School Dist. No. 70* (N. D.) 25 L. R. A. 363; and *People's Bank v. School Dist. No. 52* (N. D.) 28 L. R. A. 642.

passage of said bill, upon its second reading in the house of representatives, there was no call of the ayes and noes, and, further, that the vote upon such reading was not recorded in the journal of the house. Const. art. 2, § 14. The amendatory act of 1881 is subject to the same obligation. In view of the recent decisions of this court, it is useless to discuss this question now, as the rule has been definitely settled in the following cases: *Union Bank v. Oxford Comrs.* 119 N. C. 214, 34 L. R. A. 487; *Stanly County Comrs. v. Snuggs*, 121 N. C. 304, 39 L. R. A. 439; *Charlotte v. Shepard*, 120 N. C. 411, 122 N. C. 602; *Rodman v. Washington*, 122 N. C. 39. Under the authority of these decisions, we are compelled to hold that the entire issue of these bonds is null and void, for want of legislative authority. An act of the legislature passed in violation of the Constitution of the state, or in disregard of its mandatory provisions, is, to the extent of such repugnance, absolutely void; and all bonds issued thereunder bear the brand of illegality stamped upon their face by the hand of the law. The act under which these bonds profess to have been issued was never legally passed, and never became a law. As was said in *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." The Constitution of the state is plenary notice to the world of its organic law. There can be no bona fide holders of unconstitutional obligations, nor can ignorance of public statutes and legislative journals be deemed otherwise than wilful or negligent. The journals are published for the information of the public, and are widely distributed and easily accessible, fully as much so as the public records of a county. Surely, no one would be heard to say that he was the bona fide owner of a piece of land simply because he held a deed therefor, when an inspection of the records would show that his grantor had no power to convey. It has been well said in *United States v. Macon County*, 99 U. S. 582, 25 L. ed. 331: "The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound."

A careful distinction should be drawn between the want of power to issue bonds, and mere irregularities in the exercise of that power. The latter, under certain circumstances, may be cured by recitals, or eliminated by estoppel; but a want of power goes to the very root of the transaction, and destroys its vitality. A tree may yet live though its branches are badly shattered by the storm, but the last leaf falls when the 44 L. R. A.

root is dead. This rule has been clearly laid down by the Supreme Court of the United States in the oft-cited case of *Anthony v. Jasper County*, 101 U. S. 603, 25 L. ed. 1005, where Chief Justice Waite says: "Dealers in municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the bona fide holder is protected against mere irregularities in the manner of its execution; but, if there is a want of power, no legal liability can be created. When the bonds now in question were put out, the law required that, to be valid, they must be certified to by the auditor of state. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. We had occasion to consider in *McGarrahan v. New Idria Min. Co.* 90 U. S. 316, 24 L. ed. 630, the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: 'Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires.' The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out, and bind for the payment of money the public organization they represent." By repeated adjudications, this has become the settled rule of that court. *Police Jury v. Britton*, 15 Wall. 566, 570, 572, 21 L. ed. 251, 253, 254; *Claiborne County v. Brooks*, 111 U. S. 400, 406, 28 L. ed. 470, 472; *Northern Bank v. Porter Twp.* 110 U. S. 608, 618, 28 L. ed. 258, 262; *Concord v. Robinson*, 121 U. S. 165, 167, 30 L. ed. 885, 887; *Kelley v. Milan*, 127 U. S. 139, 150, 32 L. ed. 77, 82; *Norton v. Dyersburg*, 127 U. S. 160, 175, 32 L. ed. 85, 91; *Young v. Clarendon Twp.* 132 U. S. 340, 33 L. ed. 356; *Hill v. Memphis*, 134 U. S. 198, 203, 33 L. ed. 887, 889; *Merrill v. Monticello*, 138 U. S. 673, 686, 687, 34 L. ed. 1069, 1075; *Erenham v. German American Bank*, 144 U. S. 173, 36 L. ed. 390; *Citizens' Sav. & L. Asso. v. Perry County*, 156 U. S. 692, 704, 39 L. ed. 585, 591.

But it is urged that, while the bonds were expressly issued under the act of 1879, there was, apparently unknown to both parties to the transaction, and certainly ignored by them, an existing authority to issue said bonds, derived from an ordinance of the constitutional convention passed in 1868; and that, therefore, we should hold that these bonds were unwittingly issued under that ordinance, and are therefore valid. The only authority we can find in that ordinance in any way authorizing the subscription to the stock of the company or the issuing of the bonds is as follows:

"Sec. 2. That the capital stock of said

company may be created by subscriptions on the part of individuals, corporations, and counties, in shares of \$100."

"Sec. 12. Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor, or material for constructing said road as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations, and restrictions as are set forth and prescribed in the act incorporating the North Carolina & Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."

That said ordinance cannot be relied on to support the validity of the bonds at issue is apparent for several reasons:

First. We do not see that any authority whatever is given or attempted to be given by either of these sections to Wilkes county to subscribe to the capital stock of this company. But it is said that § 12, by referring to the charter of the "North Carolina & Atlantic Railroad Company," by which we presume is meant the Atlantic & North Carolina Railroad (Laws of 1852, chap. 136), confers upon the different counties through or near which the Northwestern North Carolina Railroad may run the same authority to subscribe as was given to the counties tributary to the former company. Said section does not refer generally to the act of 1852, nor does it profess to confer any of the powers therein granted. It simply says that those counties and towns that do subscribe "shall do so in the same manner and under the same rules, regulations, and restrictions" as are prescribed in the former act. The words "same restrictions" are peculiarly significant here, as the act of 1852, § 45, provides in express terms that, "if the said road be not completed within six years after the ratification of this act, this charter shall be forfeited. Therefore, even if the powers granted in the act of 1852 had been given to the Northwestern North Carolina Railroad Company, or the counties in its interest, subject to the "same restrictions," those powers would have expired by their own limitation long before their attempted exercise twenty-three years thereafter. As all such powers must be strictly construed, this restrictive provision must be held to be in the nature of a limitation, and not a condition subsequent; that is, the authority given to the counties to subscribe, if it ever existed, expired at the end of six years, unless already exercised in such a way as to create vested rights. But it makes no difference how the power was exercised, if there was no power. Section 12 of the ordinance of 1868 does not refer to § 33 of the act of 1852, which confers the power, but is evidently limited by its very terms to §§ 34-36, which prescribe the manner in which that power must be exercised by the counties or towns to which it may have been granted. It would have been very easy for the convention to have given the same authority granted in § 33, either in express terms or

by reference to said section; but it has not done so, and we cannot do so by judicial construction.

There is no principle better settled than that all charters granting special privileges or powers must be not only strictly construed, but must be construed most strongly against the grantee. This rule, with the reasons therefor, has been so clearly stated by Chief Justice Pearson in *Raleigh & G. R. Co. v. Reid*, 64 N. C. 155, 158, that we can do no better than to quote his language, as follows: "It is equally well settled that contracts made by the state with individuals, in granting charters, are not to be construed by the same rules as contracts between individuals. In the latter, the rule of the common law, which is the same as common sense, is, 'Words are to be taken in the strongest sense against the party using them,' on the idea that self-interest induces a man to select words most favorable for himself. It is otherwise when the state is a party; for it is known that in obtaining charters, although the sovereign is presumed to use the words, in point of fact the bills are drafted by individuals, seeking to procure the grant, and that 'the promoters,' as they are styled in England, or the 'lobby members,' as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes; and a matter of this kind, instead of being in its strict sense a contract, is more like the act of an indulgent head of the family dispensing favors to its different members, and yielding to importunity. So, the courts, to save the old gentleman from being stripped of the very means of existence by sharp practice, have been forced to reverse the rule of construction, and to adopt the meaning most favorable to the grantor." The same rule is laid down in *Pennsylvania R. Co. v. Canal Comrs.* 21 Pa. 9, 22, where Chief Justice Jeremiah S. Black, says for the court: "It may be that the privilege which the relators claim might arise by implication out of their charter or some other of the acts cited by their counsel, if we were at liberty to give to them the broad construction which we sometimes apply to other laws of a different character. But corporate powers can never be created by implication nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. When the state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud that every consideration of justice and policy requires they they should be treated as nugatory when they do find their way into the enactments of the legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the

courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This court has asserted it times without number. We have ruled five or six important cases upon it within the last year. We seem not to have made much impression on the professional mind, and we are probably making as little now. But, when respectable counsel call on us hereafter (as they doubtless will) to enlarge corporate powers by construction, we can only repeat again and again that our duty imperatively forbids it. The privileges of the Pennsylvania Railroad Company may be too rigidly restricted. If the usefulness of the company would be increased by extending them, let the legislature see to it. But let it be remembered that nothing but plain English words will do it." It should be borne in mind that there is no pretense of authority for the issue of these bonds outside of the charter of the Northwestern North Carolina Railroad Company and its amendments. It has been the actor as well as the beneficiary throughout, and therefore the acts under consideration come peculiarly within the rule of strict construction laid down by the two great chief justices from whom we have quoted.

We have not overlooked the fact that in *Belo v. Forsyth County Comrs.* 76 N. C. 489, this court strongly intimates that § 12 of the charter did confer the authority given in § 33 of the act of 1852; but it does so incidentally, and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497 that, "as the case is presented to us, that question does not arise, and we do not decide it." It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The court stated that "the principle, however, of equitable estoppel is a most important element in the transaction," and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel *in pais* upon the county of Forsyth. Can it be questioned that estoppels must be mutual, and that he who relies upon the recitals in the bond to estop another must himself be bound by them? If this is so, it ends the case at bar, as all the recitals point to the unconstitutional act of 1879.

The case of *Hill v. Forsyth County Comrs.* 67 N. C. 367, considering simply the power of the legislature to authorize the issue of bonds, has no bearing upon the present case. The Forsyth county bonds recited that they were "authorized by an ordinance of 1868, by an order of the court of pleas and quarter sessions of Forsyth county, at June term, 1868, and re-enacted and ratified and confirmed by an act of the general assembly, 41 L. R. A.

ratified the 11th of August, 1868." [76 N. C. 489.] The cases are clearly distinguishable. Another important point of difference is that the Forsyth county bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation. It is evident that the legislature as well as the railroad company itself thought that the authority given in the ordinance was not sufficient, as in both cases additional legislation was sought and obtained, but with this essential difference: In the case at bar, the amendatory act, having been passed in violation of mandatory provisions of the Constitution, in legal contemplation, was never passed. As it has no legal existence, we have no authority to construe it, but simply to obliterate it. In *Jarrott v. Moberly*, 103 U. S. 580, 588, 26 L. ed. 492, 494, the court, in discussing a similar case, says: "Further legislation was needed. Such was the evident opinion of the legislature of the state for by an additional act, passed on the 29th of March, 1872, the authority was given in terms." And on page 580, 26 L. ed. 493, it says: "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation, and suppress the mischief at which it was aimed."

Secondly. The bonds on their face profess to have been issued under an entirely different statute. The principle laid down by the Federal authorities, and practically of universal acceptance, is that estoppels rest upon the recitals in the bond. The rule is generally cited as laid down in *Coloma v. Evans*, 92 U. S. 484, 23 L. ed. 579, as follows: "Where legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Northern Bank v. Porter Twp.* 110 U. S. 608, 616, 28 L. ed. 258, 261.

In the case at bar the bonds recite that they were issued under the act of 1879; and as all estoppels of this nature, to be operative, must be mutual, are not the bondholders themselves estopped from setting up any facts to the contrary? These recitals point out the very act under which the power is claimed, and it was the duty of all persons claiming thereunder to see that the act met the constitutional requirements. Certainly, the estoppel can never go further than the recital itself. It cannot operate upon any other act, nor as to the validity of any act. In *Gilson v. Dayton*, 123 U. S. 59, 31 L. ed.

74, it was held that "as it appears on the face of the bonds sued on in this action that they were issued under the special act of February 18, 1857, which was held void in *Post v. Kendall County Supers.* 105 U. S. 607, 26 L. ed. 1204, and not under the general law of March 6, 1867, the judgment dismissing the action is affirmed." As was said in *Davies County v. Huidekoper*, 98 U. S. 98, 100, 25 L. ed. 112, 113: "There must, indeed, be power, which, if formally and duly exercised, will bind the county or town. No bona fides can dispense with this, and no recital can excuse it." In *Dixon County v. Field*, 111 U. S. 83, 92, 28 L. ed. 360, 363, it was held that the estoppel arising from recitals, in the face of the bonds, never extended to or covered matters of law, and could arise only "upon matters of fact which the corporate officers had authority by law to determine and to certify."

Thirdly. That ordinance did not create a contract between the railroad company and the county of Wilkes. The only contract that has ever existed between them was the contract of 1888, which was subject to all the constitutional provisions then existing. The mere authority given in the charter of a railroad company to receive subscriptions from municipal corporations, where no consideration is given, and no attempted exercise of the power, has none of the essential elements of a contract, and is held at the pleasure of the lawmaking power. Much more so is it subject to constitutional restrictions. *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 630, 23 L. ed. 628, 631; *Concord v. Robinson*, 121 U. S. 165, 169, 30 L. ed. 885, 887; *Citizens' Sav. & L. Asso. v. Perry County*, 156 U. S. 692, 697, 39 L. ed. 585, 589. *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 630, 23 L. ed. 628, 631, was overruled in *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544, only in so far as it applied to the Constitution of Illinois, and for the only reason that the Supreme Court of the United States deemed it proper, in the construction of a state Constitution, to follow the state decisions, instead of their own view of the law. The general principle remains unchanged, and meets our approval.

The ratification of the Constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted, and not granted in strict accordance with its requirements. Article 2, § 16, is as follows: "No law shall be passed to raise money on the credit of the state or to pledge the faith of the state, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the state, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal." Article 7, § 7, is as follows: "No county, 44 L. R. A.

city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein." The intention of the Constitution is obvious. Profiting by the sad experience of other states, it intended to restrict the granting of public aid, and to hold to the strictest accountability every member of the Legislature who assisted in such grant by forcing him to twice record his vote on the journal, where it would be open to public inspection. It further intended that every such grant should be the deliberate and intelligent act of the legislature itself, as well as of the community affected thereby. It is our duty to give to these salutary provisions that just construction, acquired alike by the rules of law and of common sense, that will effectuate, and not destroy, their beneficial purpose.

This view, we think, is sustained by the uniform decisions of the Supreme Court of the United States, the only tribunal before which this decision can ever lawfully come for review. In *Wadsworth v. Eau Claire County Supers.* 102 U. S. 534, 537, 26 L. ed. 221, 222 (citing and reaffirming *Aspinwall v. Davies County Comrs.* 22 How. 364, 16 L. ed. 296), the court says: "We held in that case that the popular vote did not itself create a vested right in the railroad company to the bonds, and that a subscription was necessary to create a contract binding the county to issue bonds in payment of the stock, and binding the company to issue stock for the bonds. 'Until the subscription is made,' said Mr. Justice Nelson, speaking for the whole court, 'the contract is unexecuted and obligatory upon neither party.' Hence the new state Constitution was held to govern the case, and from the time of its adoption to have withdrawn from the county commissioners all authority to make subscriptions to the stock of incorporated companies except in the manner and under the circumstances prescribed by that instrument." In *Norton v. Brownsville Tazewell Dist. Comrs.* 129 U. S. 479, 490, 32 L. ed. 774, 778, Chief Justice Fuller, speaking for the entire court, says: "These cases [referring to *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. ed. 628; *Falconer v. Buffalo & J. R. Co.* 69 N. Y. 491; *Buffalo & J. R. Co. v. Falconer*, 103 U. S. 821, 26 L. ed. 471; *Wadsworth v. Eau Claire County Supers.* 102 U. S. 534, 26 L. ed. 221; and *Aspinwall v. Davies County Comrs.* 22 How. 364, 16 L. ed. 296] sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the legislature and of a constitutional inhibition upon the municipality itself. In the former case past legislative action is not necessarily effective, while in the latter it is annulled. Of course, if an entirely new organic law is adopted, provision in the schedule or some other part of the instrument must be made for keeping in force all laws not inconsistent therewith, and this was furnished in this instance by

the 1st section of article 11; but such a provision does not perpetuate any previous law enabling a municipality to do that which it is subsequently forbidden to do by the Constitution. The inhibition being self-executing, and operating directly upon the municipality, and not in itself enabling the latter to proceed in accordance with the prescribed limitation, further legislation is necessary before the municipality can act." In the late case of *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 220, 42 L. ed. 1017, it is held that "a clause in a charter of a railroad company, granting it power to consolidate with or become the owner of other railroads, is not such a vested right that cannot be rendered inoperative by subsequent legislation, passed before the company avails itself of the power thus granted." It is useless to cite the cases themselves cited in the cases referred to herein.

It is further urged on the part of the defendants and those whom they represent that the issuing of these bonds was authorized by §§ 1996 to 2000 of the Code. This question was definitely settled in *Stanly County Comrs. v. Snuggs*, 121 N. C. 394, 400, 401, 39 L. R. A. 439, and we see no reason to reverse our ruling, nor do we find any facts taking this case from its operation. We can add nothing on this point to what was therein so fully and ably said in the opinion of the court, except to say that, if the construction contended for by the defendants must be placed upon those sections, then they are in direct violation of the letter and spirit of the Constitution, inasmuch as they practically annul one of its essential provisions. If the word "uncompleted" can refer to any road not yet begun, and the word "interest" apply to a mere friendly feeling or supposed advantage to be derived from the general building up of the country, then the several counties may go on forever subscribing unlimited amounts to any railroad *in esse* or *in futuro* that may be located within the range of their knowledge. Such a construction would simply nullify the Constitution, by making its explicit restrictions vain and worthless. It cannot be adopted by us; but, if we were forced to adopt it, we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books. While the legislature may, in individual cases, grant to specific counties the necessary authority in accordance with the provisions of the Constitution and subject to its restrictions, it cannot, by a sweeping act of unlimited application, utterly destroy its operation. If the legislature or the railroad company or the county had placed any such construction on those sections, additional legislation would have been deemed useless, and the recitals in the bonds would have been different. It is true that this road had been begun, and was in one sense uncompleted, when the subscription was made; but it was not begun when the Constitution was ratified, and the county at that time had no pecuniary interest in it, nor any interest contemplated by the statute. It is not necessary for us to consider the fact that the first section of the

road had been completed to Winston, beyond which all idea of extension seems for years to have been abandoned. The act of 1881 has no reference to the bonds in question, and is subject to the same objections as the act of 1879, which we have been discussing.

We have given this case the most thorough investigation and careful consideration on account of the important principles and the large amount involved. We deeply deplore the fact that many parties must suffer, who are in morals, if not in law, innocent holders of the bonds; but their loss comes from their misplaced confidence in those from whom they received the bonds, and the negligence of the corporation to which the power was professedly given and the bonds were issued. The only authority for their issue is found in a railroad charter, and we cannot undertake to validate defective or unconstitutional legislation by judicial construction. The suggestion of repudiation, so strongly urged here and elsewhere, has no weight with us. The so-called "repudiation" of an unconstitutional obligation is a contradiction in terms, and its assertion amounts simply to a moral and legal absurdity.

It has been said that the usual difference between heterodoxy and orthodoxy is the difference between your doxy and my doxy, and that in financial ethics the same distinction exists between stealing and financiering. This distinction we cannot indorse. It is just as wrong to wring from an unwilling and perhaps a suffering debtor an unjust debt as it is to deprive a creditor of a just debt. We will try to do neither, but will hew to the line. The strictly moral aspect of the case is not before us, but it is possible that the plaintiffs, representing an honest, industrious, and intelligent people, may have reasons for their action as strong in morals as in law. Enough appears to indicate, what is common knowledge, that the stock for which these bonds were issued has been swept away in the maelstrom of corporate reorganization. It may be that the plaintiffs, deprived of every vestige of consideration by the decree of a court of equity, may not feel any moral obligation beyond the strict letter of the law. They may see no difference between repudiation and reorganization when both accomplish the same result, to retain the benefit and shift the burden.

In *Lewis v. Pima County*, 155 U. S. 54, 58, 39 L. ed. 67, 69, it was held that bonds issued under an act of the legislature of the territory of Arizona, which was in violation of the Revised Statutes of the United States, were void, and "created no obligation against the county which a court of law can enforce." In the carefully considered case of *Brenham v. German American Bank*, 144 U. S. 173, 182, 36 L. ed. 390, 394, 396, the court says: "It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held

to exist in the present case. . . . As there was no authority to issue the bonds, even a bona fide holder of them cannot have a right to recover upon them or their coupons,"—citing *Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *East Oakland Twp. v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. ed. 81; *Daviess County v. Dickerson*, 117 U. S. 657, 29 L. ed. 1026; *Hopper v. Covington*, 118 U. S. 148, 151, 30 L. ed. 190, 192; *Merrill v. Monticello*, 138 U. S. 673, 681, 682, 34 L. ed. 1069, 1073.

It has been suggested that the defense in this case has been only colorable, as but one of the bonds was represented. Under the circumstances, we think, that was sufficient. An elaborate answer, evidently prepared by able counsel, has been filed, presenting every reasonable defense; and, while no argument was made before us for the defendants, every phase of the case has been carefully examined by us in the five months during which we have held it under advisement. The plaintiffs had no means of knowing who held the bonds, as they are payable to bearer, and pass from hand to hand without indorsement or registration. The bondholders themselves could have become parties at any stage of the proceedings, and would have been gladly heard by us; but the mere fact that they deliberately refrained from any participation in the defense when they had every opportunity of doing so should not deprive the plaintiffs of all power to protect the rights of the people they represent in a court of competent jurisdiction, where alone this action could be brought by them. The current of authority from other states sustains the conclusions we have reached in this case; but, owing to the large number of cases, we have thought it best to cite only from our own decisions and those of the Supreme Court of the United States.

For the reasons stated in this opinion, the judgment of the court below is affirmed.

Furches, J., dissenting:

On the 9th of March, 1868, the constitutional convention of North Carolina passed an ordinance chartering and authorizing the formation of a corporation, to be known as the "Northwestern North Carolina Railroad Company." Under this charter said company was formed and organized; and on the 25th of March, 1868, the county of Forsyth subscribed \$100,000 to said corporation, which subscription was held to be valid in *Hill v. Forsyth County Comrs.* 67 N. C. 367. In payment of this subscription, the county of Forsyth issued coupon bonds to the amount of \$100,000, and they were held to be valid against the county in *Belo v. Forsyth County Comrs.* 76 N. C. 489, and the work of constructing said road between Greensboro, in the county of Guilford, and Winston, in the county of Forsyth, was commenced. This part of the road was completed and put into operation within the next few years, and has continued to be run and operated ever since. This charter made Winston a point to which the road should

run, west of its starting point on the North Carolina Railroad. From this point (Winston) it was authorized to build branch roads, but none were built until 1887, when the company proposed to build a branch of its road from Winston to or near Wilkesboro, in Wilkes county, provided Wilkes county would make a subscription of \$100,000 to the capital stock of said company. This proposition to subscribe \$100,000 to the capital stock was submitted to the qualified voters of said county, by the commissioners thereof; the vote taken; a majority of the whole qualified voters of said county voted for the subscription. The subscription was made, and the road built to Wilkesboro, in compliance with the agreement of the railroad company; and the bonds now asked to be declared invalid were issued by the county, delivered to the railroad company, and the interest thereon regularly paid until the commencement of this action. All these facts are shown by the record, and are admitted to be true. But there having been a change in the *personnel* of the board of commissioners since said bonds were issued, and since said road was built, this new board is seeking in this action to repudiate the action of the former board.

I understand the court to rest its opinion on two grounds,—the want of power in the commissioners to submit the proposition to the voters, and to issue the bonds; and the doctrine of estoppel. If there is error in these positions, I shall contend that the conclusion to which the court has arrived is erroneous, and should be reversed. I admit that, if the commissioners had no legislative authority to submit the proposition of subscription to the voters of Wilkes, these bonds are void, and the judgment of the court is correct. But I propose to show that they had this authority, and that the bonds are valid.

The charter (the ordinance of the convention) in express terms makes the charter of the Atlantic & North Carolina Railroad Company a part of the charter of the Northwestern North Carolina Railroad Company, so far as it relates to the subscription of counties to the capital stock of the company. This being so, the charter of the Atlantic & North Carolina Railroad Company is to be read and considered as a part of the charter of the Northwestern North Carolina Railroad Company. *Wrought Iron Range Co. v. Carver*, 118 N. C. 328; *Leavenworth County Comrs. v. Higginbotham*, 17 Kan. 62. It is like an instrument referring to another instrument (*Flaum v. Wallace*, 103 N. C. 296), or where the complaint in one action refers to the complaint in another action for data (*Alexander v. Norwood*, 118 N. C. 381), they are to be read and considered together as one instrument. I have shown that the subscription made to this company (the Northwestern North Carolina Railroad Company) by the county of Forsyth, under the charter as originally passed, has been sustained, and held to be valid by this court in *Hill v. Forsyth County Comrs.* 67 N. C. 367. This decision established the power—the authority—to submit the prop-

osition of subscription to the voters of the county, and to issue bonds. But the validity of the bonds issued on this subscription of Forsyth was again put directly in issue in the case of *Belo v. Forsyth County Comrs.* in a mandamus proceeding, to compel their payment, and their legality was again sustained by this court. *Belo v. Forsyth County Comrs.* 76 N. C. 489. This case, also, as I contend, established the authority to submit the question to the voters, and to issue these bonds. It is true that the submission of this question in Forsyth was made by the justices of the peace, acting as a county court; and it is true that the charter provides that the question should be submitted by them. But this charter was passed, and this submission was made, and bonds issued, before the adoption of the Constitution of 1868, which did not go into effect until the 22d of April of that year. By this Constitution and subsequent legislation, the county court was abolished, and the county commissioners succeeded to their powers in this matter, and in all such cases. It is so held by this court in *Belo v. Forsyth County Comrs.* 76 N. C. 489, and it is expressly so provided by the legislature. Code, § 1997. Therefore, while the submission of the question in Wilkes was by the commissioners, they were the successors of the justices and the county court, fully and clearly authorized to make the submission and the subscription and to issue the bonds.

But it is contended by the court that, if the charter authorized this subscription and the issue of the bonds now sought to be repudiated, it was passed before the Constitution of 1868 went into effect, and that it was thereby repealed. To support this position, *Aspinwall v. Daviess County Comrs.* 22 How. 364, 16 L. ed. 296, and *Lewis v. Pima County*, 155 U. S. 54, 39 L. ed. 67, are cited by the court. Neither of these cases, in my opinion, sustains the position for which they are cited. The first case cited (22 How.) is intended to raise the question of violating a contract under the Constitution of the United States, and nothing more. The submission in that case was made, and the vote thereon was had, in 1849; but the subscription to the capital stock was not made, and the bonds were not issued, until 1852. In the meantime the Constitution of the state (Indiana) had been amended so as to prohibit any county in the state from issuing such bonds. But Daviess county proceeded to issue the bonds under said submission and vote, and to put them on the market, but afterwards refused to pay them; and the plaintiff, being the holder of a part of these bonds, undertook to enforce their payment. There was no question made in that case but what the Constitution had inhibited their issue. But the plaintiff claimed that the submission and the vote thereon, which were before the amended Constitution, amounted to a contract; and that the new Constitution, which prohibited the county from issuing the bonds, was an impairment of the obligation of this contract, and therefore in violation of the Constitution of the United States. No such question as this arises in 44 L. R. A.

this case. There is no pretense that these bonds are protected by any provision of the Constitution of the United States.

But it is denied by the defendants that the Constitution of 1868 repealed the charter of this road, or that it prohibited Wilkes county from making this subscription or from issuing these bonds, as I expect to show. The case of *Lewis v. Pima County* arose out of the legislation of Arizona territory. The legislature of this territory passed an act authorizing Pima county to issue bonds for the construction of a railroad. This being a territorial government, it had no legislative powers except those granted by Congress. And it was held in that case that Congress had not only failed to grant such legislative power, but had in express terms prohibited its exercise, and the bonds were held to be void. I fail to see the argument to be drawn from this case against the validity of the bonds under consideration. As has been stated, the charter of the Northwestern North Carolina Railroad was passed before the adoption of the Constitution of 1868, which took effect on the 22d of April of that year. But the legislature passed an act, ratified on the 11th of August, 1868, as follows: "Sec. 1. The general assembly of North Carolina do enact, that an ordinance entitled 'An Ordinance to Incorporate the Northwestern North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be and the same is hereby re-enacted, ratified, and confirmed." If there had been a repeal of this charter by the Constitution, which I contend there had not been, it seems to have been re-enacted in August, 1868. It has not escaped my attention that there is in the printed record an agreement as to what acts are to be considered by the court in deciding this case, and the act of 1868 is not one of those named. This agreement is signed by the counsel for plaintiffs, and by counsel for Mr. Turner and Mr. Wellborn, but it is not signed by anyone for the defendant Call. But, if it had been signed by Call, I would have to disregard it. Parties may agree upon facts, that I would feel bound by, but I cannot feel bound by an agreement as to what is the law. I refer to this act of 1868 for the purpose of meeting an argument in the opinion of the court, and not for the reason that I consider it necessary to sustain the position I have taken, as to the authority of the commissioners of Wilkes county to submit this question to the voters, and to subscribe the stock, and to issue the bonds. The charter provides for submitting the question to a vote of the people in almost, if not, the language of the Constitution of 1868, with the single exception that it shall be sufficient if a majority of the qualified voters "voting thereon shall be in favor of the subscription." To this extent, and no further, did the Constitution of 1868 conflict with the provisions of this charter; and this was cured by § 1997 of the Code, which was admitted to have been passed as the Constitution requires, and which provides that it shall take a majority of the qualified voters of the county to authorize the subscription, as was done in this case. Suppose that § 1997 of

the Code had been passed by the legislature as an amendment to this charter, with all the formalities and requirements of the Constitution; would it be contended that the submission was without legislative authority, and that these bonds were void? And, if not, why is it that a general law, applying to all cases of submission, has not the same effect?

The next ground upon which the court rests its opinion is that of estoppel. This ground of alleged invalidity to the bonds arises in this way: The legislature, at its February session (1879), attempted to pass, and did pass, an act providing for the extension of the Northwestern North Carolina Railroad, from Winston to Wilkesboro, for the subscription of counties to its capital stock, and the issue of bonds. But it is claimed by the plaintiff, and such appears to be the fact, that this act did not receive the three several readings, on three several days, with a call of the yeas and noes, as provided by the Constitution, and, for that reason, that the said act is void, under *Union Bank v. Oxford Comrs.* 119 N. C. 214, 34 L. R. A. 487, and *Stanly County Comrs. v. Snuggs*, 121 N. C. 400, 39 L. R. A. 439. But the commissioners, when they issued these bonds, did not know that this act was unconstitutional and void, and they recited in the bonds that they were issued under the act of 1879. This act does not purport to be an original act, but it is stated in the act itself that it is an amendment to the ordinance of the convention chartering said road. So that anyone seeing these bonds would be led by the statements therein to know that they depended upon authority derived from the original charter; that is, the ordinance of the convention of 1868. And it is claimed in the opinion of the court that this recital in the bonds, put there by the plaintiffs, estops the holders and those representing them from showing any other authority in the commissioners, except the act of the 20th of February, 1879, and that, that act being void for the reasons heretofore stated, the commissioners had no power to issue the bonds. I admit that this act is a nullity, and cannot benefit the bondholders; and as it is void, and can do them no good, it can do them no harm. The court therefore, upon this recital in the bonds that they were issued under the act of February 20, 1879, again rests its judgment upon the doctrine of estoppel, and holds that the bondholders and the defendants in this action are estopped to show that the commissioners had any other authority except the said act of 1879. With the greatest respect and deference to the opinion of the court, it seems to me that the doctrine of estoppel is not only misapplied, but that its use and purpose are misconceived in this application by the court. Estoppels are as to facts, and not of law. In such transactions as this, they are made to apply to a party stating the facts, and not to the party to whom they are stated. This seems to me to be elementary learning. But see *Bigelow, Estoppel*, pp. 44 L. R. A.

4-7, and 356, and note 1: "It is not the deed of the defendant, but of Isham [the grantor] only, by whom alone it is executed; and, not being the deed of the defendant, it cannot, as a deed, estop him from denying that the grantor had title." And the same principle is held in the case of *Northern Bank v. Porter Twp.* 110 U. S. 608, 28 L. ed. 253, near the end of the opinion (cited by the court). In that case the bondholder was trying to estop the maker by holding him to the statements in the bond; and the court says that the maker is estopped by the recital of such facts as it was supposed to have special knowledge of,—such as that there had been a submission to a vote, and that a majority of the qualified voters voted for the bonds. But it was held that the defendant (the maker) was not estopped to show the law,—to show that the township had no legal authority to make the subscription and to issue the bonds. If the maker of the bonds was not estopped by the recitals in the bond from showing the want of legal authority to make the bonds, what rule of law or justice is there to estop the defendants in this case from showing that the commissioners of Wilkes county had the power—legal authority—to issue these bonds? It is said in the opinion of the court that "estoppel are mutual," and, as the plaintiff would be estopped by the recitals, that the defendant must be. This rule obtains in many instances, but I deny its application in this case, as I have shown above, from *Bigelow on Estoppel* and from *Northern Bank v. Porter Twp.* But were I to admit the rule to be that, where one party is estopped, the other party is also, what would be the result of the reasoning of the court, when I have shown that the maker would not be estopped to show the want of power?

The court, in its opinion, says that certain positions were strenuously insisted on by the defendants. I think this must be a mistake, as the case was not argued before us, either by brief or by oral argument, on behalf of the defendants. Mr. Turner and Mr. Wellborn, by leave of court, made themselves parties defendant after the action was brought, but they have given the case no further attention. Why they did this I do not know. The case appears to be a controversy so far as parties are concerned, for there are plaintiffs and there are defendants. But, as to the conduct of the case before this court is concerned, it has been unilateral. The opinion of the court speaks of the reorganization of the railroad company, thereby defrauding someone out of his stock. The record furnishes no evidence of any reorganization of the railroad company. It is stated in the opinion of the court that the Supreme Court of the United States is the only court authorized to review this opinion. I agree with the court in this expression of opinion, but I have no idea that it will ever be reviewed by that court, as the case is decided in favor of plaintiffs, and the defendants have not taken interest enough in it to be represented by counsel, and it is not likely

they will appeal. It is said that the talk of repudiation has had no effect on the court, and I have no idea that it has; and I hope that my aversion to repudiation has had no influence on me in coming to the conclusions I have reached. My opinion is that the

bonds are valid, and that their payment should be enforced by the courts.

Fairecloth, Ch. J.: I concur in the dissenting opinion.

NORTH DAKOTA SUPREME COURT.

William D. HALE, Receiver, etc., of American Savings & Loan Association, Appt.,
v.

ELLA CAIRNS *et al.*, Respnts.

(.....N. D.....)

*A member of a building and loan association, who borrows money from the association, and bids a premium for the privilege of obtaining the loan, and executes his bond for the amount of the loan and premium, and gives a mortgage to secure the payment of such bond, and also assigns to such association his shares of stock as collateral security for such payment, is not entitled, in an action brought to foreclose such mortgage by the receiver of such association (said association being insolvent), to apply the amounts he has paid as dues upon his stock in reduction of his indebtedness.

(November 19, 1898.)

APPEAL by plaintiff from a judgment of the District Court of Cavalier County in favor of defendants in an action brought to foreclose a mortgage. *Reversed.*

The facts are stated in the opinion.

Messrs. Cochran & Corliss, for appellant:

The plaintiff may, as foreign receiver, maintain this action.

High, Receivers, §§ 241 *et seq.*; Beach, Receivers, § 682; 6 Thomp. Corp. § 7340; *Rogers v. Riley*, 80 Fed. Rep. 759; *Metzner v. Bauer*, 98 Ind. 425; *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.* 123 N. Y. 37; *Boulevard v. Davis*, 90 Ala. 207, 9 L. R. A. 601; *Gilman v. Ketchman*, 84 Wis. 60, 23 L. R. A. 52; *Comstock v. Frederickson*, 51 Minn. 350; *Johnston v. Rogers*, 19 Ky. L. Rep. 1272; *Hurd v. Elizabeth*, 41 N. J. L. 1; 21 Am. & Eng. Enc. Law, p. 241; *Falk v. Janes*, 40 N. J. Eq. 484; 2 Beach, Mod. Eq. Pr. § 747.

The association having assigned the bond and mortgage to the plaintiff as receiver, he is the absolute owner thereof by virtue of contract.

High, Receivers, § 244; *Graydon v. Church*, 7 Mich. 36; *Smith v. Chicago & N. W. R. Co.* 23 Wis. 267.

The insolvency of the association, followed by the appointment of the receiver, has the effect to render the sum loaned due without reference to the terms of the contract.

*Headnote by BARTHOLOMEW, Ch. J.

NOTE.—The right of a member of a building and loan association to apply stock payments upon a mortgage is considered in a note to *Southern Bldg. & L. Asso. v. Anniston Loan & 44 L. R. A.*

Curtis v. Granite State Provident Asso. 69 Conn. 6; *Strohen v. Franklin Sav. Fund & L. Asso.* 115 Pa. 273; *Buist v. Bryan*, 44 S. C. 121, 29 L. R. A. 127; *Towle v. American Bldg., Loan & Invest. Soc.* 61 Fed. Rep. 446; *Waverly Mut. & Permanent Land, Loan & Bldg. Asso. v. Buck*, 64 Md. 333; *Endlich, Bldg. Asso.* § 523, p. 518; *Rogers v. Hargo*, 92 Tenn. 35; *Weir v. Granite State Provident Asso.* 56 N. J. Eq. 234; *Rogers v. Rains*, 100 Ky. 295; *Strauss v. Carolina Interstate Bldg. & L. Asso.* 117 N. C. 308, 30 L. R. A. 693; *Chapman v. Young*, 65 Ill. App. 131.

The dues which Cairns has paid upon his stock, that is, the dues upon the four shares of stock with which he was to pay the \$400 borrowed, and the dues upon the four shares of stock with which he was to pay the premium bid, should not be deducted from the amount found due on the loan for principal and interest.

When such an association becomes insolvent the borrowing stockholder should enjoy no advantage over the non-borrowing stockholder. All who have borrowed money of the association should return it with interest, for the assets of such association consist chiefly of loans made to members; and then, when all the assets have been collected in, all the stockholders should share in the net assets in proportion to their respective holdings.

Wohlford v. Citizens' Bldg. L. & Sav. Asso. 140 Ind. 662, 29 L. R. A. 177; *Eversmann v. Schmitt*, 53 Ohio St. 174, 29 L. R. A. 184; *Curtis v. Granite State Provident Asso.* 69 Conn. 6; *Goodrich v. City Loan & Bldg. Asso.* 54 Ga. 98; *Strohen v. Franklin Sav. Fund & L. Asso.* 115 Pa. 273; *Rogers v. Hargo*, 92 Tenn. 35; *Sullivan v. Stucky*, 86 Fed. Rep. 491; *Brown v. Archer*, 62 Mo. App. 277; *Weir v. Granite State Provident Asso.* 56 N. J. Eq. 234; *Moran v. Gray* (N. J. Eq.) 38 Atl. 668; *Price v. Kendall*, 14 Tex. Civ. App. 26; *Post v. Mechanics' Bldg. & L. Asso.* 97 Tenn. 408, 34 L. R. A. 201; *Knutson v. Northwestern Loan & Bldg. Asso.* 67 Minn. 201.

Dues paid upon stock do not constitute payments upon the loans made to stockholders.

Endlich, Bldg. Asso. §§ 448, 452, 477, 478; *Pioneer Sav. & L. Co. v. Cannon*, 96 Tenn. 509, 33 L. R. A. 112; *Southern Bldg. & L. Asso. v. Anniston Loan & T. Co.* 101 Ala. 582, 29 L. R. A. 120; *State, Washington Bldg. & L. Asso., v. Hornbacker*, 42 N. J. L. 635; *Post v. Mechanics' Bldg. & L. Asso.* 97 Tenn. 408,

T. Co. (Ala.) 29 L. R. A. 120. See also *Post v. Mechanics' Bldg. & L. Asso.* (Tenn.) 34 L. R. A. 201.

34 L. R. A. 201. Cases in note to *Robertson v. American Homestead Asso.* (Md.) 69 Am. Dec. 163; 4 Am. & Eng. Enc. Law, 2d ed. pp. 1057, 1058.

If Cairns had paid any portion of the premium bid or any interest thereon, such payment should be deducted from the amount due.

Endlich, Bldg. Asso. §§ 523, 531; *Weir v. Granite State Provident Asso.* 56 N. J. Eq. 234; *Moran v. Gray* (N. J. Eq.) 38 Atl. 668; *Rogers v. Rains*, 100 Ky. 295; *Curtis v. Granite State Provident Asso.* 69 Conn. 6; *Post v. Mechanics' Bldg. & L. Asso.* 97 Tenn. 408, 34 L. R. A. 201.

Some of the cases hold that only a proportionate part of the premium paid should be credited to the debtor.

See *Sullivan v. Stucky*, 86 Fed. Rep. 491; *Tovole v. American Bldg. Loan & Invest. Soc.* 61 Fed. Rep. 446. See also *Weir v. Granite State Provident Asso.* 56 N. J. Eq. 234.

Mr. M. H. Brennan, for respondents:

The borrowing member in cases of insolvency and foreclosure is entitled to credit for all payments made.

Rochester Sav. Bank v. Whitmore, 25 App. Div. 491; *Thompson v. North Carolina Bldg. & L. Asso.* 120 N. C. 420; *Strauss v. Carolina Interstate Bldg. & L. Asso.* 117 N. C. 308, 30 L. R. A. 693; *Robertson v. American Homestead Asso.* 10 Md. 397, 69 Am. Dec. 162; *Buist v. Bryan*, 44 S. C. 121, 29 L. R. A. 127; *Thompson, Bldg. Asso.* chap. 8, §§ 30, 42, 50, chap. 12, §§ 5, 13; Endlich, Building Asso. §§ 33, 373, 496, 498, 502, 531; 2 Am. & Eng. Enc. Law, pp. 629, 642; *Randall v. National Bldg. L. & Protective Union*, 42 Neb. 809, 29 L. R. A. 133.

Bartholomew, Ch. J., delivered the opinion of the court:

William D. Hale, the appellant, is the duly-appointed receiver of the American Savings & Loan Association. As such he seeks to foreclose a mortgage given by Robert Cairns and Ella Cairns to said association. Robert Cairns died before the action was brought, and the defendants Mary and Robert Cairns are his heirs at law. The American Savings & Loan Association was a corporation organized and doing business under the laws of the state of Minnesota, with its home office at Minneapolis. The allegations of the complaint, aside from the allegations as to the insolvency of the association and the appointment of the receiver, are substantially the same as in the case of *United States Sav. & L. Co. v. Shain* (decided at this term) 77 N. W. 1006. The answer also raises the same issues as in that case. Following the decision in that case, we hold that the contract in this case must be governed by the laws of the state of Minnesota, and that said contract is not usurious.

Upon the question of the proper credits to be given to the defendants, this case differs materially from the *Shain Case*, as the association has become insolvent, and is unable to mature the stock, and consequently unable to complete the contract on its part. In this case the loan was \$400, and the premium bid was \$400. The evidence of indebtedness

took the form of a bond. Ella Cairns signed as one of the obligors. The bond was for \$300, but only the sum of \$400 drew interest, and that at the rate of 6 per cent. Eight shares of stock were assigned to the association as collateral security; the bond to be paid by the absolute surrender of such stock at maturity. The bond was payable on or before nine years from date. It is conceded, as we understand the record, that on December 19, 1888, Robert Cairns, deceased, subscribed for, and there were issued to him, ten shares of stock in said association. Subsequently two of said shares were surrendered, and they figure in no manner in this controversy, and we shall treat the matter as a subscription for eight shares. Upon these shares he contracted to make monthly payments at the rate of 60 cents upon each share until the stock matures. Cairns did not apply for a loan until more than a year thereafter, and the loan was not actually made until March 8, 1890. All payments up to that time had been kept up. Consequently there had been paid upon said eight shares, before the loan was made, the sum of \$67.20. From the time the loan was made until the insolvency of the association the stock payments were regularly made. This included all payments up to and including October, 1895. Hence he paid upon his stock, after the loan, the further sum of \$321.60; and of this amount one half, or \$160.80, was paid upon stock held by the association as collateral security for the bonus or premium. The interest upon the loan of \$400 was also paid monthly in advance, and amounted during said term to \$134. For what amount of the sums so paid should the respondents receive credit?

This question has received very different answers at the hands of different courts. It has never yet been answered by this court. It has been held that a proper and equitable adjustment, in cases where the association has become insolvent and unable to mature its stock, is to charge the borrowing member with the amount of money received, with legal interest thereon, and credit him with all that he has paid, "whether paid as fines, penalties, or dues." *Strauss v. Carolina Interstate Bldg. & L. Asso.* 117 N. C. 308, 30 L. R. A. 693; *Thompson v. North Carolina Bldg. & L. Asso.* 120 N. C. 420; *Buist v. Bryan*, 44 S. C. 121, 29 L. R. A. 127. See also *Rochester Sav. Bank v. Whitmore*, 25 App. Div. 491. In this case the question was presented in an involved form, and just what the court decided is not clear. Respondent also cites in this connection *Randall v. National Bldg. L. & Protective Union*, 42 Neb. 809, 29 L. R. A. 133. But in that case the association involved was, so far as the record discloses, an entirely solvent corporation; and under such circumstances there can be no injustice in crediting a borrowing member, who chooses to surrender the stock pledged, with all that he has paid thereon. This rule has been frequently applied in Pennsylvania. *Spring Garden Loan Asso. v. Tradesmen's Sav. Fund & L. Asso.* 46 Pa. 493; *Watkins v. Workingmen's Bldg. & L. Asso.* 97 Pa. 514. But that a different rule, as to credits to be given,

should be applied in solvent and insolvent corporations is, we think, entirely clear. The rule is universal that when a corporation becomes insolvent there must be, or at least there may be, a loss to the stockholder. And, from their very nature, the certainty of loss in case of an insolvent building and loan association is greater than in many other forms of investment. They deal only with their members. Their capital consists exclusively of sums paid by their members. They cannot become insolvent in fact without an impairment of that capital, and, if there be an impairment, then the full amount of capital paid in cannot be returned. That being true, every principle of their organization requires that every dollar of capital that has been paid in upon stock subscriptions should bear its proportionate share of the loss. In *Endlich, Bldg. Assn.* § 514, it is said: "The truth is that there is implied, in the very essence of the building association scheme, an agreement between the members of every association, in the light of which all other agreements, and all rules and by-laws, must be read, and to which they must be conformed; and that is the agreement that all burdens shall be equally borne, as well as all profits equally shared,—that the whole enterprise shall be conducted and the rights and obligations of the participants in it shall be adjusted upon a basis of strict mutuality, equality, and fairness." It is evident that if, in cases of the insolvency of the association, all the borrowing stockholders are to be credited on their indebtedness with all the capital they have paid in, they suffer none of the impairment, and ultimately the entire loss must be borne by the nonborrowing members, and thus the basis of strict mutuality of burdens is entirely disregarded. Equity cannot, therefore, under such circumstances extend to the debtor credit for all he has paid upon his stock. This we think is the rule of the authorities, as well as of reason. *Eversmann v. Schmitt*, 53 Ohio St. 174, 29 L. R. A. 184; *Wohlford v. Citizens' Bldg. L. & Sav. Assn.* 140 Ind. 662, 29 L. R. A. 177; *Weir v. Granite State Provident Assn.* 56 N. J. Eq. 234; *Moran v. Gray*, (N. J. Eq.) 38 Atl. 668; *Curtis v. Granite State Provident Assn.* 69 Conn. 6; *Strohen v. Franklin Sav. Fund & L. Assn.* 115 Pa. 273; *Post v. Mechanics' Bldg. & L. Assn.* 97 Tenn. 408, 34 L. R. A. 201.

But, viewing respondents in the light of borrowers only, and turning to the contract, we learn that, for the privilege of receiving the loan, respondents agreed to pay a premium of an amount equal to the cash received. That agreement was made by reason of the inducements held out by appellant, to the effect that both loan and premium could ultimately be paid by a surrender and cancellation of the stock when it reached par, and that the stock could be brought to that condition by small payments thereon at stated intervals, together with the profits that would accrue to such stock through the operations of the association. But the association, by reason of its insolvency, is unable to carry out its contract. It cannot mature the stock. The induce-

ment which caused the respondent to offer the large premium has failed. Hence, whatever has been paid upon such premium, if anything, should be credited to respondents. This we think is the better rule, and it is amply sustained by the authorities last cited, although some courts have undertaken to apportion the premium, and treat a portion of it as earned. See *Towle v. American Bldg. Loan & Invest. Soc.* 61 Fed. Rep. 446; *Sullivan v. Stucky*, 86 Fed. Rep. 491. But, under what we regard as the better rule, respondents claim that they should be credited with the dues paid upon the shares of stock that were assigned as collateral to the payment of the premium. (It will be remembered that the premium was included in the bond, but drew no interest.) We held in the *Shain Case*—and the authorities fully sustain the proposition—that payments made upon stock that was pledged as collateral security for the payment of the loan did not constitute payments upon the loan. This was held upon the theory that the purchase of the stock and the borrowing of the money were distinct and separate transactions. The stock was purchased as an investment, and for the profits which it promised, and these profits inure to the benefit of the purchaser alike whether the stock be pledged or unpledged. *Goodrich v. City Loan & Bldg. Assn.* 54 Ga. 98. True, in the ultimate adjustment it was the intention to exchange the stock for the bond. But, in the language of the New Jersey court of errors and appeals in *State, Washington Bldg. & L. Assn., v. Hornbacker*, 42 N. J. L. 635, "until so exchanged, they are distinct in legal contemplation as well as in form. The stock is a collateral security for, and not a credit on, the bond." No reason, in law or logic, presents itself to us, why the same rule must not apply to payments made upon stock that is pledged to secure the payment of the premium. Such payments on stock are not payments upon the premium. Hence in this case nothing has been paid upon the premium bid, and there is therefore nothing in that behalf with which to credit respondents. It will be noticed that in this case appellant is not seeking to recover any of the premium. He asks only the payment of the cash advanced, with certain interest thereon, and taxes paid. The association having become insolvent and having been in the hands of a receiver, it becomes the duty of that officer to proceed to collect the assets of the association. It is his duty to close the business out. The expectations of both parties have been disappointed. The contract is at an end. The interest upon this loan was paid, under the terms of the contract, to November 8, 1895. The appellant is entitled to recover the original loan, with the legal rate of interest in Minnesota, which is 7 per cent, from said November 8, 1895. Should respondents pay this amount, or should it be realized upon a sale of the mortgaged property, respondents will, of course, become the absolute owners of the shares of stock which were assigned as collateral security, and will be entitled to a re-assignment thereof. There is a claim made

for taxes for the sum of \$18.80, which the court found were paid by plaintiff, and which should also be included in the judgment.

The trial court will set aside its judgment heretofore entered in this case, and enter judgment against the respondent Ella Cairns for the amount heretofore indicated, with

the usual decree of foreclosure as to all the respondents. It is so ordered.

Reversed.

All concur.

Rehearing denied January 12, 1899.

OHIO SUPREME COURT.

Harry SILBERMAN *et al.*, *Pliffs. in Err.*,
v.

Levi HEY.

(.....Ohio.....)

- *1. The right of trial by jury is a subject-matter of general legislation, and laws affecting it must be uniform in operation throughout the state. Const. art. 2, § 26.
2. A statute by the provisions of which the parties to a suit in which the issues are of right triable by jury are deemed to have waived the right, unless a certain time before the term at which the issues are, by the laws of the state, required to be made up, a demand is made for a jury, attended with a deposit of a certain sum of money for the benefit of the jury fund, affects the right of trial by jury, and must be uniform in its operation. The Cuyahoga county jury law, adopted May 19, 1894 (91 Laws, p. 793), is, in substance, such a law, and, being limited in its operation to Cuyahoga county, is invalid.

(January 31, 1899.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover the contract price of certain iron sold and delivered. *Reversed.*

The facts are stated in the opinion.

Mr. W. C. Rogers, for plaintiffs in error:

The so-called Cuyahoga county jury law is unconstitutional. It applies only to a certain limited class, in only one county of the state, and is on a general subject.

Lehman v. McBride, 15 Ohio St. 573; *Allyer v. State*, 10 Ohio St. 588; *Ex parte Falk*, 42 Ohio St. 638; *Kelley v. State*, 6 Ohio St. 269; *State v. Winch*, 45 Ohio St. 603; *Nye v. State*, 1 Ohio C. C. 355; *Cass v. Dillon*, 2 Ohio St. 617; *State v. Ellet*, 47 Ohio St. 90; *Costello v. Wyoming*, 49 Ohio St. 202; *Hamilton County Comrs. v. Rosche Bros.*, 50 Ohio St. 103, 19 L. R. A. 584.

Any law establishing the jurisdiction of any of the courts of common pleas must be a general law, whether it is as to a class of its business or a class of its litigants.

Cincinnati v. Steinkamp, 54 Ohio St. 284;

*Headnotes by the Court.

NOTE.—For the question of class legislation in respect to struck juries, see *Lommen v. Minneapolis Gaslight Co.* (Minn.) 33 L. R. A. 437. See also *People v. Dunn* (N. Y.) 43 L. R. A. 247.
44 L. R. A.

State, Broerman, v. Hamilton County Comrs., 51 Ohio St. 333; *State, Atty. Gen., v. Davis*, 55 Ohio St. 15; *Gaylord v. Hubbard*, 56 Ohio St. 25; *Hixson v. Burson*, 54 Ohio St. 470; *Pitkin County Comrs. v. First Nat. Bank*, 6 Colo. App. 423; *State v. Hipp*, 38 Ohio St. 226.

By the provisions of this act, § 2, the sum of \$5 deposited with the clerk of the court shall be appropriated towards the payment of jury fees generally, and to the extent that that goes into the county treasury that litigant especially contributes towards the tax in that behalf.

Pittsburgh, C. & St. L. R. Co. v. State, 49 Ohio St. 189, 16 L. R. A. 380; *Wasson v. Wayne County Comrs.*, 49 Ohio St. 622, 17 L. R. A. 795.

Mr. Emil Joseph, for defendant in error:

The act of 91 Ohio Laws, 793, is not a law of a general nature within the meaning of the Constitution.

McGill v. State, 34 Ohio St. 228; *State, Hibbs, v. Franklin County Comrs.*, 35 Ohio St. 458; *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90; *State, Atty. Gen., v. Shearer*, 46 Ohio St. 275.

The act complained of does not deprive litigants of the right to trial by jury, but prescribes the circumstances under which a jury shall be deemed waived in all cases appealed, etc.

Bonewitz v. Bonewitz, 50 Ohio St. 373.

Similar laws of other states governing the selection of jurors have been held constitutional.

Randall v. Kehler, 60 Me. 37, 11 Am. Rep. 169; *Adams v. Corriston*, 7 Minn. 456; *Cushman v. Flanagan*, 50 Tex. 389; *Bailey v. Joy*, 132 Mass. 356; *Vitrified Wheel & Emery Co. v. Edwards*, 135 Mass. 591; *Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125; *Foster v. Morse*, 132 Mass. 354, 42 Am. Rep. 438.

Minshall, J., delivered the opinion of the court:

The suit below was brought in the common pleas court of Cuyahoga county by Levi Hey against the defendants, Silberman & Co., to recover a balance due on an account for certain iron sold and delivered. The latter claimed that the iron was not of the quality ordered, and also claimed damages in the sum of \$100. The amount claimed by the plaintiff was \$181.95. The issues having been made up, when the case came on for trial the defendants demanded a jury, which was denied them, under the provisions of what is termed the "Cuyahoga County Jury

Law," which was passed and took effect May 19, 1894 (91 Laws, p. 793). In this case, according to this law, the defendants, to be entitled to a jury, should have demanded a jury, in writing, at least five days before the commencement of the term after the issues should have been made up according to the statutes of the state, and have deposited with the clerk \$5, to be appropriated to the payment of jury fees. This was not done, but under the general law of the state the defendants were entitled to a jury without having filed such written demand, or making the deposit of any sum whatever.

The plaintiffs in error claim that the statute under which they were denied a jury trial is unconstitutional, and that the judgment should be reversed for this, among other reasons. We entertain no doubt of the invalidity of this law. It is true that there is an attempt to give it the character of a general one, by making it applicable to "all counties which now contain, or which may contain a city of the second grade of the first class." But, if its subject-matter is not a proper subject of local legislation, this attempt to give it the form of a general law can be of no avail, as has been frequently decided by this court. It is manifestly a local law, intended to apply to Cuyahoga county, and can apply to no other. The Constitution (art. 2, § 26) requires that all laws of a general nature shall be uniform in their operation throughout the state, and it is well settled that the "general nature" of a law must be determined by its subject-matter. If this be general, the law must be general, but, if the subject-matter be of a local nature, a local law applicable to the subject-matter may be enacted. But as to the nature of the subject-matter the legislature is not the exclusive judge. If it were otherwise, then this important provision of the Constitution would be little more than directory, instead of mandatory, as it undoubtedly is. The greatest respect will always be given the determination of the legislature in enacting the law, but, where its validity is properly challenged on this ground, it is the duty of the court to pass on it; and if clearly satisfied that the provision has been violated, in making that a local, which should have been, if enacted at all, a general, law, it is within the power of the court, and its duty, to declare it invalid. It is sometimes a question of some nicety to distinguish between that which is local and that which is general, as regards the subject-matter of a law; and, where there is room for a fair difference of opinion in regard to it, the doubt arising from such difference should be resolved in favor of the law. In this case we are unable to perceive any ground for such a difference. There is probably in the entire field of legislation no subject of a more general nature, undoubtedly none of more general interest, than the right of trial by jury. It is regarded as a birthright of Englishmen, and among American citizens as one of their constitutional guaranties. It is guaranteed to all the citizens of this state by the provision of its Constitution, that the

right shall be "inviolable." At the adoption of the Constitution of Ohio, every litigant in a suit such as that between the parties below had a right to demand a jury trial without depositing any sum of money or making the demand at any particular period before the case was called for trial; and this remains so in every county in the state, except that of Cuyahoga, if the act above referred to is a valid law. No local circumstances are suggested for this difference, and we are unable to conceive of any. If, in suits where less than \$300 are demanded, or on appeal from the probate court, or from the docket of a justice of the peace, public policy requires that the right to a jury should be made to depend upon a demand therefor made a certain time before the issues should have been made up, and the deposit of a certain sum of money with the clerk of the court, what reason of a local nature exists, why this should be so in Cuyahoga county, that does not exist in any or all the counties of the state? No answer suggests itself to this question that would not also permit of a difference in the law of procedure, or of a variety on many other subjects of legislation that have heretofore been universally regarded as of a general nature. Undoubtedly there is more litigation in a large county like Cuyahoga than in some others. But this difference can be, and has been, provided for by increasing the judicial force of the subdivision in which the county is situated.

It is claimed that this law should be sustained on the authority of *McGill v. State*, 34 Ohio St. 228. That case, when examined, will be found to relate to an enactment quite different from the one before us in this case. It does not in any way affect the right of trial by jury. It simply provides a mode for the return of the names of electors for jury service in Cuyahoga county, different from the general law. The mode of selecting electors for jury service has never been regarded as an essential element in the right of trial by jury. Different modes have been adopted and prevailed at different times. In fact, as pointed out by the learned judge delivering the opinion in the case, the general law at that time was not uniform in its provisions on the subject; the selection being, in general, made by the trustees of the townships, acting as judges of election, and in other cases by town council, thus adapting its provisions to local requirements. Local circumstances, such as the situation of large cities, with their corrupting influences, in certain counties, may, in the interest of a fair and impartial jury trial, make the selection of electors for jury service a matter of local concern, and require legislation not required in, and inapplicable to, the other counties of the state. This was the view taken by the court in deciding the case. It adjudged that a special law, under such circumstances, was proper, and sustained the act in question. Our Constitution does not require all laws to be uniform in their operation throughout the state. The requirement simply embraces all laws of a gen-

eral nature clearly implying that those not of a general nature need not operate uniformly throughout the state. Conceding the case of *McGill v. State* to have been rightly decided,—and there is no purpose here to question it,—still it must, as we think, readily appear from what has been said that it does not control this case. The law here in question af-

fects the right of trial by jury,—a subject of general interest throughout the state. The law considered in the *McGill Case* simply affects the mode of selecting electors for jury service; and in this regard local circumstances may, in the interests of the integrity of the system, require special legislation. *Judgment reversed, and new trial granted.*

OREGON SUPREME COURT.

STATE of Oregon, *Appt.*,
v.

George RENICK, *Respnt.*

(.....Or.....)

A person cannot be himself a false token so as to be indictable for obtaining money by means of a false token and false pretenses, when he procures money from a woman by a promise of marriage and by offering himself to her under a fictitious name, and by falsely stating that he is unmarried.

(February 28, 1899.)

A PPEAL by the state from a judgment of the Circuit Court for Multnomah County sustaining a demurrer to an indictment charging defendant with having obtained money from another by means of a false token. *Affirmed.*

The facts are stated in the opinion.

Messrs. O. M. Idleman, Attorney General, and *Charles F. Lord*, for appellant:

George Renick, the defendant, by appearing and representing himself to be Charles Smith, and a single man, and of marriageable age, is a false token within § 1372 of our Code.

Bouvier defines a token "as a document or sign of the existence of a fact."

Section 1372 of Hill's Annotated Code provides that, "upon a trial for having, by any false pretense, obtained the signature of any person to any written instrument, or obtained from any person any valuable thing, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing."

Bishop, *Crim. Law*, 8th ed. § 151; *King v. Jones*, 1 Leach, C. L. 174, 2 East, P. C. 822; *Rex v. Govers*, Sayer, 206; *Com. v. Drew*, 19 Pick. 170.

The man represented himself to be that which he was not, and presenting himself in the assumed character and under false colors, forestalled inquiry; his presence in the assumed character was the very pretense or token which caused the complainant in this case to part with her money.

7 Am. & Eng. Enc. Law, p. 748, § 4; *Reg. v. Jennison*, 9 Cox, C. C. 158, Leigh & C. C. C. 157, 31 L. J. M. C. N. S. 146, 8 Jur. N. S. 442, 6 L. T. N. S. 256, 10 Week. Rep. 488.

NOTE.—On the general subject of false pretenses, see note to *Barton v. People* (Ill.) 10 L. R. A. 302.

44 L. R. A.

Messrs. Stott, Boise, & Stout, for respondent:

Mere words are neither symbols nor tokens, and what a man says about himself does not make him a false token, or a token of any kind.

2 Bishop, *Crim. L.* 5th ed. §§ 145, 155; *Com. v. Warren*, 6 Mass. 72; *People v. Gates*, 13 Wend. 311.

Wolverton, Ch. J., delivered the opinion of the court:

The indictment in this case charges, in substance, that the defendant, George Renick, did on the 10th day of November, 1896, in Multnomah county, Oregon, wilfully and feloniously, with intent to defraud, by means of a certain false token, to wit, himself, the said George Renick, falsely and fraudulently present himself, the said George Renick, and represent and pretend to one Carrie Meyer, an unmarried woman, that he, the said George Renick, was one Charles Smith, that he was unmarried, and competent and in a position to lawfully contract marriage with her, whereas, in truth and in fact, the said George Renick was not Charles Smith, and was not then unmarried, but had a lawful wife then living, by means of which false token, fraudulent pretense, and false representations, coupled with a promise to marry her, the said Carrie Meyer, he, the said George Renick, did then and there obtain of Carrie Meyer divers gold coins, of the value of \$190. A demurrer to this indictment was sustained, and the state appeals. It is claimed that the money was obtained by false pretenses, through and by the use of a false token, and that the use by defendant of himself as such false token was sufficient in law to constitute the offense. This presents the only question to be determined.

There was a species of cheat or fraud at common law which was effectual through the use of deceitful or illegal symbols or tokens, such as were calculated to affect the public at large, and against which common prudence could not have guarded. It was not sufficient upon which to found the offense if a mere privy token was employed,—a counterfeit letter in another person's name, or a private check upon a bank in which the drawer had no funds (*Lara's Case*, 2 Leach, C. L. 647, 652), and the like,—not having the semblance of public authenticity or purporting to be of public consequence, such as spurious money of the realm or bank notes circulating throughout the community as a

medium of exchange. But by Stat. 33 Hen. VIII. chap. 1, the obtaining goods by means of false privy tokens, counterfeit letters, etc., is expressly made an indictable offense, and this, Mr. Bishop says, has now become common law with us. 1 Bishop, Crim. Law, § 571. But as it regards privy tokens, at least, this statute has always been considered as creating a new offense. *People v. Stone*, 9 Wend. 182. Another species of cheat or fraud at common law was accomplished through the false personation of another. 2 Russell, Crimes, pp. 10, 11. Perhaps the commonly accepted definition of a "common-law cheat is that it is a fraud . . . [wrought by] some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in some pecuniary interest." 1 Bishop, Crim. Law, § 571; 2 Wharton, Crim. Law, § 1116; 5 Am. & Eng. Enc. Law, 2d ed. p. 1025. But Russell, in his work on Crimes, gives it a wider signification, and defines it as "the fraudulent obtaining the property of another, by any deceitful and illegal practice or token (short of felony) which affects or may affect the public." 2 Russell, Crimes, p. 613. See also 1 Bouvier, Law Dict. p. 317. Under this definition, the cheat need not necessarily be accomplished through the use of a symbol or token, and cases are cited by the learned author, in connection with the definition, which would seem to support his enlarged conception of it. Some cases are cited by Bishop, as *King v. Jones*, 1 Leach, C. L. 174, wherein an apprentice got himself enlisted as a soldier, and thus obtained a bounty, by professing that there was no impediment; and *Rea v. Hanson*, Sayer, 229, wherein a woman was indicted for getting board and lodging by falsely affirming herself to be single and of the name of Fuller, when she was married and of the name of Hanson. And it is supposed by the author that the boy in the one case and the woman in the other were tokens, and therefore that those cases were disposed of upon that ground only. But, when they are looked into, it does not appear that the decisions were based upon that theory. Indeed, they are so meagerly reported that it is difficult to determine what was the specific ground of their disposal. The broader definition of Russell and Bouvier of a "cheat" at common law would undoubtedly include the offense, as it was in either instance a deceitful practice. In the case of the boy, it was a wilful misrepresentation touching his age and apprenticeship; and of the woman, a wrongful personation of another. There is an old case of *Queen v. Macarty*, 6 Mod. 301, wherein it was charged that Macarty, one of the defendants, falsely represented himself to be a broker, and Fordenborough, the other of such defendants, falsely pretended to be a merchant of London, and as such traded in Portugal wines, and that, through such pretensions and representations, they induced one Chown to barter a quantity of hats for a quantity of a spurious and unwholesome wine represented to be good and wholesome Portuguese wine. In deciding the case upon exceptions to the indictment, Holt, Ch. J., says: "The crime is not the selling one thing for

another, but here is a false token, the one pretending to be a broker and the other a merchant, and a combination to cheat." *Rea v. Govers*, Sayer, 206, is another old case wherein the defendant was indicted for falsely assuming to be a merchant, and producing divers counterfeit commissions purporting to be from Spain, and thereby induced another person to extend him credit. Upon a rule to show cause why judgment should not be arrested, Ryder, Ch. J., said: "The present case is much stronger than that of *Queen v. Macarty*, inasmuch as the defendant, besides pretending to be a merchant, did produce several paper writings, which he affirmed to be letters containing commissions to him as a merchant." Mr. Russell pertinently remarks, of the first of these cases, that the true ground of the judgment was that it was a case of conspiracy, and this was another species of cheat at common law; and of the second, that the cheat was effected by means of a forgery, which was in itself a substantive offense, indictable at common law. The forgery, if successful, was indictable as a common-law cheat. The broader definition alluded to would include these offenses also, without going to the extent of holding that the defendants themselves were tokens. But, whatever may be the rule and definition touching the common-law cheat, the statutes of England early began to distinguish between the different species of cheat, and to carve out a distinct offense for obtaining money or property by falsely personating another. Such an offense has been widely adopted in the American states, and our own statute has made the act punishable. Hill's (Or.) Anno. Laws, § 1776. The statute has also made it an offense for any person to obtain, or attempt to obtain, with intent to defraud, any money or property whatever, by any false pretense, or by any privy or false token. Id. § 1777. The evidentiary matter necessary to support a charge under the latter section must consist of a false token or writing accompanying the pretense. Id. § 1372. Construing the two sections together, the crime known to our statute is much the same as that constituted by 33 Hen. VIII., which extended the common-law cheat so as to include one accomplished through the use of a false privy token or counterfeit letter. The two offenses are defined, however, and made separate and distinct, by statute, so that there need be no longer a question, as under the common law, as to whether, in the false personation of another, the person engaging in the deceit is himself a false token. It is made a crime to so act, and a case coming fairly within the statute, it is thought, could not be prosecuted under the section for obtaining money under false pretenses. The case at bar, however, is probably not a false personation, by reason of the fact that the defendant did not assume to represent a real personage, but only made use of a fictitious name, having no application to anyone.

But it is contended that he is guilty of a false pretense by the use of himself as a token. If that were so, he must be regarded as a privy token, as his personation was not calculated, nor was it his purpose, to de-

ceive or impose upon the public in general; the fraud being an imposition upon an individual only, and not extending to the injury of the public, in the sense of a public cheat. In the *Jones Case*, 1 Leach, C. L. 174, the personation was of a class capable of enlistment in the public service, and the act operated as a fraud in the procurement of public moneys. So, in *Rea v. Hanson*, Sayer, 229, the woman obtained general credit by pretending to be unmarried, thus affecting the public. Mr. Wharton puts a case: "If a pretender (e. g. Perkin Warbeck, or the Tichbourne claimant) palm himself off on a community as another person, and, under the guise of his assumed character, obtain credit from the public at large, he is indictable as a cheat, assuming that he imposes upon persons who have no notice that his claims are disputed, and also addresses his imposture to the public at large. The offense is then one aimed at the public generally, and is, supposing there is no notice to put others on their guard, aimed as much at the careful as the careless. Hence it is a cheat at common law." "But suppose," says the learned author, a little further on, "the pretender goes simply to an individual, and with that individual uses his pretended character as a basis for getting money, while there is nothing about the pretender's appearance or general reputation to sustain such character. In such case, there being no latency, since there is a direct subject tendered to the prosecutor on which to make inquiry, and the fraud being pointed at a single individual, it is not a cheat at common law." 2 Wharton, Crim. Law, § 1124. Thus is characterized the distinguishing feature between a token of public import and a privy token or symbol, and the effect of their use in the consummation of the common-law cheat, and it serves as an admirable aid in determining the nature of the supposed token used in the consummation of the offense charged. If, therefore, in the case at bar, the supposed token is a token at all, it should be termed a privy token. But is the defendant himself even so much a privy token? Within Stat. 33 Hen. VIII., such a token was taken to denote "a false mark or sign, forged object, counterfeit letter, Key ring, etc., used to deceive persons, and thereby fraudulently get possession of property." Black, Law Dict. See also note to *Com. v. Speer*, 2 Va. Cas. 67. Mere words are neither symbols nor tokens. Hence it has been held that one who obtains a credit by falsely representing himself to be in trade, and keeping a grocery, utters a mere falsehood. *Com. v. Warren*, 6 Mass. 72. So, if one falsely pretends to another that he has been sent by a third person for money, and obtains it (*Queen v. Grantham*, 11 Mod. 222); or, in selling a horse he knows to be blind, wilfully represents him to be sound (*State v. Delyon*, 1 Day. 353); or if he knowingly disposes of wrought gold under the sterling alloy for gold of standard weight (*Rea v. Boucer*, 1 Cowp. 323). In these and like cases the defendant but utters a naked falsehood, unconfirmed by symbol or token, and was not within Stat. 33 Hen. VIII. In the case of *Com. v. Warren*, 6 Mass. 72, the defendant represented

his name to be William Waterman, and that he lived in Salem; and the court said respecting it that, "if a man will give credit to the false affirmation of another, and thereby suffer himself to be cheated, he may pursue a civil remedy for the injury, but he cannot prosecute by indictment."

Now, were there representations which the defendant made to the prosecutrix more than wicked falsehoods, under our statute? or may it be affirmed that his presence when uttering the falsehoods was the exhibition of a false privy token, which induced her to part with her money and assisted him in consummating the fraud? It was a matter susceptible of proof and demonstration, upon inquiry, for she was not bound to take his word touching his assertions that he was an unmarried man or that his name was Smith. His physical presence had no tendency to establish the one fact or the other, and was therefore not an agent, in the sense of a token or symbol, in consummating the deception and accomplishing the fraud. He may have been both a liar, and the symbol of a liar, but he himself, considered as a token, did not contribute, by reason of his personal appearance, to the deception. By the statutes of England and many states of the Union, the element of a false token or symbol is eliminated, and the law is broadly cast that whoever, by any false pretense, obtains money, etc., with intent to defraud, shall be guilty of the offense. The case of *Reg. v. Jennison*, 9 Cox, C. C. 158, is cited, wherein it appears that the defendant was indicted for having obtained money from an unmarried woman on the false representation that he was a single man, that he would furnish a house with the money, and would then marry her, and it was held that the false representation that he was not a married man was sufficient to support a conviction for false pretenses. But the authority is not in point, as the decision was made under the enlarged English statutes, and the question of a token did not enter into the controversy. Under our statute, the pretense must be accompanied with a false token, and the question presented here is whether defendant was himself a false privy token. We think he was not. He did not attempt to assimilate anything in existence. There are no personal or physical characteristics known to social science whereby an unmarried man may be distinguished from one that is married. So that if a man presents his physical self to another person, and says nothing of his marital state, no one can say whether he at that instant is married or single, from the inspection alone. Testimony must be produced *dehors* the person from which to determine the fact. If he says that his name is Charles Smith, a fictitious character, and that he was unmarried, when he had a wife living, this is a mere *descriptio personæ*, and an inspection of the person will neither corroborate nor detract from the statement. If he be denominated a "token," and that token is false, it is only made so by the lie he has uttered; his physical existence does not help to establish it. In other words, he has not assimilated anything

of real existence whereby the unwary have been deceived. He did utter a wicked falsehood, and this is a false pretense, but the false token is wanting, and therefore the indictment does not charge a crime. It is nec-

essary to specify the false token in the indictment (2 Wharton, Crim. Law, § 1129), and this the state has not done.

The judgment of the court below will therefore be affirmed.

PENNSYLVANIA SUPREME COURT.

CHESTER TRACTION COMPANY *et al.*
v.
PHILADELPHIA, WILMINGTON, & BALTIMORE RAILROAD COMPANY, *Appt.*

(188 Pa. 105.)

1. A crossing by a street railway of the tracks of a steam railroad at grade should not be permitted under a statute forbidding it when it is reasonably practicable to avoid it where an overhead crossing would cost only \$150,000 to \$200,000, although the capital of the street railway is only \$500,000, if it expects to carry 3,000,000 passengers annually and passenger trains on the railroad average one in fourteen minutes.
2. An imperious necessity for an additional crossing by a street railway of the tracks of a steam railroad at grade is not shown by the fact that traffic has so increased that its present crossings are not sufficient to enable it to quickly move its cars.

(October 17, 1898.)

A PPEAL by defendant from a decree of the Court of Common Pleas for Delaware County in favor of plaintiffs in a suit brought to enjoin defendant from interfering with plaintiffs' attempt to lay street railway tracks across defendant's road at grade. *Reversed.*

The facts are stated in the opinion.

Messrs. John B. Hannum and John G. Johnson for appellant.

Mr. W. B. Broomall, for appellees:

A court of equity will not under the act of June 19, 1871, decree the construction of an overhead crossing where the cost of such crossing would be so great as to prevent the construction of the railroad.

Pennsylvania S. Valley R. Co. v. Philadelphia & R. R. Co. 160 Pa. 277.

The city ratified its consent to the Union Railway Company to maintain its railway not only in the streets contained in the original route, but also those thereafter to be occupied, by the ordinances of September 4, 1890, and October 7, 1890.

A municipality may ratify a previous doubtful consent.

Pennsylvania S. Valley R. Co. v. Philadelphia & R. R. Co. 160 Pa. 277.

NOTE.—For grade crossing by electric railway over steam railroad, see also *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.* (Conn.) 29 L. R. A. 367; *Northern C. R. Co. v. Harrisburg & M. Electric R. Co.* (Pa.) 34 L. R. A. 572.

As to the right to compensation for such a crossing, see *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* (Ill.) 29 L. R. A. 485, and *note*.

44 L. R. A.

Where the charter route of a street railway is assailed as open to objection it does not stand the railway company in hand to make such objection, but the commonwealth alone can be heard to make it in the interest of the general public.

Pennsylvania R. Co. v. Greensburg, J. & P. Street R. Co. 176 Pa. 559, 36 L. R. A. 839.

The ordinance of March 18, 1890, requires the railway to be constructed on Welsh street at grade. It cannot be made at any other place because the charter route does not admit of it. It cannot be made an overhead or subway crossing because the municipal consent does not admit of it.

The court has found in this case that the necessity for the crossing is imperative.

Dean, J., delivered the opinion of the court:

The city of Chester, fronting on the Delaware river, has a population of about 25,000. Beginning at or near the river, about forty-five streets run north, intersecting other streets and avenues running east and west. The Philadelphia, Wilmington, & Baltimore steam railroad crosses the city at grade from east to west, and therefore is crossed by all the north and south streets of the city,—among them, Welsh street. For many years the railroad company maintained two tracks through the city, and at the commencement of these proceedings was constructing and about to lay down the rails on two more. By ordinances duly enacted, the city granted to the Union Railway Company the right to occupy with its railway certain streets, among them Welsh street, from Fourth to Sixth. Afterwards the Chester Traction Company became the lessee of the Union, and claimed all the rights and privileges of the lessor company. It attempted, under the consent of the city, theretofore granted, to lay its tracks on Welsh street, thereby crossing the steam railroad at grade. The latter resisted, and thereupon the plaintiffs filed this bill to enjoin defendant from any interference. The bill averred its charter and lease, the consent of the city, and the necessity of the grade crossing in conducting its business in accordance with the terms of its charter. The defendant denied the legal right of the Chester Traction Company, under its grant, to occupy the street at all; further, denied that it was a necessity to the company to cross at grade at that point. After full hearing, the court below, in opinion filed, ruled in favor of plaintiffs in the issue on both points, and directed an injunction to issue. From that decree we have this appeal by defendant, as-

signing for error the findings of fact and conclusions of law by the court below.

Without at present noticing the assignment averring an absence of corporate right to lay its rails, by reason of the facts on which the charter was founded, not existing at the date of the grant, we take up the one averring there is no necessity for the crossing of Welsh street at grade. The learned judge of the court below says: "We also find, as a fact admitted by the respondents, that there is no other practicable manner by which the railway can cross the railroad at Welsh street, except at grade. We also find that the proposed crossing is imperatively demanded and required by public convenience and is necessary to relieve the congestion of public travel at the railway crossing at Market street, one square of about 395 feet, south of Welsh street." [6 Del. Co. Rep. 484]. So far as we can discover in the record, there is no such admission by defendant. It is possible, counsel for defendant (although the record does not show it) made such admission at the hearing, or in the argument in the court below. If so, he made no such admission before us; on the contrary, based his argument, in large measure, on a denial of these facts. The averments in the answer to the bill are as follows: "... Further, that, admitting that there is no other practicable manner by which the railway of the plaintiff can cross the tracks of the defendant at Welsh street except at grade, yet the defendant avers that there are other practicable methods by which the said railway company can cross the tracks of the said defendant at other points, where the danger of the grade crossing at this particular locality might be avoided. Said defendant, however, denies that there is no other practicable mode by which the railway of the plaintiff can be constructed on Welsh street, and avers that the said railway can be constructed to cross the tracks of the said defendant either above or below grade." This is not, to our minds, an admission of the fact, but an assumption of it for the sake of the argument, and then an attempt to demonstrate that, even if such facts existed, there ought not to be a grade crossing at that point, because such crossing was not necessary to the transaction of the company's business. Let us examine first the facts which should deter these parties from constructing a grade crossing at this point. One hundred scheduled passenger trains pass daily on the steam road. This would be an average of one every fourteen minutes of the twenty-four hours. No witness will undertake to give the number of freight trains, because they run irregularly; but on a main line between two such cities as Philadelphia and Baltimore the number must be very great, and possibly equals that of passenger trains. The use of this particular part of the track is great, because of the location of defendant's freight warehouse near it, thus necessitating the cutting out and shifting of cars from trains. The view of the approaches of Welsh street from the steam railroad is obstructed, because of buildings on the sides of the streets. As to

the extent of the use that would be made of the electric road at the crossings, we adopt the statement of its president, Mr. Lindsey. He says the purpose of the Welsh street crossing is to lessen the heavy traffic on Market street crossing, over which all the cars of all the companies now cross, except one line, which crosses at Morton avenue; that pretty close to 3,000,000 passengers are carried over the Market street crossing yearly. But one conclusion can reasonably be formed from these undisputed facts. A grade crossing is highly dangerous to the traveling public on both roads. All precautions taken to avoid danger serve only to lessen it. The millions of passengers on the two roads are at the risk of the few railroad servants who have charge of them. Recklessness, negligence, indifference, or dullness on part of the servant will still endanger life and limb of the passenger. While we are writing this opinion: we have the news of the Cohoes accident, where the steam road was crossed at grade by the electric. Every passenger in the electric car goes into one or the other of the two classes, of sixteen killed and seventeen injured. The servants of each system attribute the accident to the negligence of those of the other. Increasing the number of crossings only increases the danger, by increasing the chances for collision. That this crossing is especially perilous follows, because of the infrequent use of that particular spot of ground by both roads.

This brings before us the 2d section of the act of June 19, 1871: "If in the judgment of such court it is reasonably practicable to avoid a grade crossing, they shall by their process prevent a crossing at grade." The meaning of this, as we decided in *Perry County R. Extension Co. v. Newport & S. Valley R. Co.* 150 Pa. 193, is that the day of grade crossings is past, and they ought not to be permitted, except in case of imperious necessity. It is said by Paxson, Ch. J., in that case, that in the earlier period of railroad construction the desire of the people for railroads tended to close their eyes to the danger. The traffic was light, and trains ran at long intervals. But "the rapid development of the country, the enormous growth in wealth, population, and business, has materially changed the relations of railroads to the public and to each other." In every case which has come before this court since (*Pennsylvania R. Co. v. Braddock Electric R. Co.* 152 Pa. 116; *Altoona & P. Connecting R. Co. v. Tyrone & C. R. Co.* 160 Pa. 623; *Scranton & P. Traction Co. v. Delaware & H. Canal Co.* 180 Pa. 636, and others), we have strictly adhered to this construction of the act. And we have further held that what was reasonably practicable was not to be determined by the financial ability of the road seeking to cross, but by the physical practicability of avoiding the grade crossing. The plaintiff was shown by competent witnesses that the expense, approximately, of avoiding this grade crossing by one overhead, would be from \$150,000 to \$200,000, while the entire capital stock of the corporation is but \$500,000. But the financial inability of the company is not a

test to determine whether an improvement to carry safely 3,000,000 passengers is reasonably practicable; otherwise, the poorer the company, the more unlimited its right to interfere with the exercise by the older company of its franchise, and the more freely can it disregard the safety of the traveling public. A corporation which undertakes to carry safely 3,000,000 passengers should provide a capital sufficient to build a superstructure which will not subject this multitude to avoidable risk at a crossing. The city of Philadelphia is built on low, flat ground, probably not essentially different from that on which Chester city is located. The same Delaware river washes its eastern boundary. Yet it avoids grade crossings—not one or two, but dozens of them—by over or under structures. True, the expense is very great, and very much greater than if the grade crossings had never been permitted; but the fact that two steam roads reach the very center of the city, and that every street on their route will soon cross under or over them, demonstrates that it is reasonably practicable to avoid them under the most unfavorable circumstances. We think, on the undisputed facts, proved by the plaintiffs themselves, an overhead crossing was reasonably practicable, and the court below should have so found.

But the plaintiff already has two grade crossings—one at Market and one at Potter street. By the increase of the city's population and business there has been a great increase of travel. As a consequence, the two grade crossings are not of sufficient capacity to enable the electric railway to quickly move its cars. But that does not constitute "imperious necessity." Grade crossings are not to be established to promote the mere convenience of the railroad seeking to cross. The older company still has some rights under its charter, and the presumption always is that, as between senior and junior grants, the legislature did not intend that the later should interfere with the older. The legislature, by giving the right to cross at grade, could not have intended to seriously disturb or destroy the older franchise. Yet the able counsel for appellees does not shrink from the inevitable conclusion which follows his premise, for we quote the exact language of his argument: "As the population of Chester increases, and the travel upon these street railways increase, it is necessary to have additional facilities in crossing appellant's railroad. This railroad runs through the middle of Chester. The lines which have been built, extending to the upper part of the city, and extending also to the boroughs of Upland, Media, and Darby, require additional means of crossing this railroad. It is to provide for this increased traffic that the crossing at this point [Edgmont Avenue], and the crossing at Welsh street, a square eastwardly from this point, has been proposed." That is, as travel increases on the electric railways, the number of grade crossings will be limited only by the action of city councils. Eventually there might be forty-five,—one for every north and south

street. But, stimulated by like causes, travel and traffic on the steam road would also increase, and we would have the result of two railways wanting to occupy the same narrow strip across the city at the same time almost every minute of the day. Nor does the fact that heavy damages may be exacted by the passenger as a penalty for neglect to carry safely have much weight in the determination of the question. Admit that a collision would cost one or the other company, or both, a heavy sum. That would mean a loss of dividends to the company, and a loss of life or limbs to the traveling public. The risks are not equal, and humanity shrinks from offsetting the one against the other. Besides, by unnecessarily crossing at grade, the older corporation has imposed upon it a heavier burden than that which, in strictness, was incident to its grant. In addition to its obligation to carry safely on its own contract, it must be watchful that it does not injure those of the public carried by another corporation across its roadbed. It cannot be maintained that such results as we have mentioned would not seriously impair the value of the older franchise. We appreciate fully the difficulties of the situation. The electric railway, for the successful prosecution of its growing business, demands increased facilities for conducting it. If these facilities are to be obtained by additional inexpensive grade crossings, it not only largely increases the peril of the public, but seriously obstructs the older company in the exercise of its franchise rights. Proper overhead crossings involve an increase of capital stock, on which, probably, there could be no returns without increased fares to the public, or a construction out of gross receipts, which means indefinite postponement of dividends to the present shareholders. But the difficulty is not the creation of either corporation. The demands of the public have simply outgrown anything that could have been foreseen when the charters were granted, and when the exercise of their franchises were regulated by law. While everyone admits that existing grade crossings ought to be abolished and no further ones, except in the rarest cases, permitted, the existing legislation does not provide means equitably adequate to the end. More than once this court has called attention to the necessity of such legislation; but nothing has ever been added to the provisions of the act of 1871, which, as a solution of the difficulty, is, in effect, a mandate to the courts to prohibit grade crossings, unless over or under ones are physically impracticable, and unless crossings be an imperious necessity. The courts have no power to determine exactly how they shall be avoided, or to equitably apportion the expense among those interested, as under the New York statute lately adopted. So we must administer law as we find it, and not as we think it ought to be. We are of opinion the decree, on both grounds, should be reversed. First, an overhead crossing is reasonably practical; second, no imperious necessity demanding additional crossings is shown.

As to the question raised from the fact that the Chester Street-Railway Company, under a prior grant, had already laid a track upon Second street, when the Union Railway obtained its charter for a route on the same street, in violation of the law of its creation, we do not pass upon it here. The case is ruled on the other questions. And while we do not doubt our authority, in a collateral proceeding, to pass upon the question as to whether the charter of the Union is wholly nugatory, we see no reason why we should unnecessarily exercise that authority in this case.

The decree of the court below is reversed, and injunction dissolved, at costs of appellees.

POST PRINTING & PUBLISHING COMPANY

v.

INSURANCE COMPANY OF NORTH AMERICA, App't.

(189 Pa. 300.)

The cost to the purchaser in possession, and not to the seller who attempted to retain a secret lien for the purchase money, is the value of property which must be paid by an insurer under a policy stating that the loss is payable to vendor and vendee as their interests may appear. It being understood that the title is in the vendor, where the property had been turned over to the purchaser absolutely for a sum evidenced by cash and notes, which has mostly been paid so that the seller asserts no claim under its lien.

(January 2, 1899.)

APPPEAL by defendant from a judgment of the Court of Common Pleas for Allegheny County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. S. Ferguson, E. G. Ferguson, D. T. Watson, and Johns McCleave for appellant.

Mr. Willis F. McCook for appellee.

Dean, J., delivered the opinion of the court:

The defendant company, with some thirty other fire insurance companies, after March 12, 1894, and before February, 1897, insured the plaintiff against damage by fire, on a quantity of publishers' machinery and material, in the aggregate sum of \$53,700. The amount of defendant's policy was \$2,000. Part of the property insured consisted of ten Mergenthaler linotype machines. There was a stipulation in each policy as follows: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurred, and the loss or damage shall be ascertained or estimated ac-

cording to such actual cash value, and with proper deduction for depreciation, however caused; and shall in no event exceed what it would then cost the insured to repair or replace the same with materials of like kind or quality." On February 14, 1897, a fire destroyed a large part of all the property covered by the policies, and, if it did not completely destroy, it very seriously damaged, the ten typesetting machines. In adjusting the loss between insurers and insured there was no dispute except as to the extent of the insurer's liability on these ten machines. There had been two contracts by the publishing company with the Mergenthaler Company with reference to them, each of which fixed the price at \$3,000 per machine; nor could the publishing company or any other purchaser replace them at a less price, for both by the protection afforded by the patent covering the different parts of the machine, and because the Mergenthaler Company alone was prepared to manufacture them, that company had a monopoly of their sale. At the trial in the court below there was some conflict in the evidence as to whether they had been so damaged as to be incapable of repair, and also some evidence tending to show they could have been repaired for less than \$700 each. The plaintiff alleged, and offered evidence tending to show, they could not have been repaired so as to do the work required of them, and therefore it had replaced them with new ones, at a cost of \$3,000 per machine, or an entire cost of \$30,000. The jury on the conflicting evidence, as between these two parties, found for the plaintiff; that is, that the machines were wholly destroyed, and that the cost of replacing them was \$30,000, or \$3,000 each. But defendant further alleged the real owner of the machines, and the party to their contract of indemnity was the Mergenthaler Company, and to this company, under the stipulations in its policy, it must make good the loss; and further, that this loss to the manufacturer and seller of the machines was less than \$1,000 each, because, although selling them for not less than \$3,000, the net profit was \$2,000, for the cost of manufacture did not exceed \$1,000. Therefore if, under the facts and written instruments, the party insured was the Mergenthaler Company, the insurer was only, under the clause already quoted, bound to pay what would be the "cost to the insured to repair or replace the same with materials of like kind or quality," making the loss to the insurers \$20,000 less than if the party indemnified be the Post Publishing Company.

As the finding of fact by the jury is that the loss as to each machine is total, the only question left for determination is, Who is indemnified by the policy? On March 12, 1894, by written contract, the Mergenthaler Company delivered into the possession of the publishing company the machines. It is not worth while discussing the terms of this lease, because both parties agree that it was a mere bailment, and though the possession was in the publishing company, the title was in the Mergenthaler Company. This contract of bailment continued until May 18,

NOTE.—As to the rights of parties under conditional sales in general, see *Cole v. Hines* (Md.) 32 L. R. A. 455, and note; also *Perkins v. Grobden* (Mich.) 39 L. R. A. 815, 44 L. R. A.

1895, when a new one was entered into. By the use of the machines for months, the plaintiff had become satisfied of their merits, and, as lessee by the first contract, it had the option to buy at the price of \$3,000 for each machine, and have credited on the purchase price the rental theretofore paid. The new contract provided that the publishing company should continue in the use of the machines theretofore delivered to it until May 20, 1897, and for the possession and use thereof should pay to the Mergenthaler Company \$25,000 in cash and notes, the last note falling due May 20, 1897, and interest to be paid on all the notes. Including the rental of \$5,000, already paid, this made the whole sum payable on the last contract \$30,000. The cash and notes were delivered. It was further stipulated that the publishing company would keep the machines insured at a sum of not less than \$1,000 on each machine, pay the premium, and deliver the policies to the Mergenthaler Company; and, further, that the title to and property in the machines should remain in the Mergenthaler Company: provided that they should become the property of the publishing company when all the rent covenanted for and costs and charges were paid. On the face of each policy was this indorsement: "Loss, if any, on typesetting machines, as insured under first item of this policy, payable to the assured and the Mergenthaler Linotype Co. as their respective interests may appear. It is understood that the title to the typesetting machines insured under the first item of this policy is vested in the Mergenthaler Linotype Co. Loss, if any, on same, payable to the assured and the said Mergenthaler Linotype Co. as their respective interests may appear." In whom was the title to this property at the time of the fire? The bailment was ended by the second contract, when the lessee exercised its right to purchase. The amount to be paid was absolutely \$30,000, for that was the sum evidenced by the cash and notes; and the amount to be paid when the lessee exercised the option to purchase. No covenant is exacted for their return from the publishing company; none for further assurance of title by the Mergenthaler Company when the notes are paid. Then the letter of the Mergenthaler Company to the publishing company, inclosing the con-

tract to be signed, dated April 8, 1895, which says: "We hand you herewith two copies of the proposed contract of sale for ten linotype machines, heretofore leased to you, as agreed upon with Mr. Barr some time since," shows at once the intention of the parties to turn the lease into a sale, as provided by the first contract. As to creditors of the vendee, although no actual fraud was contemplated, the law would have held it constructively fraudulent as to them, for the title and possession of the chattel were in the vendee, with a secret lien for the purchase money in the vendor, and the machines would have been subject to seizure and sale at the suit of creditors. The declaration that the title shall remain in the vendor until the notes are paid, with no stipulation for the return of the property, was a mere attempt to maintain a secret lien. *Farquhar v. McAlevy*, 142 Pa. 240; *Stephens v. Gifford*, 137 Pa. 219; *Summerson v. Hicks*, 134 Pa. 567. Whether, as between themselves, equity would have sustained a lien for any portion of the purchase money, it is not necessary to inquire, for that is not the question before us. It will be time enough for that when the Mergenthaler Company attempts to enforce any supposed lien it has against the plaintiff. Nor does the stipulation on the policy that the loss, if any, shall be paid to the assured and the Mergenthaler Company as their respective interests at the time may appear, affect the right of the plaintiff to its judgment. This worked no change in the title; is but the usual stipulation by the mortgagor of insured property to protect his mortgage creditor. It does not affect the liability of the insurer for the amount of his policy, nor the right of the assured, the holder of the legal title, to recover. If the insurer—the stakeholder—wants to avoid risk from dividing the sum and paying to each as his interest appears, he can pay the money into court, and that tribunal will adjust the equities. So far as appears, the Mergenthaler Company asserts no claim on its supposed chattel lien or mortgage, it having been paid all the purchase money at date of the fire, except \$8,287.50. There is nothing further in the case requiring discussion.

All the assignments are overruled, and the judgment is affirmed.

RHODE ISLAND SUPREME COURT.

Everett W. ADAMS
v.

UNION RAILROAD COMPANY.

(.....R. I.....)

1. The benefit of a contract by a town with a street railway company, limiting the rate of fare, is available to a passenger in an action of trespass for being ejected for nonpayment of fare after tendering the amount allowed by the contract.

NOTE.—As to right of action by third person on contract between others for his benefit, see note to *Jefferson v. Asch* (Minn.) 25 L. R. A. 237.

44 L. R. A.

2. The fact that a person boarded a car for the purpose of making a test case as to the amount of fare demandable will not affect his right to maintain an action for an unlawful ejection after tendering the fare lawfully due.

(January 9, 1899.)

ACTION to recover damages for alleged wrongful ejection from defendant's cars. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. Edward L. Mitchell, for plaintiff:

The contract between the town of East Providence and the Union Railroad Company

fixing the rate of fare was made for the sole benefit of the citizens of the town, and can be enforced by them.

Hendrick v. Lindsay, 93 U. S. 143, 23 L. ed. 855; *Putney v. Farnham*, 27 Wis. 187; *Lehow v. Simonton*, 3 Colo. 346; *Green v. Richardson*, 4 Colo. 584; *Meyer v. Lowell*, 44 Mo. 328; *Rogers v. Gosnell*, 58 Mo. 589; *Fitzgerald v. Barker*, 85 Mo. 13; *Joslin v. New Jersey Car Spring Co.* 36 N. J. L. 141; *Snell v. Ives*, 85 Ill. 279; *Daub v. Englebach*, 109 Ill. 267; *Bohanan v. Pope*, 42 Me. 93; *Kimball v. Noyes*, 17 Wis. 700; *McDowell v. Laev*, 35 Wis. 171; *Bassett v. Hughes*, 43 Wis. 319; *Kaufman v. United States Nat. Bank*, 31 Neb. 661; *Lyman v. Lincoln*, 38 Neb. 794; *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Ricard v. Sanderson*, 41 N. Y. 179; *Coster v. Albany*, 43 N. Y. 399; *Thorp v. Keokuk Coal Co.* 48 N. Y. 253; *Arnold v. Nichols*, 64 N. Y. 117; *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Little v. Banks*, 85 N. Y. 258; *Schley v. Fryer*, 100 N. Y. 71; *Gifford v. Corrigan*, 117 N. Y. 257, 6 L. R. A. 610; *Scott v. Gill*, 19 Iowa, 187; *Rice v. Savery*, 22 Iowa, 470; *Johnson v. Knapp*, 36 Iowa, 616; *Benge v. Hiatt*, 82 Ky. 666, 56 Am. Rep. 912; *Allen v. Thomas*, 3 Met. (Ky.) 198, 77 Am. Dec. 169; *Porter v. Richmond & D. R. Co.* 97 N. C. 46; *Sanders v. Clason*, 13 Minn. 379; *Jordan v. White*, 20 Minn. 91; *Barnes v. Hekla F. Ins. Co.* 56 Minn. 38; *Coleman v. Whitney*, 62 Vt. 123, 9 L. R. A. 517; *Flint v. Cadenasso*, 64 Cal. 83; *Day v. Patterson*, 18 Ind. 114; *Ellis v. Johnson*, 96 Ind. 377; *Devol v. McIntosh*, 23 Ind. 529; *State, Lowry, v. Davis*, 96 Ind. 539; *Wright v. Briggs*, 99 Ind. 563; *Croze v. Truesdale*, 28 Ind. 44; *Stephenson v. Elliott*, 53 Kan. 550; *Emmitt v. Brophy*, 42 Ohio St. 82; *Pom. Spec. Perf. of Contr.* 2d ed. § 486.

A person for whose benefit a contract is made can enforce it.

Laurence v. Fox, 20 N. Y. 268; *Harriman, Contr.* 217.

The most common instance where the third party is allowed to sue is where a mortgagor sells land, and his grantee assumes and agrees to pay the mortgage.

In such case the mortgagee is generally allowed to sue the purchaser on his contract to pay the mortgage.

Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Schley v. Fryer*, 100 N. Y. 71; *Flint v. Cadenasso*, 64 Cal. 83; *Ellis v. Johnson*, 96 Ind. 377; *State, Lowry, v. Davis*, 96 Ind. 539; *Wright v. Briggs*, 99 Ind. 563; *Daub v. Englebach*, 109 Ill. 267; *Fitzgerald v. Barker*, 85 Mo. 13; *Gifford v. Corrigan*, 117 N. Y. 257, 6 L. R. A. 610; *Stephenson v. Elliott*, 53 Kan. 550.

The same rule applies when there is a contract to discharge any other obligation of the promisee.

Emmitt v. Brophy, 42 Ohio St. 82; *Arnold v. Nichols*, 64 N. Y. 117; *Bassett v. Hughes*, 43 Wis. 319; *Urquhart v. Brayton*, 12 R. I. 169; *Wood v. Moriarty*, 15 R. I. 518; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Brewer v. Dyer*, 7 Cush. 337; *Bohanan v.* 44 L. R. A.

Pope, 42 Me. 93; *New Haven v. New Haven & D. R. Co.* 62 Conn. 252, 18 L. R. A. 256.

Plaintiff had a right to insist upon his legal rights under this contract, even to the extent of using force to resist ejectment.

English v. Delaware & H. Canal Co. 66 N. Y. 454, 23 Am. Rep. 69.

The contract between the Union Railroad Company and the town of East Providence operated practically as an ordinance fixing the rate of fare within the limits of the town.

Allegheny v. Millville E. & S. Street R. Co. 159 Pa. 411; *People, West Side Street R. Co., v. Barnard*, 110 N. Y. 552; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Atty. Gen. v. Old Colony R. Co.* 160 Mass. 62, 22 L. R. A. 112.

The rights of the town and its citizens under this contract are practically similar to the rights of the city of St. Paul and its citizens under an ordinance, consented to by the corporation, securing to the municipality and its citizens the right to transfer tickets.

Pine v. St. Paul City R. Co. 50 Minn. 144, 16 L. R. A. 347.

A fair and reasonable construction of the contract between the Union Railroad Company and the town of East Providence would entitle the plaintiff to ride upon the second car without paying an extra fare.

The act of the conductor in ejecting the plaintiff from the car constituted an assault entitling the plaintiff to recover damages from the defendant corporation.

Pine v. St. Paul City R. Co. 50 Minn. 144, 16 L. R. A. 347; *Hamilton v. Third Ave. R. Co.* 53 N. Y. 25; *Pittsburg, C. & St. L. R. Co. v. Hennigh*, 39 Ind. 509; *Palmer v. Charlotte, C. & A. R. Co.* 3 S. C. N. S. 580; *Burnham v. Grand Trunk R. Co.* 63 Me. 298, 18 Am. Rep. 220; *Toledo, W. & W. R. Co. v. McDonough*, 53 Ind. 288; *Laird v. Pittsburg Traction Co.* 166 Pa. 4; *Baltimore & O. R. Co. v. Bambrey (Pa.)* 16 Atl. 67; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 36 L. ed. 71; *Carsten v. Northern P. R. Co.* 44 Minn. 454, 9 L. R. A. 688; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357.

A ticket is only evidence of a contract, and the plaintiff was entitled to a transfer under a contract between the town and the company.

Georgia R. Co. v. Olds, 77 Ga. 673; *Ohio & M. R. Co. v. Cope*, 36 Ill. App. 97.

The fact that he did not have a transfer ticket to show to the second conductor was not his fault, but the fault of the company.

Forsee v. Alabama G. S. R. Co. 63 Miss. 67, 56 Am. Rep. 801.

The plaintiff having paid his fare had a right to resist ejectment and was not obliged to leave the car.

English v. Delaware & H. Canal Co. 66 N. Y. 454, 23 Am. Rep. 69.

The defendant having pleaded justification under § 43 of chapter 187 of the General Laws, the plaintiff, aside from any contractual rights he may have under the contract between the town of East Providence and the Union Railroad Company, is entitled to recover damages for the assault.

The replication *de injuria* is in the nature

of a general issue, and puts in issue all matters alleged in the plea.

2 Greenl. Ev. 15th ed. § 96.

The present action is not a moot case, but is an actual case of which the court will take jurisdiction.

Fisher v. New York C. & H. R. R. Co. 46 N. Y. 644.

Mr. William G. Roelker for defendant.

Stiness, J., delivered the opinion of the court:

Pub. Laws 1891, chap. 975 (Act May 29, 1891), gave authority to towns to "pass ordinances or make contracts" granting franchises to corporations for operating street railways, etc. October 15, 1892, the town of East Providence made such a contract with the defendant, in which it was agreed that, "during the continuance of said exclusive franchise, the fare from one point to any other point on the lines of said party of the second part in said town shall not exceed five cents." In the agreed statement of facts it appears that a line was constructed which ran from Rumford to Riverside, which was discontinued before this alleged cause of action accrued, but that both Riverside and Rumford were still upon its lines by connecting roads. October 23, 1896, the plaintiff boarded the Warren avenue car, paid his fare, stating to the conductor that he wanted to go to Rumford; and, at the nearest point of connection, he demanded a receipt showing that he had paid his fare, or a transfer to Rumford, which the conductor refused to give. He then boarded the first car going to Rumford, by the only route he could take, stated to the conductor that he had paid his fare on the other car, that he desired to go to Rumford, and that he had asked for a transfer or other evidence that he had paid his fare, which had been refused. The conductor insisted upon his paying his fare on that line, and, upon the plaintiff's refusal to pay, the conductor ejected him from the car. The plaintiff sues in trespass for assault and battery. The defendant pleads in justification, setting up a charter to the South Main Street Horse-Railroad Company, to which, with other companies, the Union Railroad Company is successor, which gave to the former company the right to extend its lines into East Providence, and to fix rates of fare not exceeding ten cents for each passenger between any two points on said road; that in accordance with such authority, continued to the defendant, and under ordinances of East Providence relating thereto, the defendant has established and charges a lawful fare of five cents for one continuous ride on any car of said Union Railroad Company in said town of East Providence; that, upon the plaintiff's refusal to pay such fare, he was ejected from the car by the conductor, using no more force than was necessary.

We think the contract of October 15, 1892, recited above, supersedes the rights under the charter and said statutory provisions pleaded. The statute of May 29, 1891, gives authority to make a contract, and by it the defendant waives its previous rights in respect to fare, for the consideration of exten-

sion of lines and an exclusive right to maintain them. Under this view of the contract, a plea in justification, so far as it rests upon rights previously held, is of no avail. The only question is the one which has been chiefly pressed in argument,—whether the plaintiff can avail himself, as an individual, of the right to claim the benefit of the provisions of that contract in this action. The plea does not wholly fail, because it still has the averment that the plaintiff was ejected for a refusal to pay the lawful fare. The terms of the contract are plain,—that "the fare from one point to any other point on the lines of said party of the second part shall not exceed five cents." We cannot vary this language by reason of the fact that, when the contract was made, two rides for five cents was not the established rate of fare. The contract makes no such reservation, and it was entered into with a view of new or extended lines within the town. If, then, it is of general application, it is controlling in this case.

The plaintiff cites a large number of cases to the effect that a promise made by A. and B., for the benefit of C., may be sued on by C. Most of these cases relate to debt, where there has been a substantial, though not a technical, novation. In *Wilbur v. Wilbur*, 17 R. I. 295, this court held that it was not prepared to extend the doctrine to cases where no debt was assumed. The case was an action of assumpsit, on the promise to another to pay a note without consideration and void in law. The language of the opinion must be taken in its relation to the question before the court, which was whether a promise to pay to the plaintiff a sum of money, as for a debt, could be enforced by him when in fact no debt existed. We do not think that the court meant to lay down the rule that in no case, excepting debt, can a person avail himself of a promise to another. The contract in question was made for the benefit of passengers using the defendant's cars. The town can hardly show damages for its breach, and therefore, if the people for whose benefit it was made cannot recover for its breach no one can. True, the town might take steps to avoid the contract and stop the road for failure to perform conditions; but, in so doing, it would cut off the privileges of many to redress the wrong of one. This would neither be a reasonable nor an adequate remedy. It must have been intended to be a contract for the benefit of the public, made through the town as their corporate representative, upon which passengers could rely, and for breach of which they could seek redress; otherwise, it is a contract of little obligation and force. Suppose the defendant should charge ten cents for one ride, and should eject a passenger for refusing to pay it; under its contention, the passenger would be without redress. In *Little v. Banks*, 85 N. Y. 258, the state made a contract with the defendant to publish reports of the court of appeals, in which it was stipulated that he should furnish copies to book-sellers, and, upon default, to pay the sum of \$100 as liquidated damages, "to be sued for and recovered by the person so ag-

grieved." It was held that the plaintiff was entitled to recover. This last clause quoted introduces an element not in this case, but it is not an important one in the view of the New York court. The court held that the contract was for the benefit of booksellers, such as the plaintiff, and that he had a right under it, the clause quoted being intended to carry out the purpose of the contract by fixing a sum of liquidated damages. The general principle as to the plaintiff's right is laid down by the court as follows: "Contractors with the state, who assume, for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable, in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect; and such contract inures to the benefit of the individual who is interested in its performance." The principle is put upon the ground of public policy essential to the public welfare. In *Porter v. Richmond & D. R. Co.* 97 N. C. 46, the defendant agreed with the city of Charlotte to pay a part of a policeman's salary, to be on duty at its depot. It was held that he could sue the defendant on the contract. *Benge v. Hiatt*, 82 Ky. 686, 56 Am. Rep. 912, gave a child the right to sue on a contract made by his putative father with his mother, for the child's benefit, in consideration of the surrender of the child to the father by the mother. In *Ooster v. Albany*, 43 N. Y. 399, the city undertook improvements under a statute by which it was to pay for damages to property. Judge Folger, in the opinion, said: "Here is the promise, the consideration, and the promisee, definitely brought out. The ultimate beneficiary is uncertain." The court held that a party damaged could maintain an action against the city for such damage as he had shown. The distinction to be made in cases of this sort is well stated by Brown, J., in *House v. Houston Waterworks Co.* 88 Tex. 233, 28 L. R. A. 532: "It is not true that for every failure to perform a public duty an action will lie in favor of any person who may suffer injury by reason of such failure. If the duty is purely a public duty, then the individual will have no right of action; but it must appear that the object and purpose of imposing the duty was to confer a benefit upon the individuals composing the public." The distinction is clearly brought out in *Aldrich v. Howard*, 7 R. I. 199. In that case a statute required buildings within certain limits to be built in the manner and of the materials described in the act. The plaintiff, as adjoining proprietor, alleged a violation of the act, and special damage to his estate. On demurrer, upon the ground that there was no private right of action, the court held that the penalty was the remedy through which the public could compel a compliance with the law, but that the private right existed also for one suffering special injury. Ames, Ch. J., in the opinion, said that the case was within the rule so long ago laid down by Lord Holt that, "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing

enacted for his advantage, or for the recompense of the wrong done to him contrary to the said law." In *Taylor v. Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457, Cooley, J., said: "The burden that individuals are required to bear for the public protection or benefit may in part be imposed for the protection or benefit of some particular individual or class of individuals also, and then there may be an individual right of action as well as a public prosecution, if a breach of the duty causes individual injury." Most of the cases cited by the respondent arise out of contracts for the supply of water to a town or city, under a general public duty, and not for the benefit of individuals or a class of individuals. They hold that there is no contract in favor of a private plaintiff, while some rest upon the lack of authority to impose conditions.

The statute of May 29, 1891, gives authority to a town to act by ordinance or contract. If it acts by contract, as in this case, the necessary implication is that it may stipulate for terms other than those expressed in the act. As to the rate of fare, § 4 provides that the charge for service shall not be greater than the price actually charged by the corporation at the time of granting the franchise, which also clearly implies that it may be less, otherwise, it would be the same price. We do not think, therefore, that the contract was *ultra vires* as claimed by the defendant. The plea of justification ignores the contract, but it is made a part of the statement of facts. It is to be noted that this case is not brought upon the contract, as in most of the cases cited. The plaintiff sues for trespass. The defendant pleads a justification upon the ground that the plaintiff was ejected for refusing to pay a "lawful fare." The evidence of the contract shows what we construe to be a waiver of any right on the part of the defendant, if any such existed, to charge for fares under the charters set out in the plea; and hence that the provision, "The fare from one point to any other point on the lines of said party of the second part in said town shall not exceed five cents," fixes such fare as the maximum lawful fare between the points in question in this case. The plaintiff, having paid this fare, has paid all that he could be required to pay under the contract, which, being for the benefit of passengers, a class of which he was one, was for his benefit, and of which he could take advantage, under the principles stated above. We think, therefore, that the plea of justification is not sustained.

Another point taken by the defendant is that, because the plaintiff boarded the cars for the purpose of making a test case, this is a moot case, which the court will not entertain. A moot case is one which seeks to determine an abstract question, which does not rest upon existing facts or rights. Where a concrete case of fact or right is shown, we know of no principle or policy of law which will deprive a party of a determination, simply because his motive in the assertion of such right is to secure such determination. It is a matter of common practice. Most of

the cases of trespass to try title are of this sort. We are therefore of opinion that the case is not objectionable on this ground. We think that the plaintiff is entitled to

judgment, which, according to the agreement of parties, will be for nominal damages.

Judgment for the plaintiff for ten cents and costs.

SOUTH CAROLINA SUPREME COURT.

Sim ANDERSON, Appt.,

v.

John YOUNG, Resp't.

(.....S. C.....)

1. An instrument binding children to the service of a person during their minority, though signed by him and by their parents, is void as to them as an indenture of apprenticeship under Rev. Stat. 1893, § 2206, unless signed by the infants, although the statute does not expressly provide for their signature.
2. The real welfare of a child is the principal consideration in awarding its custody as between conflicting claims thereto.
3. The custody of a minor by virtue of a fair agreement with the parent, not prejudicial to the welfare of the minor, although not binding upon him, is not unlawful or against public policy so as to constitute such an illegal restraint as a court must relieve at the will or caprice of the parent.

(March 16. 1899.)

APPREAL by petitioner from a judgment of the Common Pleas Circuit Court for Laurens County in favor of defendant in a habeas corpus proceeding to obtain the custody of plaintiff's minor children which had been placed in charge of defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. W. R. Richey, for appellant:

The infants must be a party to the indenture, otherwise it is void.

Austin v. McCluney, 5 Strobb. L. 104.

The formalities of the statute must be complied with or the indenture will be void.

Welborn v. Little, 1 Nott & M'C. 263.

A deed of indenture is a deed consisting of as many parts or duplicates as there are parties.

5 Am. & Eng. Enc. Law, p. 453.

A writ of habeas corpus lies at the instance of either parent or apprentice to release a person held as apprentice under void or avoided indentures.

1 Am. & Eng. Enc. Law, p. 639b; *United States v. Anderson*, Cooke (Tenn.) 143; *Com. v. Robinson*, 1 Serg. & R. 353; *Com. v. Harrison*, 11 Mass. 63; *Re McDowle*, 8 Johns. 323; *Re v. Delaval*, 3 Burr. 1434.

The father of said infants being yet alive the respondent cannot hold said infants under said instruments as a testamentary instrument in the form of a deed.

2 Kent, Com. p. 225.

Messrs. Ball & Simkins, for respondent:

The paper is good as an indenture of apprenticeship. The statute has been substantially followed.

It does not require the infant to sign the indenture, but only that the magistrate shall certify, under his hand and seal, the presence and approbation of the father, mother, or guardian of the infant. For the infants to have signed in this instance would really have been a burlesque, by reason of their tender years.

The distinction now between deeds-poll and indentures is of no practical value. Under the common law the main distinction related to the form of the action on each. If it was an indenture, the action was assumpsit; and if a deed-poll, debt or covenant. But with the advent of the Code, all distinction between the two has passed away with the abolition of the distinction in these forms of action.

5 Am. & Eng. Enc. Law, pp. 453, 454.

If the paper was not an indenture such as the statute requires, it is still binding at common law on the parties to it. Even if it is voidable on the part of the infants, it does not follow that Sim Anderson, Neicy Anderson, and John Young are not bound by it.

2 Am. & Eng. Enc. Law, 2d ed. p. 505.

The infant alone can take advantage of any informalities.

Loddell v. Allen, 9 Gray, 377; *Van Dorn v. Young*, 13 Barb. 286.

Jones, J., delivered the opinion of the court:

Appellant appeals from an order of Judge Townsend refusing his petition for a writ of habeas corpus to obtain the custody of his minor children, one a girl about eight years old, and the other a boy about seven years old. The return of respondent to the writ was as follows: "That he holds in custody and detains the bodies of Mattie Anderson and Sim Anderson, Jr., by reason of the following facts: Sim Anderson, Sr., the father of the two infants, Mattie Anderson and Sim Anderson, Jr., came to live with respondent, John Young, the latter part of December last, bringing with him the two said infants, one six and the other seven years of age, and they continued on there during the year 1898. Sim Anderson was at the time almost totally blind, and, although his eyesight improved some, his general health was all along very

NOTE.—As to the considerations on which courts act in awarding the custody of children, see also *Sheers v. Stein* (Wis.) 5 L. R. A. 781, and note; *Weir v. Marley* (Mo.) 6 L. R. A. 672; *Re Lally* (Iowa) 16 L. R. A. 681; *Nugent v. Powell* (Wyo.) 20 L. R. A. 199; *Eaders v. End-*

ers (Pa.) 27 L. R. A. 56 (and note on validity of contract for transfer of parental responsibility); *Re Young* (N. C.) 36 L. R. A. 224; *Kelsey v. Green* (Conn.) 38 L. R. A. 471; and *Stringfellow v. Somerville* (Va.) 40 L. R. A. 623.

poor, and he was utterly unable to properly take care of the said infants; and his wife, Neicy Anderson, who lived on another place, applied to him to be allowed to take the children, and care for them. This Sim Anderson refused to do, but, after consulting together, they agreed between themselves as a wise settlement of the matter to bind the children to me. Sim Anderson came to me, and proposed the plan. I finally consented, provided Neicy, the mother, was willing. He assured me she was, and afterwards I saw her, and she gave her consent. We all then went to Magistrate W. M. McMillan, and explained the matter to him. He drew the instrument of writing binding over the children to me, which he explained fully to us all, and which we, the said Sim Anderson, Neicy Anderson, and myself, then and there signed. This indenture is herewith exhibited, marked 'A.' This respondent then entered upon his performance of said indenture, and has since carried out towards the said children all the obligations therein required of him. And this respondent is satisfied that the welfare of the children is much better subserved by matters remaining as they are than giving the custody of the children to the said Sim Anderson, who is utterly unable to care for them." The alleged indenture was dated August 19, 1898, was executed under seal by the said father and mother of the children and by John Young, the respondent, and was attested as signed, sealed, and delivered in the presence of W. M. McMillan, as magistrate, under his seal. The instrument, among other things, recited that the father and mother, of their own free will and accord, put their son and daughter apprentice under John Young to learn to be farmers, and, after the manner of apprentices, to serve him for fourteen years, or until they became of age; containing stipulations as to the service and conduct of their said children, one such stipulation being that they shall not absent themselves from said John Young's services, day or night, without leave. On his part John Young covenanted to teach and to provide for said apprentices for said term. All parties bound themselves "for the true performance of all and singular the covenants and agreement aforesaid." The instrument was not signed by the said children, and, so far as appears, they were not present at the execution; and there was no certificate upon the same by the magistrate beyond his attestation as a witness, as follows: "W. M. McMillan [L. S.] Magistrate L. C. S. C.," under the words, "Signed, sealed, and delivered in the presence of." The circuit judge held that the indenture set up in the return, to which petitioner is a party, is binding upon him, and, there being nothing to show improper treatment of the infants on the part of John Young, respondent be refused the petition. Appellant assigns error (1) in holding that the indenture is binding upon him, (2) in holding that the instrument is an indenture, (3) in refusing his petition, (4) in not holding that he was entitled to the custody of his children.

The act of 1740 concerning masters and 44 L. R. A.

apprentices (3 Stat. at L. p. 544) expressly provided that the intending apprentice "shall execute such indenture in the presence and with the approbation of his or her father, mother, or guardian," etc., and under this act it has been decided that the indenture will be void as to the apprentice unless he is a party to it. *Welborn v. Little*, 1 Nott & M'C. 263; *Austin v. McCluney*, 5 Strobb. L. 104. Indentures of apprentices are now regulated by §§ 2072, 2073 *et seq.*, Gen. Stat. 1882, now appearing as §§ 2205, 2206 *et seq.*, Rev. Stat. 1893. In these sections the language above quoted from the old act of 1740 is not to be found. In § 2072, Gen. Stat. 1882, it is provided as follows: "It shall, and may be lawful, to and for any person or persons within this state to take one or more apprentice or apprentices indentured according to the directions of this chapter," etc. It is nowhere provided in said chapter how apprentices shall be indentured except in § 2073, appearing as § 2206, Rev. Stat. 1893, which provides as follows: "It shall be the duty of any trial justice to whom application is made by a person desiring to become the master or mistress of any infant to be bound to service by indenture according to law, to certify under his hand and seal upon such indenture the presence and approbation of the father, mother, or guardian of such infant at the time it was executed, . . . which indenture or indentures, so executed and certified as aforesaid, shall be good and effectual, to all intents and purposes, as if such apprentice had been of full age, and by indenture of covenant had bound him or herself; or otherwise shall be void and of none effect." Notwithstanding the absence of the language quoted from the act of 1740, we hold that by necessary implication the apprentice must execute the instrument, otherwise it will be void as to such apprentice as an indenture of apprenticeship under the statute, however unreasonable this may appear when applied to infants which have not attained years of discretion. There is no doubt that the rule generally held is that the apprentice, to be bound, must execute the indenture, unless the statute expressly provide a different mode of execution in behalf of the infant. Having reached the conclusion that the alleged indenture is void as to the infant apprentices because they are not parties to it, we need not consider whether, when the parents have actually executed the instrument themselves, and bound themselves to its stipulations in the presence of the magistrate, and the magistrate has signed the instrument as a witness under his title and seal, it is not a compliance with the requirement as to the magistrate's certificate as to their presence and approbation. But it does not follow, because the indenture is void as to the infants, that petitioner is therefore entitled to the custody of his children. There is no doubt that ordinarily, and *prima facie*, the father, as natural guardian, is entitled to the custody of his minor children; but this right is not absolute, as his property right in a chattel would be. His right of

custody may be subordinated to the real interests of his child. While, then, a court is in duty bound to relieve an infant from illegal restraint, yet, in awarding custody, it will exercise a wise discretion, looking to the real welfare of the child as the principal consideration. This is the rule in this state, and generally in this country. *Ex parte Schumpert*, 6 Rich. L. 346; *Ex parte Williams*, 11 Rich. L. 459; 17 Am. & Eng. Enc. Law, p. 368.

As the office of the writ of habeas corpus is to release from illegal restraint, the first inquiry here is whether the petitioner's children are illegally restrained by the respondent. Respondent asserts that his custody of the children is lawful by virtue of the indenture with the father and mother placing them with him as apprentices. Conceding that the instrument is void as to the minors as an indenture of apprenticeship under the statute for want of compliance with statutory regulations, the question remains whether the instrument is so void as to make respondent's custody illegal as against the father who executed it. In *Eubanks v. Peak*, 2 Bail. L. 409, Judge O'Neill expressed the opinion that a mother, during the minority of her son, was entitled to his services; and, if she chose to place him with another, and to contract that he should serve that other until he was of the age of twenty-one years, and that for his services the defendant should remunerate him by schooling, and the delivery of property, it was a valid contract, which inured to the benefit of the plaintiff, and on which he could maintain that action. In the later case of *Austin v. McCluney*, 5 Strobb. L. 106, the court held that, while the indenture under the act of 1740 was of no force as against the minor, who was not a party to it, it was nevertheless binding at common law against the parties thereto, and such a contract was not contrary to public policy. In this last case the court cited *Day v. Everett*, 7 Mass. 147, as sustaining an indenture not executed in accordance with the statute as good at common law, as the father might lawfully assign the services of his child during his minority, and during the life of the father. A parent cannot, at common law, irrevocably divest himself of his

trust and duty to care for and train his children, and surrender their care and custody to another, merely for his own comfort or pecuniary gain; but he may lawfully place his children in the custody of another, and assign their services during minority for their own welfare,—as to learn some useful trade or occupation,—in which case a court is not bound to restore the children to the parent's custody unless it appears that the real welfare of the children requires it. We think reason and authority warrant us in stating as the law that the custody of a minor by virtue of a fair agreement with the parent, not prejudicial to the welfare of the minor, is not unlawful or against public policy, and is not such illegal restraint as a court must relieve at the will or caprice of the parent. *Hurd, Habeas Corpus*, 537; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321; *Bonnett v. Bonnett*, 61 Iowa, 199, 47 Am. Rep. 310; *Green v. Campbell*, 35 W. Va. 698; see also note in *Brooke v. Logan*, 2 Am. St. Rep. 184 (112 Ind. 183), and note in *Enders v. Enders*, 27 L. R. A. 56 (164 Pa. 266). In this case, while the father is seeking to revoke his agreement, and regain the custody of the children, the mother, who, for some reason, is not living with the father, insists that the children should remain with respondent, who is the husband of her sister, or, if not, that they be given to her, as petitioner is unable to properly care for them. It does not appear that petitioner has a home for them, or any means whatever. There was evidence before the circuit judge tending to show that petitioner was crippled and partially blind, and wholly unable to support himself and the children. On the other hand, there was evidence that respondent was faithfully carrying out his agreement to care for the children, and there was no showing whatever of any ill or improper treatment of them by respondent, and it was not questioned that respondent was a man "far beyond ordinary for respectability, virtue, and general well-doing," "a man of good disposition, and well able and qualified to care for and train the children."

The exceptions are overruled, and the order refusing the petition is affirmed.

TEXAS SUPREME COURT.

TEXAS LOAN AGENCY, *Plff. in Err.*,
v.

Fanny R. FLEMING *et al.*

(.....Tex.....)

1. The legal sufficiency of evidence to support a finding by the court is a question of law on appeal.
2. The collection of rents from a subtenant does not operate by law as a cancellation of the original lease and an assumption of the possession of the property by the lessor.

NOTE.—As to the liability of a landlord for injuries to the tenant's guests and servants from defects in premises, see *McConnell v. Lem*, 44 L. R. A.

See also 46 L. R. A. 748.

3. The lease of a building which has a door opening at considerable height into space, and unprovided with bars and guards, does not render the landlord liable to a person who is injured in consequence of the failure of the lessee or other person during the lease to keep the door properly fastened.

(February 23. 1899.)

ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District to

ley (La.) 34 L. R. A. 609, and note; also *Stenberg v. Willcox* (Tenn.) 34 L. R. A. 615; and *Willcox v. Hines* (Tenn.) 41 L. R. A. 278.

review a judgment affirming a judgment of the District Court for Bowle County in favor of plaintiff in an action brought to recover damages for the death of plaintiff's husband which was alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Frost, Neblett, & Blanding, for plaintiff in error:

Appellant's liability to Fleming could only be predicated on the failure to perform some duty it owed Fleming. If he was the guest of Brown or Benefield, and appellant had no knowledge that they were using its rooms and closets, appellant owed him no duty, and could therefore not be liable.

Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 784; *Texas & P. R. Co. v. Mangum*, 68 Tex. 348; *Galveston Oil Co. v. Morton*, 70 Tex. 400; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573; *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365.

The tenant, and not the landlord, is responsible for injuries to guests by reason of defects in the premises.

Hale v. Dutant, 39 Tex. 667; *Erwin v. Bowman*, 51 Tex. 513; *Texas & P. R. Co. v. Mangum*, 68 Tex. 348; *Marshall v. Heard*, 59 Tex. 267.

When a landlord is liable after the premises have been leased to, and possession taken by, the tenant, it is because of structural defects existing at the time of the lease.

Durant v. Parmer, 29 N. J. L. 544; *Marshall v. Heard*, 59 Tex. 266; *O'Connor v. Andrews*, 81 Tex. 28.

If the doorway was provided with proper shutter fastenings, etc., and in that condition was safe and free from danger when properly used, and became unsafe by reason of the negligent or improper use of the door, then appellant would not be liable, if it was not in possession and did not have control of the door.

Eyre v. Jordan, 111 Mo. 424; *Ryan v. Wilson*, 87 N. Y. 471, 41 Am. Rep. 384; *Lufkin v. Zane*, 157 Mass. 117, 17 L. R. A. 251; *Gililand v. Chicago & A. R. Co.* 19 Mo. App. 411; *Shearm. & Redf. Neg.* § 501.

The loan agency, not being in possession of the property, before it could be held liable, it must be shown that it induced, for its own interest, Fleming to enter the building. If he was on the premises, neither as the guest of the loan agency nor McGraw, and without profit to the loan agency, then appellant could not be liable.

Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; *Galveston Oil Co. v. Morton*, 70 Tex. 400.

Fleming being on the premises as the guest of Brown and Benefield, who were using the building against the will and without the consent of the loan agency, he was subject to all the dangers on the premises, and could look alone to Brown and Benefield for injuries received.

Hart v. Cole, 156 Mass. 475, 16 L. R. A. 557; *Shearm. & Redf. Neg.* § 499; *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262.

44 L. R. A.

To hold the owner of a building liable for injuries to persons on the premises, without either invitation, permission, or knowledge of the owner, such owner must have a knowledge of the defects which cause the injuries. *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449.

In the absence of a statute, the owner of a building is not, as to the public, bound to keep the premises in such repair that they may be safely visited by the public.

The liability of the owner exists only in favor of third persons standing upon their rights strictly as such. Those who claim that they were invited into a dangerous place must seek their remedy against the person who invited them. If they are the guests of the tenant, he and not the owner is the person to whom they must look for redress.

Marshall v. Heard, 59 Tex. 266; *Gordon v. Peltzer*, 56 Mo. App. 599; *O'Connor v. Andrews*, 81 Tex. 32.

Where the landlord or owner furnishes the proper appliances, he is not liable for the negligent use of them, or failure to use them.

Boycen v. Anderson [1894] 1 Q. B. 164, cited in 15 English Ruling Cases, 341.

Where there is no conflict, and the finding is directly against all of the evidence, this court has, unquestionably, jurisdiction, and it becomes its duty to look to the record.

Clarendon Land Invest. Agency Co. v. McClelland Bros. 86 Tex. 179, 22 L. R. A. 105; *Tackaberry v. City Nat. Bank*, 85 Tex. 496; *Joske v. Irvine*, 91 Tex. 574; *Cunningham v. Austin & N. W. R. Co.* 88 Tex. 534.

No liability attaches to appellant in this case whether in possession or not.

Whether a trespasser or naked and gratuitous licensee is unimportant. In neither case had he the right to expect the defendant to do more than refrain from wanton injury.

Clark v. Michigan C. R. Co. 113 Mich. 24; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 373, 87 Am. Dec. 644; *Crogan v. Schiele*, 53 Conn. 186, 55 Am. Rep. 88; *Schmidt v. Bauer*, 5 L. R. A. 580, note, 80 Cal. 585; *Galveston Oil Co. v. Morton*, 70 Tex. 404; *Texas & P. R. Co. v. Mangum*, 68 Tex. 347; *Marshall v. Heard*, 59 Tex. 268; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573; *Missouri, K. & T. R. Co. v. Edwards*, 90 Tex. 65, 32 L. R. A. 825; *San Antonio & A. P. R. Co. v. Morgan* (Tex.) 46 S. W. 28; *Eyre v. Jordan*, 111 Mo. 424; *Henson v. Beckwith*, 20 R. I. (pt. 1) 167, 38 L. R. A. 716.

A licensee is one who is on the premises by sufferance, closely allied to a trespasser.

Allegheny v. Campbell, 107 Pa. 530, 52 Am. Rep. 478; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783.

An invitation may be implied where there is a common interest or mutual benefit or advantage. A license is inferred, where the object is a pleasure or benefit to the party using it.

Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154; 16 Am. & Eng. Enc. Law, p. 414. Edgar Fleming was not upon the premises

of appellant with its permission, or upon its implied invitation.

The owner of premises is under no obligation legally to keep them free from pitfalls and obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission, and when the owner is in possession.

Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 784; *Gibson v. Leonard*, 143 Ill. 182, 17 L. R. A. 588; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 373, 87 Am. Dec. 644; *Galveston Oil Co. v. Morton*, 70 Tex. 404; *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262; *Holmes v. North Eastern R. Co.* L. R. 4 Exch. 257; *Crogran v. Schiele*, 53 Conn. 186, 55 Am. Rep. 88; *Schmidt v. Bauer*, 5 L. R. A. 580, note, 80 Cal. 565.

Construction alone of premises conveys no implied invitation.

A mere passive acquiescence on the part of the owner or occupant in the use of real property by others does not involve him in any liability to them for its unfitness for use.

Schmidt v. Bauer, 5 L. R. A. 580, notes, 80 Cal. 565.

The landlord is liable if the nuisance occasioning the injury existed when the premises were leased; or where the structure was in such a condition that it would likely become a nuisance in its ordinary use for the purpose for which it was constructed and let, and the landlord failed to repair it; or when the landlord authorized or permitted the act which caused it to become a nuisance.

Kalis v. Shattuck, 69 Cal. 597, 58 Am. Rep. 568.

The door was furnished with a lock, key, and bolt to fasten it securely. It must follow, then, that the condition it was in at that time that caused the injury, if that caused it, was the failure by the occupant to use the appliances so furnished. This would, under the law, exempt appellant from liability.

Oriental Invest. Co. v. Sline (Tex. Civ. App.) 41 S. W. 131; *Texas & P. R. Co. v. Mangum*, 68 Tex. 348; *Marshall v. Heard*, 59 Tex. 266; *Henson v. Beckwith*, 20 R. I. (pt. 1) 167, 38 L. R. A. 716.

The owner or landlord is not liable to third persons for injuries resulting from the use to which a tenant puts the premises, unless he knew when the lease was made to what use the premises were to be put, and that such use would be a nuisance.

Muller v. Stone, 27 La. Ann. 123; *Lufkin v. Zane*, 157 Mass. 117, 17 L. R. A. 251; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; note to *Schmidt v. Bauer* (Cal.) 5 L. R. A. 581.

There being no nuisance, possession or control is essential to fix owner's liability.

Shindelbeck v. Moon, 32 Ohio St. 264, 30 Am. Rep. 590; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 423; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 605; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216.

Collection of rents from McGraw under the lease disproves possession of appellant.

Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 44 L. R. A.

425; *Olson v. Schultz*, 67 Minn. 494, 36 L. R. A. 790.

Messrs. Charles S. Todd, R. W. Rodgers, and Hiram Glass, for defendants in error:

Appellant is liable if either of the two following conditions of fact existed at the time of the injury: (1) If defendant was in possession of the premises, and knew, or by the exercise of ordinary care and diligence could have known, of the dangerous condition of the premises, and of the use made of the closets by the guests of the hotel adjoining; or (2) if McGraw was in possession of the premises under lease from defendant, and at the time of such lease and delivery to him by defendant, the premises were in a dangerous condition and the closets were being used by lodgers in the adjoining hotel, and defendant knew, or by reasonable care and diligence could have known, of such dangerous condition and such use.

Whittaker's Smith, Neg. pp. 53 et seq. 64-66, 221, 226, 227, ed. 1896, marginal pp.; *Cooley*, Torts, p. 606, and notes; *Bishop*, Noncontr. Law, §§ 411 et seq.; *Wharton*, Neg. § 83; 1 Washb. Real Prop. 5th ed. 570; *O'Connor v. Andrews*, 81 Tex. 28; *Perez v. Rabaud*, 76 Tex. 191, 7 L. R. A. 620; *O'Connor v. Curtis* (Tex.) 18 S. W. 953; *Marsan v. French*, 61 Tex. 173, 48 Am. Rep. 272; *Oriental Invest. Co. v. Sline* (Tex. Civ. App.) 41 S. W. 130; *Hines v. Wilcox*, 96 Tenn. 148, 34 L. R. A. 822; *Stenberg v. Willcox*, 96 Tenn. 163, 34 L. R. A. 615; *Southern Bldg. & L. Asso. v. Lawson*, 97 Tenn. 367; *Timlin v. Standard Oil Co.* 126 N. Y. 514, Reviewing *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449; *Tomle v. Hampton*, 129 Ill. 379; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Brassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Stratton v. Staples*, 59 Me. 94; *Haycard v. Merrill*, 94 Ill. 349, 34 Am. Rep. 229; *Chapman v. Rothwell*, El. Bl. & El. 168; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327.

The owner of a building owes the duty to the public (a stranger or third person not a trespasser) to keep its property in such reasonably safe condition that the public or a third person, who is without fault, will not be injured by reason of any dangerous defect in or nuisance upon such building.

The owner is liable for injury to any such third person on such premises by invitation either expressed or implied; and implied invitation may arise from and be proved by the circumstances.

Actual knowledge, either of the existence of the defect or nuisance, or of the use of the premises, is not necessary; if the facts and circumstances are such that the owner by the exercise of ordinary care, prudence, and diligence might and ought to have known, he will be charged with knowledge of what it was his duty to have known.

A person who erects or maintains any structure in a locality is liable as for a nuisance for any injuries that may ensue from its improper construction or maintenance.

Wood, Nuisances, § 120.

The thing itself being such that it may be productive of injury if not properly guarded and cared for, the person erecting it without taking measures to prevent it from being productive of ill results in any event cannot rid himself of the consequences of his act by temporarily parting with his control over it.

Gagg v. Vetter, 41 Ind. 228, 13 Am. Rep. 322; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; 1 Wood, Nuisances, § 120, p. 157, note 3.

Whether the abandonment by McGraw and the action of appellant amounted to a surrender of lease and resumption of control by lessor, is a question of fact, and there is ample evidence to support the finding of the jury and the court of civil appeals.

Talbot v. Whipple, 14 Allen, 177; *Amory v. Kunnoffsky*, 117 Mass. 351, 19 Am. Rep. 416; *McKinney v. Reader*, 7 Watts, 123; *Stimmel v. Waters*, 2 Bush, 282; *Kinsey v. Minnick*, 43 Md. 121; *Matthews v. Tobener*, 39 Mo. 115; *Baker v. Pratt*, 15 Ill. 568; *Wilmington Star Min. Co. v. Allen*, 95 Ill. 288; *Fry v. Patridge*, 73 Ill. 51; *Williams v. Jones*, 1 Bush, 621; *Elliott v. Aiken*, 45 N. H. 30; *Boehm v. Rich*, 13 Daly, 62; *Murray v. Shave*, 2 Duer, 183; *Ladd v. Smith*, 6 Or. 316; *Warner v. Page*, 4 Vt. 291, 24 Am. Dec. 607; *Witman v. Watry*, 31 Wis. 639; 1 Washb. Real Prop. chap. 10, § 7, and notes.

Having terminated the relation of landlord and tenant by surrender of the lease and acceptance thereof, the appellant resumed possession of the property; and that portion including the closets, not actually occupied, was in possession of defendant.

O'Connor v. Andrews, 81 Tex. 33.

There was very strong evidence authorizing the jury to find permission and implied invitation by plaintiff in error to Benefield and his guests and lodgers to use their closets.

There was a community of interest in such use by all the occupants of the whole house, inasmuch as Sharpe and other tenants and occupants of plaintiff in error's premises could reach the closets in no other way except by going through Benefield's house, which he in turn permitted.

Benefield and his guests had an easement in the use of the closets, and appellant's tenants an easement through Benefield's halls.

Wood, Nuisances, § 135; *Totten v. Phipps*, 52 N. Y. 354.

Brown, J., delivered the opinion of the court:

Fannie R. Fleming, the widow of Edgar Fleming, brought this suit for herself and her minor children, in which she was joined by the parents of her deceased husband. Plaintiffs sought to recover from the Texas Loan Agency damages for the death of Edgar Fleming, charged to have occurred through the negligence of the loan agency at an hotel in the city of Texarkana, Texas. It was averred in the petition that the deceased lost his life through the defective and dangerous condition of a door in the hotel building, the property of defendant, at which

he stopped as a guest. The plaintiffs recovered a judgment for \$20,000, which was affirmed by the court of civil appeals, upon the following conclusions of fact: "It was established by the facts that appellant, in 1891, held a mortgage on a certain hotel building in Texarkana, Texas, owned by one Benefield; and, to settle the matter, the hotel was partitioned, Benefield getting a portion 32 feet wide and 130 feet long, and appellant the balance of the building. The hall running east and west ran across both portions of the house, and was used jointly by the different owners. The hall running north and south was in the part of the building belonging to Benefield. The water-closets in the building were all on the property belonging to appellant. Guests of the hotel, on the second floor, in order to reach the water-closets, had to pass along the hall running north and south, until a short hall, also on Benefield's property, running east and west, was reached, at the end of which the room in which the water-closets were situated was reached. This room belonged to appellant, and access to it could only be obtained in the manner described. In addition to the door leading from the hall into the room, there was a door on the south of the room, which opened out into space. The water-closets were used indiscriminately by guests, whether in Benefield's or appellant's part of the house. The hotel was, on May 1, 1891, leased by Benefield and appellant to D. McGraw, for a term of five years. At the time of the lease, the door leading out into space was not locked, nor in any manner protected or guarded, but was often left open. The condition of the door was known to appellant, and it remained in that condition until the accident occurred, on the morning of March 3, 1892. On February 1, 1892, McGraw abandoned the hotel, and appellant proceeded to collect rents from tenants of McGraw on the first floor; and Benefield opened an hotel in his part of the building, and with the knowledge and consent of appellant, the guests of Benefield used the water-closets above described. On the night of March 2, 1892, Edgar Fleming, a guest of Benefield, went to the water-closets, and, the door being open that opened out into space, stepped out, fell to the pavement 15 feet below, and received injuries from which he died on March 4, 1892. We find that appellant at this time had resumed control of the hotel, and that the door was open on the night of the accident. Edgar Fleming was not guilty of contributory negligence in going through the door. Edgar Fleming lost his life through the negligence of appellant. The accompanying diagram will render assistance in arriving at an understanding of the condition of the premises hereinbefore mentioned." 46 S. W. 64. The plaintiff in error assigns that the following findings of fact are without evidence to support them: "(1) With the knowledge and consent of appellant, the guests of Benefield used the water-closets above described. (2) We find that appellant at this time had resumed control of the hotel, and that the door was open on the night of the accident."

When a court of civil appeals has found, from the evidence, conclusions of fact, they are binding and conclusive upon this court if there be evidence to sustain them. It is a question of law, however, for this court to determine, if there be any evidence in the record to support the findings of that court. *Choate v. San Antonio & A. P. R. Co.* 91 Tex. 409; *Hudson v. Rome, W. & O. R. Co.* 145 N. Y. 412; *Hannigan v. Lehigh & H. R. R. Co.* 157 N. Y. 244. It requires no less testimony to support a finding of fact made by a court of civil appeals than if such finding were made by a jury in the trial of the cause. "It is the duty of the district court to instruct a verdict, though there be slight testimony [in support of an issue], if . . . probative force [of such testimony] be so weak that it only raises a mere surmise or suspicion of the existence of the fact sought to be established—such testimony, in legal contemplation, falls short of being 'any evidence,' within the meaning of the law. *Joske v. Irvine*, 91 Tex. 574. The fact that there may be evidence which was admissible does not preclude the trial court from determining the question of its legal sufficiency. The same test is applicable to a finding of fact by the court of civil appeals when challenged in this court upon the ground that it is without evidence to support it. If the testimony be such that a district judge should instruct a verdict then a finding by the court of civil appeals upon such evidence would be equally untenable as a verdict. The jurisdiction of the court of appeals of the state of New York to review the action of the general term on the facts is quite similar to that of this court in regard to the findings of fact by the courts of civil appeals. In *Hudson v. Rome, W. & O. R. Co.* cited above, the New York court said: "All questions as to the weight of evidence are final in the general term, and this court has no power to review the determination of that court with reference thereto. But where the evidence which appears to be in conflict is nothing more than a mere scintilla, or where it is met by well-known and recognized scientific facts, about which there is no conflict, this court will still exercise jurisdiction to review and reverse if justice requires."

A careful examination of the statement of facts fails to show any evidence whatever to sustain the following portion of the finding of the court: "And, with the knowledge and consent of appellant, the guests of Benefield used the water-closets above described." Curtis, the only representative of the loan agency who appears to have been at Texarkana about that time, testified positively that he did not authorize Benefield or anyone to use any part of the building which had been leased to McGraw, and that the loan company and its officers never knew until after Fleming was injured that the rooms or closets belonging to it in said building were being used by Benefield or any other person. Benefield testified that Curtis refused to rent him that part of the building, and Brown, the clerk of Benefield, testified that he had no authority from the loan company to use the rooms or any portion of the building

that belonged to it. There was no testimony to the contrary of these statements that we can find in the statement of facts. We therefore sustain the objection of the plaintiff in error to that portion of the finding of the court of civil appeals.

The second conclusion above copied rests upon two circumstances alone: (1) The Texas Loan Agency received from the tenants of McGraw, who occupied the first floor of the building, rent due under their contract with McGraw, and credited the amount upon McGraw's account with it for rent; (2) that the accounts of Estes and Watlington, agents of the Texas Loan Agency, show that after the injury had occurred to the deceased, Mr. Fleming, and before the lease was canceled, they made some slight repairs to the building, at a cost of \$8. The rent seems to have been collected first on the day that Fleming was injured, at night, the second day of March, 1892. Did the collection from McGraw's tenants of rent due to McGraw operate, by law, a cancellation of McGraw's lease, and the taking of possession of the property by the loan agency? There is no evidence to show that it was intended on the part of the owner of the property to release McGraw, and to resume control of the property itself, but, on the contrary, its acts and declarations made at the time show a different purpose. There is nothing to show that the tenants who occupied the lower floor under leases from McGraw ever agreed to become the tenants of the loan agency, or that any agreement was made by which the leases they held from McGraw should be canceled. The fact that the repairs were made upon the building does not tend to establish the proposition that the owner had resumed control thereof. McGraw had agreed to make repairs, had sublet a portion of the house, as his lease permitted him to do, and had himself attempted to abandon the lease of the building. If repairs were necessary for the protection of the building itself, or for the protection of the subtenants, then it was not inconsistent with plaintiff's claim against McGraw, as its tenant, that it should make the repairs which he had agreed to make, but had failed to do.

Receipt by plaintiff in error of rent due to McGraw from his subtenants, and crediting that upon McGraw's account, was not inconsistent with the continuance of the lease between the landlord and McGraw. Such act did not operate to release McGraw from his contract. It is not claimed that any change was made between McGraw and his tenants, or that the loan agency took actual possession of any part of the premises. *Beall v. White*, 94 U. S. 382, 24 L. ed. 173; *Whitney v. Meyers*, 1 Duer, 266; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394; *Graham v. Whichelo*, 1 Crompt. & M. 187. In *Beall v. White*, above cited, a lease had been made to a firm for a number of years. One member of the firm retired, leaving two as constituting the new firm. The landlord received the rent from the new firm under the old contract, for some years. The retiring partner claimed that he was released by these acts, but the Supreme Court of the United

States held that the lease was not canceled by the acts of the landlord.

We doubt if it can be said there is any evidence to sustain the finding of the court of civil appeals that the door out of which deceased walked was open and unlocked at the time the loan agency delivered possession of the house to McGraw; but the fact, if true, is wholly immaterial to the issues involved in this case. The undisputed evidence shows that, when possession was given to McGraw, the opening through which the deceased walked was supplied with a good and suitable shutter, a lock with a key, and a bolt, by which it could be closed up and made entirely safe. McGraw took possession of the house on the 1st of May, 1891, and Fleming received his injury on the 2d of March, 1892, —ten months after the date that possession was delivered to the tenant. If the door had remained open during all the time that intervened between the taking of possession by McGraw and the injury received, that injury would not have been the proximate result of the negligence of the loan agency in not closing the door at the time that it had possession of it, but would be attributable to the negligence of the tenant in failing to close the door and make it safe during the time the property was under his control. We shall therefore discard the fact that the door was not then closed, in the further consideration of this case.

It is said that the door opened out upon space, and was unprovided with bars and guards, and was therefore dangerous in itself. It is a matter of common knowledge that windows are constructed so that the opening comes down about as near to the floor as a door, with sash adjusted upon cords and rollers, by which they can be raised, and, when unsupplied with blinds, are as dangerous in themselves as the door in question. If the opening which caused the injury had been a window supplied with sash, instead of a door with a shutter, the danger would have been just as great as it was in the present instance, and the liability of the landlord would have been the same. There is not in the record any testimony that tends to show that the door in question was unsafe when properly closed and secured; and, in fact, if anyone had testified to such a proposition it would be incredible, as being contrary to well-known physical facts inconsistent with it. *Hudson v. Rome, W. & O. R. Co.* 145 N. Y. 412.

The judgment in this case rests solely upon the proposition that the landlord is liable for the negligence of his tenant or other person who may, without authority from him, occupy the premises, and that the failure of such person to use the means which the landlord has furnished to make safe and secure the openings about the building renders the owner liable to the guests of such tenant for damages received by reason of that negligence. It is difficult to argue a proposition so palpably at variance with the well-settled principles of law which determine the liabilities of such parties. We have, however, carefully examined this question, and find that the authorities without

exception, so far as we have been able to discover, are in direct opposition to any such claim of liability. The law is that when the landlord leases premises to another, and such premises are in a good and safe condition, he is not liable for any injury which may result by reason of the negligence of the tenant to make use of the means furnished him by which the premises may be maintained in safety for all persons using them. *Johnson v. McMillan*, 69 Mich. 30; *Adams v. Fletcher*, 17 R. I. 137; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; *Leonard v. Storr*, 115 Mass. 86, 15 Am. Rep. 76; *Handyside v. Powers*, 145 Mass. 123; *Kalis v. Shattuck*, 69 Cal. 593, 58 Am. Rep. 568; *White v. Montgomery*, 58 Ga. 204; *Allen v. Smith*, 76 Me. 335; *McCarthy v. York County Sav. Bank*, 74 Me. 315, 43 Am. Rep. 591; *Sargent v. Stark*, 12 N. H. 332; *Stewart v. Putnam*, 127 Mass. 403.

The authorities cited above embrace the following classes of cases: (1) Cases in which the leased premises had water and sewerage fixtures, which were capable of being used safely, but the tenant failed to make use of the means supplied, whereby the premises were overflowed, and property of another injured. (2) Those cases where the premises let abutted upon a public highway, and, for the purpose of supplying the basement of the building with fuel, had coal holes in the sidewalks of the streets, which, when leased, were supplied with the appliances necessary to making them safe and secure for persons walking over them; but the tenant either left the holes open, or failed to make use of the securing appliances, and thereby pedestrians upon the public highway fell into the coal holes, and were injured. (3) Where the premises leased were situated upon public highways, with the roof overhanging the sidewalk, not being supplied with any means for preventing ice which might accumulate upon the roof falling into the street. The tenant failed to relieve the roof of the accumulation of snow and ice, and persons traveling upon the highway were injured by its falling upon them. (4) Where an awning was constructed in front of the leased building for the purpose of shading and protecting it from the weather, but the tenant permitted the awning to be used as a standing place for a number of people, whereby it was broken down, and caused injury to those who were assembled or passing upon the highway beneath it. In all those cases the courts held that the owner of the land was not liable for the negligence of the tenant in failing to use the means supplied to him for protecting others from injury. In the case of *Sargent v. Stark*, above cited, the landowner had built a dam across a stream, under a law that forbade him, during a given season, to submerge certain lands adjacent to the stream. The dam was built in accordance with law, and provided with water gates, by which the quantity accumulated could be at any time reduced so as not to affect the lands forbidden to be overflowed. The landowner leased the mill and the dam to another, who failed to make use of the gates. The land was overflowed, and suit

was brought against the owner. In passing upon the case, the supreme court of New Hampshire said: "There can be no doubt that Stark had a right to build a dam on his own land, of such model and dimensions as he pleased, unless it was so constructed as necessarily to affect the right of his neighbors by overflowing the land above, or by obstructing improperly the passage of water to the land below. . . . We infer from the case that the proprietor of the mills was restricted as to flowage only during a portion of the year. If so, it was only necessary that the water should be properly drawn down during that portion of the year in which his right was limited in this respect. At all events, it is the neglect of the proper control and management of the water, and keeping it within its legal limits, that prejudices the plaintiff, and not the erection of the dam. . . . It will hardly be pretended that the lessor of the mills would be liable for the mismanagement of the water by the lessee. . . . Those only can be rendered liable under the circumstances of this case who were so managing and controlling the water as to cause the injury." That case is directly in point, and clearly announces the true doctrine upon this question. It was no injury to anyone for the loan company to own a house in which there was a door opening out upon space, without bars or guards, provided it had a sufficient shutter to close the opening, and sufficient lock and bolts to secure the shutter in place.

As the supreme court of Michigan said "It was the neglect of those who used the house to properly control and manage" the shutter to the door that caused the injury to Fleming. Modern methods of heating and lighting, furnishing water and sewerage, when used with care, contribute much to the health and comfort of the people, but, by want of care, may be made offensive, dangerous, and destructive to life and property. If the doctrine upon which this case rests should prevail, no property owner could safely lease to another premises thus fitted up for use as hotel building or the like; for, by negligence in using gas, a guest might be asphyxiated, or want of care might introduce poisonous sewer gas into the building, producing death to the customers of the tenant.

The trial court, in effect, charged the jury that if there was a door at the place provided with a shutter, with lock and key, but it was not closed and secured at the time the lease was made and possession delivered to McGraw, then the loan agency would be responsible for the injury received. The trial court erred in submitting the case to the jury with such instructions, and the court of civil appeals erred in affirming the judgment.

It is therefore ordered that the judgment of the District Court and of the Court of Civil Appeals be reversed, and that this cause be remanded for further trial.

UTAH SUPREME COURT.

William W. CROCO, *Resp't.*,
v.

OREGON SHORT-LINE RAILROAD COMPANY, *Appt.*

(.....Utah.....)

- *1. The amount of damages is a fact to be found by the jury, and, if there be any evidence to support the verdict, the court is not at liberty, under the Constitution of this state, to set it aside.
2. The general rule in tort is that the plaintiff is entitled to recover damages for all injuries which are the natural and proximate consequences of, or can be traced to, the injury complained of. Such are termed "general damages," and may be proved under the general allegation of damage in the complaint. Special damages are those which are not the probable and natural result of the injury, and must be specially pleaded. A plaintiff is not required to aver all the physical injuries which he sustained, or which might have resulted from or be aggravated by the wrongful act of defendant.
3. The common law has always been

*Headnotes by MINER, J.

NOTE.—For collateral champerty as a defense, see *note* to *Pennsylvania Co. v. Lombardo* (Ohio) 14 L. R. A. 785.

As to champertous contract with attorneys, see also *Manning v. Sprague* (Mass.) 1 L. R. A. 44 L. R. A.

See also 45 L. R. A. 110, 196.

in force in Utah, but the rule as to champertous contracts was modified by the provisions of § 3683 Utah Comp. Laws 1888, which provided that "the measure and mode of compensation of attorneys and counsellors at law, is left to the agreement, express or implied, of the parties." Under this statute it was competent for attorney and client to agree that the attorney's compensation should be contingent upon success, and payable, by percentage or otherwise, out of the proceeds of the litigation. It was not competent for the attorney, in consideration thereof, to agree to pay the fees and costs of suit thereafter to be commenced, but one who was not a party to such contract has no right to question its validity.

4. When the defense of champertous contract is relied upon, it must be pleaded.

(November 11, 1898.)

APPEAL by defendant from a judgment of the District Court for Weber County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

516, and *note*; *Gilman v. Jones* (Ala.) 4 L. R. A. 113, and *note*; *Burnham v. Heselton* (Me.) 9 L. R. A. 90, and *note*; and *Reese v. Kyle* (Ohio) 16 L. R. A. 723.

Mr. Parley L. Williams, for appellant: The damages awarded are excessive.

The damages assessed are against the clear weight of the evidence and so manifestly wrong as to leave no reasonable inference that the amount of damages awarded were justified.

If a complaint contained no more definite statement of injury than that a plaintiff was permanently injured, it would be bad upon special demurrer, for failure to set out in sufficient detail and describe the particular injuries, but a special demurrer to the complaint in this case would not have been sustained, for the allegation is that the plaintiff, by reason of the negligence alleged, "became greatly and permanently injured, cut, and disfigured in and upon his head, back, arms, and legs," and, further, that he was internally injured in the region of his back and abdomen.

There is no definite allegation at all of other injuries.

The plaintiff was not entitled to introduce evidence of injuries other than those sufficiently described in the complaint, to enable the defendant to know the particular matters he was required to meet.

Batterson v. Chicago & G. T. R. Co. 49 Mich. 184; *Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433; *Flint & P. M. R. Co. v. Stark*, 38 Mich. 714; *McAbsher v. Richmond & D. R. Co.* 108 N. C. 344; *Mobile & O. R. Co. v. George*, 94 Ala. 199; *Linton v. Unexcelled Fire Works Co.* 124 N. Y. 533; *Swenson v. Kleinschmidt*, 10 Mont. 473; *Hayes v. Fine*, 91 Cal. 391; *Price v. St. Louis, K. C. & N. R. Co.* 72 Mo. 414.

The loss of memory is not a natural, ordinary, or probable result of an injury from a railroad accident, and is an injury, therefore, for which the defendant is not liable.

Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 28 L. ed. 1070; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Haile v. Texas & P. R. Co.* 23 U. S. App. 80, 60 Fed. Rep. 557, 9 C. C. A. 134, 23 L. R. A. 774.

The common law prevails in Utah, and has existed here ever since the territory of Utah was organized.

At common law champerty was a crime and punishable as such, and all contracts tainted with it were void.

People v. Green, 1 Utah, 13; *First Nat. Bank v. Kinner*, 1 Utah, 100; *Thomas v. Union P. R. Co.* 1 Utah, 232; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 62, 34 L. ed. 498; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061.

Champerty is a species of maintenance, and punished in the same manner.

4 Bl. Com. p. 135.

Champertous contracts are void both by law and equity.

Berrien v. McLane, Hoffm. Ch. 421; 4 Kent. Com. 499, note (b); *Stanley v. Jones*, 7 Bing. 369; *Backus v. Byron*, 4 Mich. 535.

If an attorney has an interest in the subject-matter of the litigation, "the duty which 44 L. R. A.

an attorney owes to his client, to the court, and to 'any party' to the litigation would be in conflict with his interest.

There would be no bounds to the crushing influence of the power over the client. *Welles v. Middleton*, 1 Cox, Ch. Cas. 125; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586.

In Illinois champerty is recognized as a part of the common law, and contracts between attorney and client whereby the attorney is to institute and prosecute suits at his own expense for the recovery of property belonging to or claimed by the client, for which his own compensation is to be a portion of the property recovered, however honestly entered into and carried out, is champertous and void.

Thompson v. Reynolds, 73 Ill. 12; *Gilbert v. Holmes*, 64 Ill. 548; *Coleman v. Billings*, 89 Ill. 183; *Phillips v. South Park Comrs.* 119 Ill. 626; *North Chicago Street R. Co. v. Ackley*, 171 Ill. 100.

The law is the same in Indiana.

Scobey v. Ross, 13 Ind. 117; *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Lafferty v. Jelley*, 22 Ind. 471.

In Massachusetts it is held that champerty is unlawful under the common law there prevailing.

Thurston v. Percival, 1 Pick. 415; *Brinley v. Whiting*, 5 Pick. 348; *Lathrop v. Amherst Bank*, 9 Met. 489.

The same doctrine is held in Ohio.

Key v. Vattier, 1 Ohio, 132; *Weakly v. Hall*, 13 Ohio, 167, 42 Am. Dec. 194.

Also prevails in Kentucky.

Brown v. Beauchamp, 5 T. B. Mon. 413, 17 Am. Dec. 81.

In the District of Columbia.

Stanton v. Haskin, 1 MacArth. 558, 29 Am. Rep. 612.

And in Missouri.

Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314.

The law of champerty prevailed in New York.

Merritt v. Lambert, 10 Paige. 352; *Wallis v. Loubat*, 2 Denio, 607; *Sedgwick v. Stanton*, 14 N. Y. 289.

In Iowa.

Boardman v. Thompson, 25 Iowa, 487.

Vermont.

Hamilton v. Gray, 67 Vt. 233.

Wisconsin.

Barker v. Barker, 14 Wis. 131; *Miller v. Larson*, 19 Wis. 463.

Alabama.

Holloway v. Lowe, 7 Port. (Ala.) 488.

Oregon.

Dahms v. Sears, 13 Or. 47; *Brown v. Bigne*, 21 Or. 260, 14 L. R. A. 745.

The Supreme Court of the United States is in accord on this subject with the current of decisions in the several states.

Peck v. Heurich, 167 U. S. 624, 42 L. ed. 302.

Messrs. **Evans & Rogers** and **A. G. Horn** for respondent.

Miner, J., delivered the opinion of the court:

This action was brought against the rail-

road company to recover damages for an injury to plaintiff's person received on April 3, 1897, at Malad Bridge, in Idaho, at which time the train on which plaintiff was a passenger was derailed. The plaintiff alleges that the accident was occasioned because defendant negligently maintained an inadequate switch, side track, and roadbed, and negligently and carelessly ran its train at a great and dangerous rate of speed, by reason of which the train was thrown from the track, and plaintiff became greatly and permanently injured. Upon a trial the jury found a verdict of \$5,000 in favor of the plaintiff. This appeal is from the judgment, and the order overruling defendant's motion for a new trial.

1. The appellant contends that the damages assessed are excessive, against the clear weight of the evidence, and so manifestly wrong as to show the amount of the verdict was unjust and influenced by prejudice and passion. Upon an examination of the testimony, we find that there was evidence upon which the jury could find a verdict for the plaintiff, although conflicting as to the nature of plaintiff's injuries. In such case it has been invariably held by this court that the amount of the damages is a fact to be found by the jury from all the evidence in the case, and if there be any evidence to support the findings or verdict, this court is not at liberty, under the Constitution of this state, to review alleged errors in avoiding it. In such case the court will consider the evidence only so far as may be necessary to determine the question of law. *Nelson v. Southern P. Co.* 15 Utah, 328; *Walley v. Deseret Nat. Bank.* 14 Utah, 313; *Watson v. Mayberry.* 15 Utah, 275; *Harrington v. Eureka Hill Min. Co.* 17 Utah, 300; *Mangum v. Bullion, B. & C. Min. Co.* 15 Utah, 536; *Anderson v. Daly Min. Co.* 15 Utah, 23; *State v. Halford.* 17 Utah, —, 54 Pac. 819; *Reese v. Morgan Silver Min. Co.* 17 Utah, —, 54 Pac. 759.

2. The plaintiff, under objection and exception, was permitted to testify on redirect examination that his memory was poorer than it was before the injury; and under like objection, that the testimony was not within the allegations of the complaint, the plaintiff was permitted to testify that there was a difference in his eyesight after his relapse, and that he could not see out of his right eye. The witness had made contradictory statements concerning several matters of injury, indicating an absence of correct recollection; and counsel for the plaintiff contends that the question as to memory was asked for the purpose of explaining apparent contradictions in his testimony, and that the testimony concerning plaintiff's eyesight after his discharge from the hospital was offered for the purpose of basing a hypothetical question to medical experts who afterwards testified in the case; the contention being that the relapse was a partial stroke of paralysis on the right side, caused by an injured spine, and not an epileptic fit, as contended for by the appellant. It does not appear that any demurrer had been in-

terposed to the complaint for uncertainty or otherwise. In its charge to the jury the court limited the damages to the allegations of the injuries set forth in the complaint, and no reference was made to the loss of eyesight or memory. We think the testimony was competent under the claim of counsel, and also under the complaint filed. The result of the injury charged in the complaint, and traceable to the wrongful act, was that the plaintiff became greatly and permanently injured, cut, and disfigured in and on his back, head, and arms, and that he received injuries in other parts of his body, and was internally injured in the region of his back and abdomen, and that, by reason of such injuries so received, plaintiff became sick, sore, and disordered, and crippled for life, from which injuries he suffered great mental distress, and was unable to follow his usual avocation. Judge Sutherland, in his work on Damages (3 Sutherland, Damages, 2d ed. 2661, 2662), says: "The general rule in tort is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting, although such injury could not have been contemplated as the probable result of the act done. The plaintiff may show specific, direct effects of the injury without specially alleging them; as that he was thereby made subject to fits. If they were a part of the result of the injury, the plaintiff may recover for such damage without specially alleging it, as well as the pain and disability which followed. The obviously probable effects of the injury may be given in evidence, though not laid in the declaration. Thus, where one of the direct consequences of a wound was the loss of the power to have offspring, evidence of that fact was admissible, though the declaration did not specifically designate that consequence." In *Johnson v. McKee*, 27 Mich. 471, the court said: "The battery consisted in striking McKee with a chair, whereby certain injuries were inflicted on his face and head, and in consequence of which he was seriously, and, as is claimed, permanently, affected. Among other results, there was evidence that he suffered from urinary difficulties caused or aggravated by the blow. It was claimed this injury was not within the terms of the declaration, and could not be shown without express averment. If the evidence showed any such resulting injury, it showed it to have been as closely connected with the blow as any of the other evil consequences. It was a sickness produced by it in the same way as the swelling and soreness in the head and eyes, and the other grievances about which no question was made on the trial. The declaration charges sickness and pain to have been among the sufferings caused by means of the assault, and we do not think the rules of pleading require any more specific description than was given. We need not inquire how far it was requisite to go in declaring for consequences not necessarily following such an injury, because these consequences are very clearly set forth. When the defendant was informed that damages were sought for sickness and disorder

and their attendant expenses, as well as for wounds and bruises, he was bound to expect evidence of any sickness the origin or aggravation of which could be traced to the act complained of." This seems to be the better and well-settled doctrine, although there are cases to the contrary. *Manley v. Delaware & H. Canal Co.* 69 Vt. 101; *Keyser v. Chicago & G. T. R. Co.* 86 Mich. 400; *Welch v. Ware*, 32 Mich. 77; *Tyson v. Booth*, 100 Mass. 258; *Snyder v. Albion*, 113 Mich. 275; *Montgomery v. Lansing City Electric R. Co.* 103 Mich. 46, 29 L. R. A. 287; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 443; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146; *Chicago v. McLean*, 133 Ill. 148, 8 L. R. A. 765. The plaintiff is always entitled to recover all damages which are the natural and proximate consequence of, and are traceable to, the act complained of; and those damages which are probable, traceable to, and necessarily result from, the injury are termed general, and may be shown under the general allegation of the complaint. Only those damages which are not the probable and necessary result of the injury are termed "special," and are required to be stated specially in the complaint. The plaintiff was not required to aver all the physical injuries which he sustained, or which might have resulted from or be aggravated by the wrongful act complained of. If such injuries can be traced to the act complained of, and are such as would naturally follow from the injury, they need not be specially averred. *Chicago v. McLean*, 133 Ill. 148, 8 L. R. A. 765; *Montgomery v. Lansing City Electric R. Co.* 103 Mich. 46, 29 L. R. A. 287. When the defendant was informed of the injury to plaintiff's head and back, and that he was greatly and permanently injured in his body, and internally injured in his back and abdomen, by reason of which plaintiff became sick, sore, disordered, and crippled for life, from which injuries he suffered great mental distress and physical pain, he was bound to expect evidence of any sickness or injury to plaintiff, of memory or eyesight, the origin or aggravation of which could be traced to the negligent act complained of. This rule does not in any sense overturn the well-established one that where damages are special they must be specially averred in the complaint.

3. It is contended that the court erred in refusing to instruct the jury, as requested by the defendant, as follows: "The court instructs you that in this case the plaintiff has entered into a contract with his attorneys whereby he agrees to give them 40 per cent of whatever sum may be recovered herein, and the said attorneys agree, for said consideration, not only to render their services as attorneys herein to the plaintiff, but in addition thereto to pay the costs required to be advanced to the clerk, the sheriff for serving summons, and whatever may be necessary to pay the fare of witnesses from Idaho to the place of trial. This constitutes an unlawful maintaining of plaintiff's case, and 44 L. R. A.

is contrary to law, and the said contract reaches to and affects the entire interest of the plaintiff in the case; and in consequence of said unlawful agreement the said plaintiff is not entitled to recover in this action, and you are therefore instructed to return a verdict for the defendant." Defendant contends that the alleged contract, claimed to be champertous, was entered into between the plaintiff and his counsel May 15, 1897. At this time § 3683, Utah Comp. Laws 1888, was in force. This section provides: "The measure and mode of compensation of attorneys and counsellors at law is left to the agreement, express or implied, of the parties." Under this statute the mode and manner of compensation were expressly left to the agreement, express or implied, between counsel and client, and no legal restrictions were placed upon their agreement or compensation at the time their contract was made. Although the common law was in force in this state at the time of the adoption of our Constitution, so far as compatible with our situation and government, as held in *Deseret Irrig. Co. v. McIntyre*, 16 Utah, 398; *People v. Green*, 1 Utah, 11; *Thomas v. Union P. R. Co.* 1 Utah, 232; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 62, 34 L. ed. 498; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079; Rev. Stat. 1898, § 2488,—still it is believed that its force, as applied to champertous contracts, was modified by the passage of § 3683, above quoted. Section 135, Rev. Stat. 1898, was not in force when this contract was made. Under § 3683, it was competent for an attorney and client to agree upon the attorney's compensation; and such compensation may be made contingent upon success, and payable, by percentage or otherwise, out of the proceeds of the litigation. But it was not competent for the attorney, in consideration thereof, to agree to pay the advance fees and costs of the suit thereafter to be commenced. *Fowler v. Gallan*, 102 N. Y. 395. "The English common law and statutes against maintenance and champerty had their origin, if not their necessity, in a different state of society from that which prevails at the present time. When the doctrine was established, lords and other large landholders were accustomed to buy up contested claims against each other, or against commoners with whom they were at variance, in order to harass and oppose those in possession. On the other hand, commoners, by way of self-defense, thinking that they had title to lands, would convey part of their interest to some powerful lord, in order, through his influence, to secure their pretended right. The want of sufficient written conveyances, and records of titles, and the feudal relation of vassal and liege lord, afforded facilities for the combinations and oppressions which followed this state of things. The power of the nobles became mighty in corrupting the fountains of justice. To remedy these evils the law against both maintenance and champerty was introduced." It is held in *Courtright v. Burnes*, 3 McCrary, 60, 13 Fed. Rep. 317: "The ten-

dency in the courts of . . . [the United States] is strongly in the direction of relaxing the [stringency of the] common-law doctrine concerning champerty and maintenance, so as to permit greater liberty of contracting between attorney and client than was formerly allowed, and this for the reason that the peculiar condition of society which gave rise to the doctrine has in a great measure passed away. In some of the states the common-law rule is altogether repudiated, and it is held that no such contract is now invalid unless it contravenes some existing statute of the state. *Sedgwick v. Stanton*, 14 N. Y. 289; *Voorhees v. Dorr*, 51 Barb. 580; *Richardson v. Rowland*, 40 Conn. 565; *Mathewson v. Fitch*, 22 Cal. 86; *Hoffman v. Vallejo*, 45 Cal. 564; *Lytle v. State*, 17 Ark. 609."

4. If it be conceded that the common law, as modified, was in force at the time the contract was made, and that it was of a champertous character, and therefore void, yet it appears that the contract was entered into between the plaintiff and his attorney, and that the defendant was in no way a party thereto. The defendant, being a stranger to the contract, had no right to question its validity in a collateral attack. There seems to be no sound reason in a rule which would allow a party to defeat a just cause of action because the opposite party has made a contract which is absolutely void, and which therefore cannot be enforced by either of the contracting parties. As to the defendant the rights of the parties are the same as if the illegal contract had never been executed. The champertous contract, being void, would devest the plaintiff of no cause of action. He is still the real party in interest. While the parties to the illegal contract might be allowed to repudiate it, other persons, not parties to it, should not be permitted to exonerate themselves from their just obligations on account of it. If, for instance, a defendant, when sued upon his valid promissory note, can avoid payment thereof, and interpose a bar to a recovery, by showing that the plaintiff made a champertous contract with his attorney for its collection, then is a meritorious plaintiff placed, to a

large extent, at the mercy of a dishonest debtor. Under such circumstances it does not lie in the mouth of the defendant to set up that fact for the purpose of escaping the payment of an honest debt, or avoiding a just liability. The law in such a case will compel the defendant to perform his undertaking, and leave the question of champerty to be determined between the plaintiff and his attorney. We are of the opinion that the defendant is not in a position to avoid a legal obligation because the plaintiff and his attorney may have entered into a champertous contract to enforce the obligation. *Small v. Chicago, R. I. & P. R. Co.* 55 Iowa, 582; *Hoffman v. Vallejo*, 45 Cal. 564; *Burnes v. Scott*, 117 U. S. 582, 29 L. ed. 991; *Duke v. Harper*, 66 Mo. 51, 37 Am. Rep. 314; *Thalhimer v. Brinckerhoff*, 3 Cow. 623, 15 Am. Dec. 309; *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388; *Hilton v. Woods*, L. R. 4 Eq. 432; *Elborough v. Ayres*, L. R. 10 Eq. 367; *Allison v. Chicago & N. W. R. Co.* 42 Iowa, 274; *Pike v. Martindale*, 91 Mo. 268; *Court-right v. Burnes*, 13 Fed. Rep. 317. There are cases holding a contrary doctrine, but we believe the above rule to be sustained by the great weight of authority. We are of the opinion that the court properly refused to give the instruction requested by the defendant.

5. There is still another reason why the instruction should not have been given to the jury: It appears that the defendant did not set up in its answer the plea of champertous contract. It is a rule well settled that, in proper cases, when such contracts are questioned between the parties who make them, a plea or answer of the fact upon the part of the defendant is necessary in order to make the defense availing. This rule will apply in this case. *Moore v. Ringo*. 82 Mo. 468; *Pike v. Martindale*, 91 Mo. 268; *Brumback v. Oldham*, 1 Idaho, 710; *Allison v. Chicago & N. W. R. Co.* 42 Iowa, 274; *McMullen v. Guest*, 6 Tex. 275; *Suit v. Woodhall*, 116 Mass. 547.

Upon the whole record we find no reversible error. *The judgment of the District Court is affirmed, with costs.*

Zane, Ch. J., and Bartoh, J., concur.

VIRGINIA SUPREME COURT OF APPEALS.

HARMAN & CROCKETT

v.

NORFOLK & WESTERN R. CO., Plff. in Err.

(91 Va. 601.)

1. Permitting salt water to run through pens provided by a carrier of live stock to facilitate shipments

NOTE.—Duties of carriers of live stock as to pens or yards at stations.

- I. The general rule.
 - II. Application generally.
 - III. Commencement and termination of risk.
 - IV. Effect of contributory negligence.
 - V. Relief from liability by contract.
- 44 L. R. A.

so that it is accessible to animals placed in the pens is negligence which will render the carrier liable for injuries caused to animals placed in the pens for shipment by drinking of the water.

2. A carrier of live stock cannot relieve itself from liability for the death of animals by showing that they died in possession of a connecting carrier if its own negligence was the cause of their death.

VI. Compensation.

VII. Discrimination.

VIII. Matters of procedure.

I. The general rule.

A railroad company holding itself out as a carrier of livestock is under a legal obligation arising from the nature of the employment to

3. In Virginia a common carrier cannot contract for exemption from liability for injury or loss caused by its own neglect.
4. The knowledge of the sellers of live stock to be delivered in the shipping pen of a railroad of the existence of salt water therein does not charge the buyer who has contracted for their transportation with contributory negligence precluding recovery for damages to stock from drinking such water.

(July 11, 1895.)

ERROR to the Circuit Court for Smyth County to review a judgment in favor of plaintiffs in an action brought to recover the value of certain lambs which were alleged to have died because of defendant's negligence in permitting them to drink salt water. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bolling & Stanley for plaintiff in error.

provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73; *Kincaid v. Kansas City C. & S. R. Co.* 62 Mo. App. 365.

As incidental to its business of transporting or hauling cattle, a railroad company must provide the means of loading, unloading, and caring for them pending their delivery to the consignee; the hauling from one point to another, and providing the car, track, engine, and servants for that purpose, are no more a part of the service rendered by the carrier than are the loading and unloading and the providing of appliances and servants for those purposes. *Walker v. Keenan*, 34 U. S. App. 691, 73 Fed. Rep. 755, 19 C. C. A. 668.

The duty of a carrier of live stock to receive, transport and deliver it is not fully discharged unless the carrier makes provision at the place of loading to properly receive and load the stock, and provision at the place of unloading to properly deliver the stock to the consignee. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73.

It is a matter of common knowledge that railroad carriers provide stockpens as a means of receiving at their stations live stock for shipment, and that it is part of their mode of transportation, and the rule as to the safety of a car is applicable to stock pens, each, of course, governed by the uses for which they are intended. *McCullough v. Wabash Western R. Co.* 34 Mo. App. 23.

And a railroad company carrying live stock is liable for damages resulting from a breach of its implied duty to furnish safe pens in which stock is to be placed preparatory to its transportation. *Mason v. Missouri P. R. Co.* 25 Mo. App. 473.

A railroad company carrying live stock is bound to keep its stock yards in a reasonably safe and secure condition for the purposes intended, and where it permits the fence surrounding the yard to become weak, rotten, and defective, by reason of which a shipper's cattle escape and run away and are injured, the railroad company is responsible for such injury. *Cooke v. Kansas City, Ft. S. & M. R. Co.* 57 Mo. App. 471.

So, in *Kansas P. R. Co. v. Reynolds*, 8 Kan. 623, it was said that to insure the safe transportation of live stock the carrier thereof is re-

Messrs. James L. White, John A. Buchanan, and B. F. Buchanan, for defendants in error:

The injury was done at Saltville, the initial shipping point and on the premises and in the loading pens of the defendant company, the regular place provided by the company for loading, and where the loading was required to be done. The railroad company is responsible for such injury.

Norfolk & W. R. Co. v. Sutherland, 89 Va. 703.

The railroad company cannot contract against its own negligence.

Virginia & T. R. Co. v. Sayers, 26 Gratt. 328; *Wilson v. Chesapeake & O. R. Co.* 21 Gratt. 654.

When a railroad holds itself out as a carrier of live stock it is obliged to provide suitable facilities, such as yards or pens for receiving and discharging the stock, and for these it may not in addition to the custo-

quired to have yards and stables with conveniences for feeding both at the terminal and along the route, as well as a corps of experienced stockmen to take care of them in transit, and that the duty to maintain them is an incident to the employment, and not an element to determine its character.

Texas Rev. Stat. art. 4236, providing that railway companies are required to erect at every depot, station, or place established for the reception and delivery of freight suitable buildings or inclosures to protect produce, goods, wares, and merchandise, and freight of every description from damage by exposure to the weather or otherwise, requires railway companies to keep pens for the shipment of cattle. *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 270.

So, a railroad company carrying live stock is bound to provide a reasonably safe chute leading from the stock pen into the car, with which to load stock. *McCullough v. Wabash Western R. Co.* 34 Mo. App. 23.

And it is its duty to keep the chute in a reasonably safe condition. *Kincaid v. Kansas City, C. & S. R. Co.* 62 Mo. App. 365.

II. Application generally.

A railroad accepting stock for shipment is liable to the shipper thereof for damages resulting from its inability speedily to forward them, by reason of which it became necessary to unload them for care, feed, and water, which it undertook to do by its own servants, but overcrowded them in pens while it kept the pens and hydrants locked so that the agents and servants of the shipper could not give them personal attention. *Gulf, C. & S. F. R. Co. v. Frost* (Tex. Civ. App.) 34 S. W. 167.

And where a train upon which cattle were being transported was stopped by drifts and backed to a station, and the cattle unloaded by the trainmen and put in a yard from which some of them escaped and died on the prairie, and the yard was insufficient in strength or size to ordinarily prevent cattle from escaping, and the escape was without the fault of the owner, the railroad company is liable therefor; but if they were thus unloaded with the consent of the owner, and were in his charge at the time of the loss, no recovery can be had. *Chapin v. Chicago, M. & St. P. R. Co.* 79 Iowa, 582.

And where cattle were delivered to a railroad company for carriage, and loaded but not started on their journey because of a heavy snow storm, not at the place of shipment, but in the

mary and legitimate charges for transportation make a special charge.

23 Am. & Eng. Enc. Law, p. 902.

Riely, J., delivered the opinion of the court:

The defendants in error, on June 13, 1891, delivered to the Norfolk & Western Railroad Company two lots of lambs to be transported to Jersey City, in the state of New Jersey. One lot was received by the railroad company at its station at Saltville, Virginia, and the other lot at Pounding Mill, in Tazewell county, Virginia. A large number of the lambs having died on the route, the owners charged that their death was caused by the negligence of the railroad company, and brought suit to recover damages for the loss sustained. The railroad company having undertaken to furnish a stock pen at Saltville for the purpose of enabling shippers of live-stock to load the same upon its cars, its neg-

ligence upon which the plaintiff's right of action was founded, consisted, it was alleged in the declaration, in not furnishing a suitable stock pen and maintaining it in a good and safe condition, but permitting salt water or brine, which was poisonous and dangerous to stock, when drunk by them, to be in the pen, whereby the lambs had access to and drank of it, and sickened and died.

When a railroad company holds itself out as a carrier of live stock, the law imposes upon it the duty to provide suitable and safe facilities, such as yards or pens, both at the place of shipment and the place of destination, for receiving and discharging the live stock offered to it for shipment over its road. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73; 23 Am. & Eng. Enc. Law, p. 902. It appears from the certificate of the evidence that the railroad company did provide at its station at Saltville, from which one of the lots of lambs was shipped, a stock

direction towards which they were to be carried, and the agents of the company took charge of the cattle and put them in stockyards having no suitable sheds or other protection, whereby some were frozen and some died, the injury will be held to have been caused by want of proper care of the carrier and its agents, and not by inevitable accident as the direct cause. *Felnerberg v. Delaware, L. & W. R. Co.* 52 N. J. L. 451.

So, a carrier bringing cattle to their destination after a delay of six hours, arriving after dark at a place where the pens are small, and not sufficient to hold the cattle, is liable to the owner for the damages caused, where it refuses a request of the owner to procure the pens of another company which are large enough, but drives them into the small pen until they trample each other, when the gates are opened and they are allowed to escape, and some of them are lost. *Gulf, C. & S. F. R. Co. v. York*, 2 Tex. App. Civ. Cas. (Willson) § 813, p. 718.

And evidence that pens in which a shipper was obliged to place his horses en route were muddy, boggy, supplied with no troughs or racks in which to feed, and that the provender ordered for them was trampled in the muddy ground by the stock and did them little good, and that he did not have frequent opportunities to unload and feed the carrier refusing to stop for such purpose, is sufficient to warrant a recovery for injuries to the stock on the ground of negligence. *Missouri P. R. Co. v. Ivy*, 79 Tex. 444. And see *HARMAN & CROCKETT v. NORFOLK & W. R. Co.*

So, an instruction in an action against a carrier by a shipper for injury to stock shipped, that under a contract to receive the stock and transport it it devolved upon the railway company to provide all necessary stock pens at the place where the cattle were to be received to enable the shipper to load the stock, and that if it failed to provide such necessary pens within a reasonable time after they were at the place of delivery, and injury resulted therefrom, the company would be liable for damages resulting therefrom, is not subject to the objection that it required the railway company to give that shipper preference over any other shipper in the use of the pens, though other shippers might have equal or better rights to first service. *Missouri, K. & T. R. Co. v. Woods* (Tex. Civ. App.) 31 S. W. 237, 2 Am. & Eng. R. Cas. N. S. 519.

An instruction in an action against a carrier for damage to a shipment of mules, placing the 44 L. R. A.

inability of the plaintiff to recover on his failure to notify the defendant to have the cars containing the mules switched up to the chute of the stock pens until after the engine pulling the train had left the place, is properly refused as ignoring the duty of the defendant to have proper machinery and facilities for unloading stock to be fed when, in the course of transit, it may be necessary to do so, and as assuming, as matter of law, that the engine remained a reasonable time after the plaintiff obtained information, giving rise to the necessity for unloading. *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 268.

So, a defect in a platform causing an injury to a horse in attempting to load him on the cars in a station in the stock lot used by the company for the purpose of loading and unloading stock will not excuse the railroad company from liability for the injury in the absence of full diligence to discover the defect before exposing the horse to the injury. *East Tennessee, V. & G. R. Co. v. Herrman*, 92 Ga. 384.

And a railroad company carrying live stock which furnishes a shipper, for loading cattle and hogs, with a chute, the bottom of which is covered with ice, is not relieved from liability for injuries caused thereby by the fact that its condition was due to the effects of a general storm which affected the whole surrounding country. *Kincaid v. Kansas City, C. & S. R. Co.* 62 Mo. App. 363.

And the dangerous condition of such a chute furnished by a railroad company, the floor of which was covered with ice, is the proximate cause of an injury to the shipper, where while driving the stock up the chute, one steer slipped against another, causing the latter to fall on him and break his leg. *Ibid.*

So, the mere fact that a cattle pen at a station was not capable of holding hogs securely will not justify the conductor of a train carrying a carload of cattle and hogs in refusing to allow the car to be switched and lay out, where the train had been delayed and the cattle were found to be suffering, and there was nothing to show that the railroad company was not under the duty of having a pen safe for hogs as well as cattle. *Johnston v. Alabama & V. R. Co.* 69 Miss. 191.

And a defense, in an action against a carrier by a shipper for negligently permitting its pens from which his pigs were shipped to be covered with lime, whereby his pigs were injured, that the lime was placed upon such pens under the provision of the contagious diseases

pen and a force pen, to enable shippers of live stock to load the stock on their cars. In the stock pen was a culvert, which was made to convey the water from a fresh-water spring, and about one third of the culvert, at each end, was broken in and uncovered. There was a tank of salt water on the hill side, above the pen, from which the salt water escaped, and flowed into the pen and into the culvert. Many of the lambs, when put into the pen to be loaded, although the loading was done as rapidly as possible, drank of the salt water, in spite of the efforts of the men engaged in loading them to prevent it. It is shown by the evidence that Harman & Crockett had bought the lambs from persons in the surrounding country, who delivered the lambs at the railroad station for shipment, and that Harman & Crockett knew nothing of there being salt water in the pen until they learned the fact after the disaster had happened to their stock. But it

was known by the railroad company's agent at its station at Saltville. The lambs, which were shipped from Saltville, left there on the cars about 5 o'clock in the afternoon, and arrived at Lynchburg at 11 o'clock the next morning. Mr. Crockett, one of the owners, met them at Lynchburg, and had them unloaded for the purpose of feeding and watering them. He fed them some hay, but finding them very thirsty and feverish, he turned the water off, and they got very little, if any, at that point. They arrived in Baltimore the next day, when they were found to be still so very thirsty that they could hardly be gotten away from the water, and were in bad condition, and looking as if sick. When they arrived at Baltimore, the two lots were unloaded, and turned into the feeding pens together, and became intermingled. At Baltimore they commenced to die, and by the time they arrived at Jersey City, the next day eighty-five had died on the route. Sixty-

of animals act of 1878, whereby every loading pen was required to be disinfected before using, is not sufficient to exonerate the carrier, as the defense admits that the pens in which the pigs were placed were improper for their reception, and there is nothing to show that under the provisions of the act it was impossible to have safer pens. *Shaw v. Great Southern & W. R. Co.* Ir. L. R. 8 C. L. 10.

So, the negligence of a railroad company in maintaining a stock pen the gate of which had defective fastenings is the proximate cause of an injury to cattle resulting from their escape from being stampeded by the noise of a passing train and frightened so that they burst open the gate, and the company is liable for such injury. *Texas & P. R. Co. v. Bigham*, 90 Tex. 223.

But where a shipper of stock confines cattle in the stock pens of a railroad company preparatory to shipment, and the appliances for fastening the pen are defective, and, to prevent the escape of the cattle, the shipper attempts to fasten it with a rope, when the cattle are stampeded by the noise of a passing train causing them to rush against the gate, whereby it is thrown open and the shipper seriously injured, the negligence of the company in permitting the gate to remain in a defective condition is not the proximate cause of the injury, and the shipper cannot recover in an action therefor against the carrier. *Ibid.*

And to warrant a recovery by a shipper for loss of weight of stock by reason of a failure of the carrier to supply sufficient pens for loading, it must appear that the loss in weight occurred by reason of such failure, and the recovery cannot include loss in weight from any other cause. *Missouri, K. & T. R. Co. v. Woods* (Tex. Civ. App.) 31 S. W. 237, 2 Am. & Eng. R. Cas. N. S. 519.

And the liability of a railroad company whose train, which contained a car loaded with cattle, was stopped by drifts and backed to a station, and the cattle unloaded and placed in an insecure pen, rests upon its negligence in placing the cattle in an insecure place, and if the loss did not occur in consequence of such negligence the company is not liable. *Chapin v. Chicago, M. & St. P. R. Co.* 79 Iowa, 582.

Under the Texas statute requiring safe and suitable pens to be provided by a railroad company it is liable for damages resulting from defective pens due to its negligence. *Galveston, H. & S. A. R. Co. v. Jackson* (Tex. Civ. App.) 37 S. W. 255.
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III. Commencement and termination of risk.

The liability of a railroad company begins from the time it receives stock in its pens for shipment. *Galveston, H. & S. A. R. Co. v. Jackson* (Tex. Civ. App.) 37 S. W. 255.

And the delivery by a shipper of a horse at a stock pen and on a chute provided by the railroad company for loading stock, and designated by its agents as appliances to be used in loading, is a sufficient delivery to charge the company with liability if the horse is injured, because the chute is in a rotten and defective condition. *McCullough v. Wabash Western R. Co.* 34 Mo. App. 23.

So, the delivery and reception of hogs in the stock pens of a railroad company for transportation is equivalent to a contract to transport them without unnecessary delay, and renders the railroad company liable for injuries from delay caused by a lack of rolling stock or otherwise. *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527.

And a railroad company which enters into an agreement with a shipper to carry cattle, and directs him where he should place them preparatory to their transfer, in obedience to which direction he delivers the stock in the railway's cattle pens, becomes from the moment of the delivery a carrier as to such stock, and its responsibility as such then attaches; the deposit being a mere accessory to the carriage. Liability is not postponed until the time when the stock shall be actually put in motion. *Mason v. Missouri P. R. Co.* 25 Mo. App. 473.

And the refusal of a railroad company to ship cattle from a station after they had been delivered according to the terms of the contract of shipment at stockyards of the company at that station and placed in such stockyards, relieves the shipper from the necessity of making any further delivery or offer to deliver. *Louisville, N. A. & C. R. Co. v. Godman*, 104 Ind. 490.

So, cattle which had been placed in the stock pen of a railroad company by direction of the company's agent for the purpose of immediate shipment, which escaped through a defect in the pen while the work of putting the herd on board the cars was actually going on and nearly half of them had already been loaded, must be considered to have been received by the carrier for shipment, rendering it responsible for them as a common carrier. *Gulf, C. & S. F. R. Co. v. Tarwick*, 80 Tex. 270.

And in *Moffat v. Great Western R. Co.* 15 L. T. N. S. 630, which was an action for dam-

one more died the following night, and others were sick, which very materially affected the sale of those that had survived. It appears from the certificate of the evidence, as testified to by men of large experience in the live-stock business that it is dangerous to animals to give salt to them, and then let them have free access to water; that the salt creates an intense thirst, which causes the animals—especially lambs—to drink immoderately of the water, the effect of which is to produce sickness, from which they are liable to die. It being proved that the stock pen at its station at Saltville was the means provided by the railroad company to enable shippers to load their live stock on its cars, and that it permitted salt water to be in the pens, accessible to the lambs, the company had not performed its legal duty to furnish and maintain suitable and safe facilities to shippers for receiving their stock for shipment. It was therefore guilty of negligence,

and liable to the plaintiffs for such loss as was caused by its negligence. It appearing from the evidence that salt water is dangerous to live stock when drunk by them; that it was in the stock pen at Saltville, into which the lambs had to be driven for the purpose of loading them on the cars; that the lambs, while being loaded, drank of it; that they were in good condition when put into the cars; and that they soon thereafter became very thirsty and feverish, and affected like stock that had been made sick by drinking water after being salted,—the jury were clearly justified in finding that this was the cause of their death.

It was argued by the plaintiff in error that it assumed no other liability than the safe carriage and delivery of the stock to its connecting line at Lynchburg, that it did this, and that its liability then ceased. This defense cannot avail, for the evidence shows that the injury was done at Saltville, the

ages to a horse in which the animal on arriving at the station was put in the horse box and tied up, after which one of the porters hearing a noise found that she had got her foot into the manger in front of her and then slipped, and before the porter could get a knife to cut the rope in which she was entangled had strangled to death, the court laid down the rule that the carrier was liable if guilty of negligence in the carriage of the horse, meaning thereby its treatment of the animal from the moment it took it into custody, but that it was not responsible for accidents of a nature beyond the range of ordinary risks.

A railroad company is not liable, however, for damages due to the escape of cattle from its cattle pens where they had been placed there by permission of its agent but had not been received for shipment, and no bill of lading had been given. *Fort Worth & D. C. R. Co. v. Riley* (Tex. App.) 1 S. W. 446, 27 Am. & Eng. R. Cas. 49.

And a refusal by a railroad company to receive and carry cattle cannot be predicated upon the fact that the train was not held until the cattle, which had escaped, could be recovered, where there is nothing to show that the means for loading was not in a proper condition, and the duty of loading rested with the shipper. *Louisville, N. A. & C. R. Co. v. Godman*, 104 Ind. 490.

And a shipper of hogs who arrived at the station from which he desired to ship, too late for the train on which he expected to ship them, the hogs not being then in the yards or on the depot grounds, but in a private yard in no way controlled or used by the carrier, cannot complain of the refusal of the carrier to delay the train at the station until the hogs could be driven into the stock yards and loaded, and cannot recover damages for such refusal. *Frazier v. Kansas City, St. J. & C. B. R. Co.* 48 Iowa, 571.

And the fact that the agent of a carrier told a shipper a few days previous that he need not load two cars he then had there until the train arrived does not estop the carrier from insisting upon a compliance with the usual custom as to future shipments of a greater number of carloads of stock. *Ibid.*

So, the obligation of a railroad carrying stock ceases as a common carrier when it has delivered the stock at its place of destination and unloaded from its cars and stored it in its proper place after which it is merely required to see that it is properly cared for and to de-

liver it to the shipper or his consignees. *Chicago & E. I. R. Co. v. Pratt*, 13 Ill. App. 477.

And the liability of a railroad company as carrier of livestock under a clause in a shipping contract limiting its liability to losses occurring on its own line, ends upon the refusal of the connecting carrier to receive it when it has been placed in pens at the end of its line, its liability then shifting to that of custodian of the property or forwarding agent, which involves only reasonable care of the property while it is held for delivery, and its liability for causing the live stock, consisting of hogs, to be stored in infected pens depends upon the exercise of ordinary care or reasonable diligence. *Larimore v. Chicago & A. R. Co.* 65 Mo. App. 167.

So, the failure to maintain fences along the line of a railway and between it and other premises of the railway company is not a cause for complaint which will render it liable for damages arising from the fact that cattle in their transit from the railroad to the highway and while passing through the station yard were frightened by a porter with a lantern, without fault on his part, so that one of them ran upon the railroad and was killed. *Roberts v. Great Western R. Co.* 4 Jur. N. S. 1240, 4 C. B. N. S. 506, 27 L. J. C. P. N. S. 266.

And a railroad company transporting a horse under a contract that it will not be answerable for damage, which lands the horse safely at its destination and ties it in a horse-box, where it is left in an exposed situation for twenty-four hours and seriously injured thereby, owing to the fact that the owner has forgotten it, is not liable for such damages. *Wise v. Great Western R. Co.* 1 Hurst. & N. 63, 25 L. J. Exch. N. S. 258.

And a railroad company which carried cattle to their destination, and arriving on Sunday morning, owing to a police regulation, the owner was unable to take them away that day, whereupon they were placed in the defendant's pens, and two of them died during their confinement, and he was prevented on the next day from taking the other away because of his refusal to sign a receipt for the whole number, ended its liability as a carrier upon the delivery of the cattle in the yard, and is not liable for the loss of the cattle which died or for injury to the rest from the delay or from a fall in the market price. *Shepherd v. Bristol & E. R. Co.* L. R. 3 Exch. 189, 37 L. J. Exch. N. S. 113, 18 L. T. N. S. 528, 16 Week. Rep. 982.

So, in *Great Northern R. Co. v. Swaffield*, L.

shipping point, and in the pen it had provided to enable shippers to load their stock in its cars.

It was also urged that under the printed contract of shipment the railroad company was not responsible for any injury to the stock until they were "loaded into the car,

and the car door fastened or secured by the conductor." It failed, as we have seen, to furnish and maintain suitable facilities for receiving the live stock, of which it held itself out as a public carrier. Such failure was negligence, and a common carrier cannot contract for exemption from liability for

R. 9 Exch. 132, 43 L. J. Exch. N. S. 89, 30 L. T. N. S. 562, in which a railroad company carried a horse to its destination, and finding no one there to take it, and having no pen at that place placed it in a livery stable, it was held that its duty as a carrier then ended, and that where the owner unreasonably refused to take the horse from the livery stable, and the carrier afterwards took him and sent him to the owner, paying the charges of the livery-stable keeper, it was entitled to recover them from the owner.

Where a railroad company does not provide suitable facilities for the delivery of live stock contracted to be carried by it, however, it may be compelled to deliver through facilities furnished by the consignee. *Covington Stockyards Co. v. Kelth*, 139 U. S. 128, 35 L. ed. 73.

So, where a patron of a railroad company has extended a track of his own from the track of the company to his premises and there equipped a station for unloading, there is no obligation on the part of the railroad company to such person or his patrons to provide a depot on its line for the unloading of cattle consigned to his yards. *Walker v. Keenan*, 34 U. S. App. 691, 73 Fed. Rep. 755, 19 C. C. A. 668.

The question whether a carrier of horses failed to exercise due care in keeping them after arrival at the place of destination for some time upon a plank floor in consequence of their having been previously confined for some time in the car, and whether such confinement would necessarily result in injury, are questions of fact for the jury, and evidence that it was customary to keep horses upon plank floors in that locality, and that it was impracticable to keep them upon earth floors, is admissible in an action for damages therefor. *Moses v. Port Townsend Southern R. Co.* 5 Wash. 595.

IV. *Effect of contributory negligence.*

Contributory negligence of a shipper which will relieve a railway company from liability for making defective pens cannot be founded upon his knowledge of their unfitness. *Galveston, H. & S. A. R. Co. v. Jackson* (Tex. Civ. App.) 37 S. W. 255.

A railroad company cannot absolve itself from its statutory duty to keep suitable pens for the shipment of cattle by showing that they were so badly kept or constructed as to make it contributory negligence upon the part of the shipper to use them. *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 270.

And knowledge of the unsafe condition of an apron or platform connecting a stock chute with a stock car into which cattle are being driven by a shipper in the exercise of due care will not prevent him from recovering for injuries received from a defect by reason of which the apron gave way and he was precipitated against the side of the car and was injured. *White v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 478, 7 L. R. A. 44.

The obligation to provide a safe mode of delivering stock transported rests with the railroad company, and if the company by its agent require a shipper's agent to remove a horse from a car on a dangerous platform,—one not ordinarily safe for the delivery of stock,—and the horse is injured thereby, the company is re- 44 L. R. A.

sponsible though the agent of the owner may have been apprised of the danger. *Owen v. Louisville & N. R. Co.* 87 Ky. 626.

And a shipper of hogs and cattle who is damaged because of the icy condition of a chute furnished by a railroad company for the purpose of loading his stock does not lay himself open to the charge of contributory negligence in failing to put ashes or sand on the floor of the chute, as the duty to furnish a safe means of loading rested with the railroad company, though he might be guilty of contributory negligence if he used a means of loading so glaringly dangerous as to make it reasonably certain that injury would result. *Kincaid v. Kansas City, C. & S. R. Co.* 62 Mo. App. 365.

So, the act of a shipper of a horse in going into the stock pen and leading the horse up the chute and into the car, unassisted by any agent or employee of the railway company, will not relieve the company from liability for injuries to the horse due to the fact that the chute was in a rotten and defective condition. *McCullough v. Wabash Western R. Co.* 34 Mo. App. 23.

And the act of an owner of cattle in opening cattle pens of a carrier and permitting the cattle to escape will not relieve the carrier from liability for damages due to a failure to provide sufficient pens, where it has refused his request to obtain the pens of another company which are sufficient, and crowded them into small pens, where they are trampling each other to death. *Gulf, C. & S. F. R. Co. v. York*, 2 Tex. App. Civ. Cas. (Willson) § 813, p. 718.

And an instruction in an action against a carrier for damage to a shipment of mules, that if the owner could have procured the feeding, watering, and resting of the mules, and thereby saved himself from damage which ensued from a failure to provide pens, he could not recover therefor, is properly refused as imposing a duty on the plaintiff which devolved upon the defendant. *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 268.

It has been held, however, that the question whether a shipper of a horse was guilty of contributory negligence which would prevent his recovery for injuries to the horse resulting from a fall from a platform supplied by the railroad company for the purpose of loading the horse is one of fact for the jury to determine from all the facts of the case, though the fact that the platform was dangerous may have been known to the shipper and he himself did the loading. *Gulf, C. & S. F. R. Co. v. Wood* (Tex. Civ. App.) 30 S. W. 715.

So, an answer in an action against a railroad company for supplying a shipper of a horse with a defective chute or platform upon which the horse was required to walk in leaving the car, whereby he was injured, alleging that in taking the horse from the car the plaintiff's agents by their negligence and by reason of the wildness and unruiness of the horse suffered him to jerk, rear, and fall, but that he was not hurt or otherwise injured, not alleging that but for such negligence he would not have fallen, does not set up contributory negligence so as to render a reply necessary. *Owen v. Louisville & N. R. Co.* 87 Ky. 626.

And evidence in an action by a shipper of

injury or loss caused by its own neglect. Va. Code, § 1296; *Virginia & T. R. Co. v. Sayers*, 26 Gratt. 328. See also *Clarke v. Rochester & S. R. Co.* 67 Am. Dec. 205, and the valuable note thereto, 14 N. Y. 570.

It was further claimed that even if it was negligence in the railroad company to permit

stock against a railroad company for an injury caused by defective stock pens, showing that the shipper thought the pens not thoroughly secure, but that the railroad company through its agent was present and pointed out the pens as the place for the reception of the stock, does not justify a demurrer to the evidence on the ground that his knowledge of their insecurity should prevent a recovery: It is at most a question for the jury. *Mason v. Missouri P. R. Co.* 25 Mo. App. 473.

So, the question whether an injury to a horse during transportation was caused by reason of the failure of the railroad company to provide suitable and safe facilities for unloading the horse, or whether the facilities for unloading were suitable and the injury was caused by the contributory negligence of the owner which would prevent a recovery, is a question to be tried upon the merits of the case, and not upon a plea to the jurisdiction of the court. *Chesapeake & O. R. Co. v. American Exch. Bank*, 92 Va. 496, 44 L. R. A. —.

V. Relief from liability by contract.

Though a contract between a railroad company and a shipper by which the shipper undertakes to load, feed, water, and unload his stock at his own risk and expense may be valid and binding, it is the duty of the railroad company to provide suitable and safe facilities for loading and unloading and for watering and feeding, a failure to perform which is negligence, against liability for which it cannot contract. *Chesapeake & O. R. Co. v. American Exch. Bank*, 92 Va. 496, 44 L. R. A. —.

And a stipulation in a contract for transportation of a horse that the shipper should unload it does not relieve the railroad company from liability for an injury to the horse while the shipper's agent was unloading it, resulting from the use of a dangerous platform supplied him by the company. *Owen v. Louisville & N. R. Co.* 87 Ky. 626.

And a railroad company receiving a number of cattle upon its cars for transportation, which started them and took them a part of the distance and then had the cars containing them detached from the train and placed upon a side track where the cattle could neither be fed nor watered nor unloaded with safety, where they were detained for three or four days, and several of the animals perished from hunger and the inclemency of the weather, and they were greatly reduced in flesh and weakened, is liable for the damages thereby caused, though the carriage was under a special contract by which the owners undertook all risk of loss, injury, damage, and other contingencies in loading, unloading, conveyance, and otherwise. *Keeney v. Grand Trunk R. Co.* 59 Barb. 104.

So, where a shipper of a horse and a railroad company make a verbal contract for the transportation of the horse, and he is directed as to the place and means of placing the animal in the car, and follows such direction, and the horse is injured by reason of a defective chute leading from the stockpen to the car, and the shipper then abandons the shipment but afterwards enters into new negotiations and ships the horse in a car from another place, whereupon a written contract is entered into, making 44 L. R. A.

the salt water to be in the pen which it had provided to enable shippers of live stock to load their stock in its cars, and the only means which it had furnished for that purpose, yet that the plaintiffs were guilty of contributory negligence in allowing the lambs to get to the water while being loaded,

no mention of a release of the damages already sustained, such written contract does not relieve the railroad company from responsibility for such injury, and is inadmissible in evidence in an action therefor. *McCullough v. Wabash Western R. Co.* 34 Mo. App. 23.

And a bill of lading of cattle shipped, given to the shipper after the time when the cattle escaped from the pen of the railroad company and were injured thereby, in which the shipper waives any and all causes of action for damages which have accrued to him by any written or verbal contract prior to the execution thereof, is inadmissible in evidence in an action for such injury, where the answer was a general denial as, under it, the defendant could not be allowed to make a defense of confession and avoidance. *Cooke v. Kansas City, Ft. S. & M. R. Co.* 57 Mo. App. 471.

And a condition in a contract for the transportation of cattle by which the owner undertakes all risks of loading, unloading, and carriage, whether arising from negligence or default of the company or its servants or from defect or imperfection in the station, platform, or other places of loading and unloading, or from any cause whatsoever, is unreasonable and invalid, and will not relieve the company from liability for a loss due to the fact that the place at which the cattle were removed was at a siding, wholly unprotected by fences or otherwise from the line, and only capable of accommodating one truck at a time, and while the second truck was being unloaded the cattle, which had been removed from the first, strayed on the line and some of them were killed by a passing train. *Rooth v. North Eastern R. Co.* L. R. 2 Exch. 173, 36 L. J. Exch. N. S. 83, 15 L. T. N. S. 624, 15 Week. Rep. 695.

In the above case, *Roberts v. Great Western R. Co.* 4 C. B. N. S. 506, 4 Jur. N. S. 1240, 27 L. J. C. P. N. S. 266, *supra*, III, was distinguished upon the ground that in that case it was merely held that the company was under no absolute obligation to fence its premises from the line in order to protect animals under its customers' exclusive control.

The presence of a servant of a shipper who accompanies cattle, riding on a free pass, does not exempt the carrier from responsibility for an injury to the cattle resulting from their being placed in improper sheds and yards where some were frozen and some died, where there was no contract between the parties that the pass shall relieve the carrier from its common-law liability. *Feinberg v. Delaware, L. & W. R. Co.* 52 N. J. L. 451.

VI. Compensation.

A carrier of live stock cannot make a special charge for merely receiving or delivering it in and through stockyards provided by itself, and it cannot invest another corporation with authority to impose burdens of that kind upon shippers and consignees. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73.

And the legal duty of a carrier of live stock is not fully discharged by receiving and discharging live stock at yards access to which must be purchased. *Keith v. Kentucky C. R. Co.* 1 Inters. Com. Rep. 601.

Where delivery of live stock is to be made at

and they cannot recover. The evidence satisfactorily establishes the negligence of the railroad company, and that the loss sustained by the plaintiffs was due to such negligence. Contributory negligence, to defeat a recovery, must be satisfactorily and affirmatively shown. Unless it appear from the plaintiff's evidence, it devolves on the defendant to prove it. Contributory negligence on the part of the plaintiffs nowhere appears. There is no evidence whatever that they knew of the existence of salt water in the loading pen, and it is not even pretended that they had any actual knowledge of it, but it is claimed that the men who brought the lambs to the station became aware of it. This is true, and the evidence shows also that they used every effort to prevent the lambs from drinking the water. The fact that they learned of the presence of the salt water in

the pen does not fix contributory negligence upon the plaintiffs. The men who delivered the lambs at the station, and put them in the cars, were not the employees of the plaintiff. They were the persons from whom Harman & Crockett had bought the stock to be delivered to the railroad for shipment. In making the delivery, they were in no sense the agents of the plaintiffs. They were simply fulfilling their parts of the contract of sale. Therefore, their knowledge was not the knowledge of the plaintiffs, and could not be imputed to them. The doctrine of constructive notice by agency does not apply. The defense of contributory negligence is not sustained.

On the trial the jury found a verdict in favor of the plaintiffs for \$742, with interest thereon from June 17, 1891. The defendant company moved the court to set aside the

a place at a point away from the carrier's line, however, and by means of a track not owned or possessed by the carrier, the printed schedule of such carrier showing in two items the compensation exacted for the haul and that exacted for the transfer to the point of delivery, the theory that a carrier is bound by law to unload freight at a station on its own line does not prevent the carrier separating the charge for loading and hauling upon its line from its charge for transporting from its line to a specified point away from its line. *Walker v. Keenan*, 34 U. S. App. 601, 73 Fed. Rep. 755, 19 C. C. A. 668.

And carriers need not move cattle from their lines of road over the tracks of stockyard companies to stockyards belonging to such companies without compensation other than their charges for hauling to points on their respective lines. *Ibid*.

And the compensation for transporting live stock may be apportioned so that a part may pay for the loading and hauling and another part for the unloading and the care of the animals pending delivery. *Ibid*.

VII. Discrimination.

Where two stockyards are contiguous and both connected with a railroad by suitable switches, and a railroad can receive stock from and deliver it to the one as easily as the other, it cannot discriminate between them and insist upon the delivery of stock in one yard where it is consigned to the other. *McCoy v. Cincinnati*, 1 St. L. & C. R. Co. 13 Fed. Rep. 3.

And a railroad is not justified by the plea of public convenience in making the yards of one stockyard company their exclusive stockyard depot at a particular place, thus enabling that stockyard company to exact payment of those who were not its customers for the privilege of passing stock to and from the cars, where there are yards owned by other persons near to and on the same switch where the public might be suitably served at lower rates. *Keith v. Kentucky C. R. Co.* 1 Inters. Com. Rep. 601.

VIII. Matters of procedure.

A cause of action for damages for injury to a horse caused by being crowded or pushed off of a narrow platform over which it was passing in being unloaded is within the jurisdiction of the proper court in the city or county in which the injury occurred. *Chesapeake & O. R. Co. v. American Exch. Bank*, 92 Va. 496, 44 L. R. A.

A complaint in an action against a railroad 44 L. R. A.

company by a shipper alleging that the company violated its contract and committed a wrong in refusing to receive and carry cattle is insufficient where the gravamen of the action is the failure of the company to maintain and keep in repair proper ways and means for loading the cattle into the cars. *Louisville, N. A. & C. R. Co. v. Godman*, 104 Ind. 490.

And a complaint in an action against a common carrier to which a horse had been delivered for transportation, alleging negligence in its care while in transit and also after it had arrived at its destination while remaining in a stable in which it was placed by the carrier in its custody as warehouseman, alleges but one cause of action. *Armstrong v. Chicago, M. & St. P. R. Co.* 45 Minn. 85.

So, evidence of the condition of mules when taken off of cars after transportation, and their value in that condition, and also in a sound condition, is admissible in an action for damages against the carrier, where it is claimed that the injury sustained was in consequence of the fact that they had been left standing in the cars at the station in cold, stormy weather, for about twenty-four hours without water or food, and they could not be unloaded, fed, or watered because the cars containing them were left on the spur track 200 feet from the chute of the stock pens. *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 268.

And a witness to whose competency no objection is made may testify in an action against a railroad company for negligently putting a horse after transportation into an unsuitable and unsafe stable whereby she was injured, as to whether the stable was of the character in which farmers and others in the neighborhood were accustomed to keep horses and cattle. *Armstrong v. Chicago, M. & St. P. R. Co.* 45 Minn. 85.

And a farmer brought up on a farm in this country, who is acquainted with the stable in question and with stables in which the people of the country usually keep their horses, and to whose competency as a witness no objection is made, may be asked in such an action if in his judgment such stable is a suitable place in which to put her. *Ibid*.

And experienced farmers, cattle dealers, vendors, or traders are competent witnesses in an action by a shipper against a railroad company for negligence in maintaining a weak, rotten, and defective cattle pen, by reason of which his cattle escaped, to testify as to the effect of the escape, stampeding, overheating, etc., upon fat cattle. *Cooke v. Kansas City, Ft. S. & M. R. Co.* 57 Mo. App. 471.

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verdict, but the court refused to do so, and gave judgment thereon. It was proved that the lambs would average about seventy-seven pounds each, and that they were worth in the New York market—the place where they were to be sold—from 7½ to 8 cents per pound. One hundred and forty-seven died before they could be gotten to market. It is an easy calculation to show that, exclusive of any compensation for those that were sold as “sick lambs,” the amount of the verdict of the jury was rather below than above the actual damages sustained by the defendants in error. And the evidence was ample to sustain the charge of the plaintiffs in the suit that the loss that they had sustained was due to the negligence of the railroad company. The court rightly overruled the motion for a new trial.

There is no error in the judgment appealed from, and the same must be affirmed.

Buchanan, J., having been of counsel, did not sit.

SOUTHERN RAILWAY COMPANY, *Appt.*,
v.
FRANKLIN & PITTSYLVANIA RAIL-
ROAD COMPANY.

(.....Va.....)

1. The obligation of the lessee of a railroad to maintain and operate the road during the term of the lease is a necessary implication, where the road was built with the aid of county subscriptions to give railroad connection to the county seat and with the expectation of making the lease, while the lease provides for equipping the road as may be necessary to its use and enjoyment, and that the receipts shall be applied to the annual expenses of running the road and keeping it in repair, then to reimburse the lessee for the annual rent, etc., although there is no express covenant requiring the operation of the road.
2. Equity may compel the continued operation of a leased railroad during the term of the lease by a mandatory injunction, which is in fact a decree of specific performance, as the remedy at law would be neither complete nor adequate.
3. Hardship will not prevent specific performance of a contract which was fairly and justly made, when it results from miscalculation or from contingencies which might have been foreseen, and for which the complainant is not in fault.
4. A decree for the continuous operation of a leased railroad as it was then operated is not objectionable as disregarding the exigencies that may arise, when the existing train service is such as the lessee has for several years deemed proper and necessary.

NOTE.—For specific performance of duty of lessee to operate railroad, see also *Schmidt v. Louisville & N. R. Co.* (Ky.) 38 L. R. A. 809, and *note*.

For mandamus to compel operation of railroad, see *State, Little, v. Dodge City, M. & T. R. Co.* (Kan.) 24 L. R. A. 564, and *note*; also *State, Kellogg, v. Missouri P. R. Co.* (Kan.) 29 L. R. A. 444.
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5. A decree requiring the operation of a leased railroad may include a branch road owned by the lessee, which is essential to the operation of the other.

(*Keith, P., dissents.*)

(February 2, 1899.)

APPEAL by defendant from a decree of the Circuit Court for Franklin County in favor of complainant in a suit brought to compel defendant to operate complainant's road in alleged accordance with the terms of a lease. *Affirmed with amendments.*

The facts are stated in the opinion.

Messrs. Blackford, Horsley, & Blackford, for appellant:

The court clearly did not have jurisdiction to grant the relief prayed for and to make such an order as that contained in the final decree.

The court could not cause the contract to be excuted through the instrumentalities of the court. This court, if it undertakes this labor, must take a new departure in equity practice and jurisdiction, and override long-established doctrines of courts and text writers.

Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 433; *Atlanta & W. P. R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305; *Pom. Contr.* 2d ed. § 312; *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 423; *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385; *Ross v. Union P. R. Co. Woolw.* 26; *Hoard v. Chesapeake & O. R. Co.* 123 U. S. 226, 31 L. ed 132; *Campbell v. Rust*, 85 Va. 653; *Ewing v. Litchfield*, 91 Va. 579.

If neither the plaintiff nor the public has a right to require it to operate this road, then the two together cannot require it, and the public is not a party to this suit.

When the law itself contemplates that it may be necessary for a road to be abandoned, and provides that when it is abandoned the right of the public is simply to vacate the power of the corporation to use that which it has abandoned, there can be no right in the public by bill in equity or otherwise to compel specific performance by the corporation.

People v. Albany & V. R. Co. 24 N. Y. 261, 82 Am. Dec. 295; *Sherwood v. Atlantic & D. R. Co.* 94 Va. 291; *Collins v. Sutton*, 94 Va. 127.

The plaintiff divested of the desires and convenience of those living adjacent to the road, but who are incapable of maintaining the road, has no right to the interference of a court of equity.

The hardship which would be imposed on the defendant in requiring it to use its revenues from other sources in operating the road which it never covenanted to operate, at enormous loss, is sufficient in itself to deter the court in decreeing specific execution.

Pom. Contr. § 186; *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501; *London v. Nash*, 3 Atk. 512; *Booten v. Scheffer*, 21 Gratt. 497.

Unless a charter positively requires a railroad company to operate its road, the court should put no construction which would impose such an obligation

Com. v. Fitchburg R. Co. 12 Gray, 180; *Sherwood v. Atlantic & D. R. Co.* 94 Va. 291. *Mr. Eppa Hunton, Jr.*, also for appellant:

In construing this contract "regard should be had to the intention of the parties contracting, and such intention should be given effect. To arrive at this intention regard is to be had to the situation of the parties, the subject-matter of the agreement, the object which the parties had in view at the time and intended to accomplish."

Young v. Ellis, 91 Va. 301.

The reason of the lease was to induce the appellant to become responsible for the bonds, and to give it security for the money paid by it.

This and this alone brought about this contract.

Can it be imagined that this lease would have been approved and ratified by the learned judge of the circuit court of Alexandria in the case of *Graham v. Washington City*. *V. M. & S. R. Co.* if it had provided for the continuous operation of this road at a ruinous loss to the property which was then under his protecting care?

Delaware & H. Canal Co. v. Pennsylvania Coal Co. 8 Wall. 276, 19 L. ed. 349; *Aspdin v. Austin*, 5 Q. B. 671; *Maryland v. Baltimore & O. R. Co.* 22 Wall. 111, 22 L. ed. 714.

A mandamus will never be awarded unless the right to have the thing done which is sought is clearly established.

Northern P. R. Co. v. Washington Territory, *Dustin*, 142 U. S. 492, 35 L. ed. 1092.

It cannot be maintained that the covenant for continuous operation is clearly established.

A construction should be avoided if it can be done consistently with the terms of the agreement which would be unreasonable or unequal, and that construction which is most obviously just is to be favored as most in accordance with the presumed intention of the parties.

Young v. Ellis, 91 Va. 301.

Enforcement of contracts may be interfered with and prevented by subsequent unforeseen events, which introduce a sufficient element of inequality, unfairness, or hardship.

Pom. Spec. Perf. 2d ed. § 178, p. 249.

In an action at law, where there has been an entire breach of the contract, compensation may be recovered at once for the whole loss.

James v. Kibler, 94 Va. 173.

Courts will not grant the extraordinary remedy of mandamus where to do so would be fruitless and unavailing.

2 *Spelling*, Extraordinary Relief, § 1377; *Strasburg v. Winchester & S. R. Co.* 94 Va. 648.

Performance of this contract involves skill, personal labor, and cultivated judgment.

Campbell v. Rust, 85 Va. 665; *Atlanta & W. P. R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305; *Texas & P. R. Co. v. Marshall*, 135 U. S. 392, 34 L. ed. 385; *Pom. Contr.* 2d ed. § 312.

A mandatory injunction is granted with 44 L. R. A.

extreme caution, and ordinarily is restricted to cases where a court of law cannot grant adequate relief, or where full compensation cannot be made in damages.

10 Am. & Eng. Enc. Law, p. 789; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955; *Wheatley v. Westminster Brymbo Coal & C. Co.* L. R. 9 Eq. 538; *Starnes v. Newsom*, 1 Tenn. Ch. 239; *Blanchard v. Detroit*, L. & L. M. R. Co. 31 Mich. 44, 18 Am. Rep. 142; *Atlanta & W. P. R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305; *Fothergill v. Rowland*, L. R. 17 Eq. 132; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84; *Powell Duffryn Steam Coal Co. v. Taff Vale R. Co.* L. R. 9 Ch. 331; *Port Clinton R. Co. v. Cleveland & T. R. Co.* 13 Ohio St. 544; *Blackett v. Bates*, L. R. 1 Ch. 117; *People v. Albany & V. R. Co.* 24 N. Y. 267, 82 Am. Dec. 295; *Union P. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428; *McCann v. South Nashville Street R. Co.* 2 Tenn. Ch. 773.

Messrs. Phlegar & Johnson, for appellees:

The practical construction, for three years, shows what the business required and what the lessee considered its duty under the lease, and the court decreed according to appellant's own construction of the lease and the necessities of the trade. Surely less should not be required.

Knopf v. Richmond, F. & P. R. Co. 85 Va. 769; *Williams v. Tomlin* (Va.) 28 S. E. 883; *Pom. Spec. Perf.* § 23, p. 30; *Price v. Penzance*, 4 Hare, 506.

Equity will enjoin the breach of a contract which it cannot require to be specifically performed.

Pom. Spec. Perf. § 24, p. 31; Note to *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* 1 Am. & Eng. R. Cas. N. S. 222, 144 N. Y. 152, 26 L. R. A. 610.

A lessee will be restrained from breaking the covenants of a lease; from committing waste; putting the property to improper use, etc.

Pom. Spec. Perf. note to § 25, citing *Frank v. Brunnenmann*, 8 W. Va. 462; *High, Inj.* § 434; *Maddox v. White*, 4 Md. 72, 59 Am. Dec. 67.

The doctrine of "one sweeping decree embracing all time and all instances" is not now the doctrine of the courts, if ever it was.

Storer v. Great Western R. Co. 2 Younge & C. Ch. Cas. 48; *Wilson v. Furness R. Co.* L. R. 9 Eq. 27; *Stuyvesant v. New York*, 11 Paige, 414; *Price v. Penzance*, 4 Hare, 506; *Colorado Land & W. Co. v. Adams*, 5 Colo. App. 190; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843; *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* 144 N. Y. 152, 26 L. R. A. 610; *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 504, 41 L. ed. 265; *Williamson v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 643; *Schmidt v. Louisville & N. R. Co.* 19 Ky. L. Rep. 666, 38 L. R. A. 809; *Pom. Spec. Perf.* of *Contr.* 2d ed. § 23.

Railroads have been built by courts.

Gilbert v. Washington City, V. M. & G. S. R. Co. 33 Gratt. 600.

Railroad leases have been operated by courts.

Gilbert v. Washington City, V. M. & G. S. R. Co. 33 Gratt. 600.

The hardships of performance will not prevent a decree for specific performance where the contract was fair when made, and the hardship grew out of subsequent circumstances, for which the plaintiff is not responsible.

Halc v. Wilkinson, 21 Gratt. 87; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955; *Franklin Teleg. Co. v. Harrison*, 145 U. S. 471, 36 L. ed. 780; *Proceet Park & O. I. K. Co. v. Coney Island & B. R. Co.* 144 N. Y. 152, 26 L. R. A. 613; *Pom. Spec. Perf.* § 178, note p. 248; *Storer v. Great Western R. Co.* 2 Younge & C. Ch. Cas. 48.

The remedy at law for this wrong is insufficient, because it is neither full nor complete. The loss of traffic, the decay of buildings and structures, the possible, if not probable, confiscation of its property and franchises, the daily and hourly breach of the contract for seventeen years, requiring a multiplicity of suits, cannot be compensated for in any action for damages.

1 Spelling, Extraordinary Relief, § 13, p. 16, notes; *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 115; *Diffendal v. Virginia Midland R. Co.* 86 Va. 459.

Equity will protect a continuing right against hourly violations of interminable duration.

1 Spelling, Extraordinary Relief, § 775; *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776.

The public interests are involved and can only be protected by a court of equity.

1 Spelling, Extraordinary Relief, § 790; *Barton v. Barbour*, 104 U. S. 135, 26 L. ed. 677; *Joy v. St. Louis*, 138 U. S. 38, 34 L. ed. 854; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 265.

There has been such part performance that justice can only be done by requiring full performance.

Pom. Spec. Perf. § 23, p. 30.

Riely, J., delivered the opinion of the court:

The Franklin & Pittsylvania Railroad Company (hereinafter called the "Franklin Company") was incorporated by an act of the general assembly of Virginia of March 12, 1878, and authorized to construct a railroad from some point on the main line of the Washington City, Virginia, Midland, & Great Southern Railroad Company (hereinafter called the "Midland Company") or any branch thereof, in the county of Pittsylvania, to Rocky Mount, the county seat of Franklin county.

On September 19, 1878, it made a lease of its road, to take effect when the same was completed, to John S. Barbour, receiver, in the chancery suit of Graham against the Washington City, Virginia, Midland, & Great Southern Railroad Company, pending in the circuit court of the city of Alexandria, for the term of thirty-four years, at the annual rental of \$7,000. The lease was made subject to the ratification of the stockholders of the Franklin Company and the approval 44 L. R. A. .

and confirmation of the said court. It was duly ratified by the former, and approved and confirmed by the latter. The road was constructed and equipped by the lessor, and delivered to the lessee on April 15, 1880, from which date the lease was to run for thirty-four years.

The Southern Railway Company having, on June 18, 1894, duly acquired, by purchase and conveyance, the road owned by the Midland Company when the lease was made, and along with it the lease to Barbour, receiver, by the Franklin Company, plainly manifested an intention, in the summer of 1897, to abandon and cease to operate the leased road. In anticipation of such action by the Southern Railway Company, and to prevent the consequences that would result from it, the Franklin Company brought its suit in equity in the circuit court of Franklin county, charging in its bill that the Southern Railway Company intended to abandon and cease to operate under the lease the road of the complainant after July 1, 1897, and asking that it be enjoined and restrained from doing so. The Southern Railway Company filed its answer to the bill, and admitted the charge of the complainant.

Is the defendant company bound to operate the leased road during the term of the lease, or may it rightfully abandon and cease to operate it? This is the first question presented for our determination. Its solution depends upon the provisions of the lease.

It is conceded that an express covenant to operate the road during the term of the lease is not to be found among the provisions thereof, but the complainant in the court below, which is the appellee here, contends that the obligation to operate the road throughout the entire term of the lease is so plainly contemplated by its provisions that the law will enforce it as an implied covenant, as fully as if the obligation were expressed in appropriate words.

Necessary implication is, beyond doubt, as much a part of an instrument as if that which is so implied was plainly expressed. "Although the words of a contract under seal," says Addison in his Treatise on Contracts (vol. 3, § 1400), "do not, in themselves, import any express covenant, yet the law, in order to promote good faith, and make men act up to the spirit, as well as to the letter, of their engagements, will create and supply, as a necessary result and consequence of the contract, certain covenants and obligations, which bind the parties as forcibly and effectually as if they had been expressed in the strongest and most explicit terms in the deed itself."

While this is very true, courts are nevertheless justly prudent and careful in inferring covenants or promises, lest they make the contract speak where it was intended to be silent, or make it speak contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties. If, however, it can be plainly seen, from all the provisions of the instrument taken together, that the obligation in question was within the contemplation of

the parties when making their contract, or is necessary to carry their intention into effect,—in other words, if it be a necessary implication from the provisions of the instrument,—the law will imply the obligation and enforce it.

Before proceeding to examine critically the provisions of the lease, it is proper to observe that a court, in construing an agreement whose language leaves in doubt its meaning as to the particular matter in controversy, in order to ascertain the intention of the parties, should have regard to the occasion which gave rise to the contract, the obvious design of the parties, and the object to be attained, as well as to the language of the instrument itself, and give the agreement that construction which will effectuate the real intent and meaning of the parties as thus ascertained from the entire instrument and by reference to the circumstances attending the making of it.

It is apparent that a principal object of the incorporators of the Franklin Company was to furnish railroad facilities to the citizens of Franklin county by connecting by rail Rocky Mount, the county seat, with the main line of the Midland Company, and thereby secure railroad communication with all sections of the state and country reached by the road and its connections. It was to this end that the county of Franklin subscribed to and paid for in its bonds \$200,000 of the capital stock of the Franklin Company. And the consummation of this object was the main inducement on the part of the Franklin Company to enter into the lease with the Midland Company; while the inducement to enter into it on the part of John S. Barbour, receiver, was, as expressed in his reports to the circuit court of Alexandria, to obtain, as he believed, a valuable feeder to his line of railroad. That the lease was in the contemplation of the parties thereto at the time the Franklin Company obtained its charter is shown by the eighth section thereof, whereby it is expressly made "lawful for said company to lease its road, or any part thereof, to the Washington City, Virginia, Midland, & Great Southern Railroad Company, or any other railroad company chartered by the commonwealth."

It is apparent, upon a fair construction of the whole instrument, considered in the light of the circumstances under which it was made, that it was within the contemplation of the parties and their intention that the road should be maintained and operated during the entire term of the lease; and, when we come to examine its provisions critically, the obligation to do so, though not expressed in words, is plainly implied.

By the lease the Franklin Company demised to John S. Barbour, receiver, its whole road from Rocky Mount to Pittsville, in Pittsylvania county, together with all its stations, water tanks, switches, sidings, privileges, franchises, and other appurtenances, including an equipment of rolling stock not to exceed in value \$20,000, for thirty-four years; said term not to commence until the Franklin Company had completed and delivered the road to the receiver, and supplied

the same with such amount of rolling stock and other equipment as might be necessary to its use and enjoyment, provided said equipment should not exceed in cost the sum of 20,000. And the receiver, in consideration of the said demise, agreed to pay to the Franklin Company an annual rental, during the term of thirty-four years, of a sum equal to 7 per centum upon the amount of certain bonds which the Franklin Company proposed to issue and secure by a mortgage upon its road, privileges, and franchises, not to exceed \$100,000. He further covenanted to apply the receipts which might be derived from the property thereby demised as follows:

First. To the payment of the annual expenses of running the road and keeping it and the equipment in proper repair.

Second. To reimburse himself for the payment of the annual rent which he had agreed to pay for the use of the road.

Third. To the payment of a dividend of 7 per centum upon the capital stock of the company, provided the capital stock should not exceed in par value the sum of \$200,000.

Fourth. The residue of said receipts, if any, after making the said payments, should be retained by the receiver for the use and benefit of the trust in his hands, under the order of the court.

He still further covenanted to return the road, at the end of the term of thirty-four years, in as good repair as when he received it, and to return rolling stock and equipment equal in value to that which he received.

In the preamble to the lease, there is also the declaration that the Franklin Railroad, when completed, "will be a valuable feeder to the traffic of the main line" of the Midland Railroad.

The leased road could not be a "feeder," valuable or otherwise, to the traffic of the main line of the lessee, unless it was operated.

Neither would there be annual expenses of running the road, and of keeping it and the equipment in repair, nor receipts to pay them, unless the road was operated.

One of the obligations of the Franklin Company, as we have seen, was to furnish rolling stock and other equipment necessary to the "use and enjoyment" of the road, not to exceed a fixed amount. The obligation to furnish the rolling stock and equipment for the use and enjoyment of the road implied the corresponding obligation to use it, and to use it was to operate the road.

By the terms of the lease, the receiver was to reimburse himself for the annual rental out of the receipts arising from the operation of the road, and provision was also made for the payment out of the receipts of a dividend to the stockholders.

The stipulations referred to plainly manifest an undertaking by the lessee to operate the road, and are inconsistent with the theory that it might, at its will and pleasure, abandon the road and cease to operate it. And that such was not the understanding of the lessee and his successors is unmistakably shown by their conduct; for although the road has been unremunerative from the

first and an increasing burden to the lessee and his successors, both he and they recognized the duty to maintain and operate it, without raising a question, so far as the record discloses, as to their obligation to do so, as did also the appellant until shortly before this suit was instituted and the injunction awarded to prevent its abandonment of the road, covering altogether a period of upwards of seventeen years.

By the general statute law of the state in force when the lease was made, an abandonment by a railroad company of its road, or a failure to use and keep it in good repair, for three successive years, rendered the company liable to a forfeiture of its charter and of its property. The parties to the lease are presumed to have known the law, and it cannot be doubted that they were fully cognizant of it. It is inconceivable that the Franklin Company would have entered into a lease of its road which would permit its abandonment by the lessee, with the consequent liability to a forfeiture of its franchises and property; and such a lease would be no less incompatible with the express covenant of the lessee to return the road in as good condition as he received it, and rolling stock and equipment equal in value to that which he received.

It was asked in argument by counsel for the appellant if it could be imagined that the circuit court of the city of Alexandria would have approved and ratified the lease if it bound the lessee to operate the road continuously during the whole term, even at a loss to the property then under its care. It may be replied, would the court have sanctioned the lease which bound the lessee to pay an annual rental of \$7,000 for thirty-four years out of moneys derived from the property then under its care, if the road might not be used, but could be abandoned at the will and pleasure of the lessee? for it is conceded that, by the terms of the lease, the rent must be paid during the whole term, whether the road be operated or not. Clearly not.

Our conclusion is that the obligation to maintain and operate the road during the term of the lease is a necessary implication from its expressed stipulations. It adds nothing to the written contract to infer an obligation to do what was actually intended by the parties and what is essential to give effect and vitality to it.

This conclusion is in no wise inconsistent with the case of *Sherwood v. Atlantic & D. R. Co.* 94 Va. 291, where this court refused to compel the railroad company to replace its tracks from its existing terminus to its former terminal station, in the city of Portsmouth, and to re-establish that point as the terminal station of its line. That case, which was much relied upon by counsel for the appellant, furnishes no ground for the contention that the appellant may abandon, at its will, the use of the appellee's road.

In that case the contract sought to be enforced was made subsequent to the mortgage under which the road was sold and acquired by the defendant company. It was held that the contract, being subsequent to the mortgage, was abrogated by the sale, and that

the purchaser took the property free and discharged from all the obligations of the contract.

It was further held in that case that, the original company having the right under its charter to fix its deep-water terminus at either one of two points, and having built its road to one of those points, and selected that as its terminus, it was not obliged by its charter to maintain any other terminus, or compelled by the general law to keep up a branch road that it had constructed to connect with its main line. So that neither by charter, nor by contractual obligation, was the defendant company obliged to make its terminal station in the city of Portsmouth.

But how different is the case at bar. By the lease there is the obligation by contract upon the lessee to use and operate the road during the term of the lease. It is true that the obligation is only implied, but it is nevertheless as operative as if it were expressed. The lease from which the obligation proceeds has never been in any wise abrogated, but in all the mutations of the properties of the lessee it has been expressly preserved, with all the duties and obligations arising under it.

In *Sherwood v. Atlantic & D. R. Co.* 94 Va. 291, the distinction was clearly drawn between the positive duties imposed by charter and those assumed by a corporation under permissive grants of power. As to the former, it was said that the court would compel their performance by appropriate remedies, while with respect to the latter it would enforce them or withhold its hands, as might seem just, upon a consideration of all the circumstances of the case.

In the case at bar there is the obligation by contract upon the lessee to maintain and operate the leased road. The obligation is in full force, and as binding as if it were a positive duty imposed by charter. The case is clearly distinguishable in principle from that of *Sherwood v. Atlantic & D. R. Co.*

The lessee being bound, by the provisions of the lease, to maintain and operate the road of the lessor, the next question for determination is whether there is any binding obligation on the appellant to do so.

In the decree of the circuit court of the city of Alexandria of September 25, 1878, by which the court approved and ratified the lease, is contained the following provision in relation to it: "And, for the purpose of establishing the rights of all parties claiming under the contract, it is hereby declared that, in any order hereafter to be made in this cause providing for a sale of the road or a reorganization of the defendant corporation, said contract shall be duly respected, and all rights acquired thereunder duly protected."

In the 37th section of the decree entered by the court, February 13, 1880, for the sale of the property of the defendant corporation (the Midland Company), the lease from the Franklin Company was expressly included; and in the 48th section of the decree it was provided that "the purchaser must take the property rights, franchises, and works sold under this decree by said commissioner sub-

ject to the leases and contracts specially named in said 37th section of this decree, . . . and the said purchaser must, as to said contracts and leases, take the place of the said company or of said receiver, as the case may be, and assume any and all liability and obligations thereunder." In the deed made, in pursuance of the sale, to the purchasers, who adopted as their corporate name "The Virginia Midland Railway Company," the lease from the Franklin Company was expressly conveyed, and the foregoing provision in the 48th section of the decree of sale duly incorporated.

The new corporation, on April 15, 1886, demised all of its property, including expressly the lease from the Franklin Company, to the Richmond & Danville Railroad Company, for a term of ninety-nine years; and by deed of October 22, 1886, the latter company conveyed much, if not all, of the said property, including the lease from the Franklin Company, to the Central Trust Company of New York, trustee, to secure certain bonds issued by the Richmond & Danville Railroad Company. This deed was foreclosed by decree of the circuit court of the United States for the eastern district of Virginia entered on April 13, 1894, in the consolidated causes of Central Trust Company of New York, trustee, against the Richmond & Danville Railroad Company, and William P. Clyde and others against the same and others, and the property conveyed by the said deed, including the lease from the Franklin Company, was bought by certain persons, who assumed and adopted the corporate name of "Southern Railway Company." A conveyance was duly made of the property on June 18, 1894, to the said company, by masters appointed for that purpose by decree entered in the said causes. It thereby acquired, and by the express terms of the conveyance assumed and adopted, the lease of the Franklin Company and thereby became liable for the fulfillment of all the obligations of the original lessee. It therefore plainly appears that the Southern Railway Company stands in the shoes of Barbour, receiver, as respects the said lease, and is as firmly bound by its covenants, expressed or implied, as if it had been the original party thereto instead of the said receiver.

Having ascertained from the provisions of the lease under construction that the lessee, Barbour, receiver, was bound to operate the road of the lessor during the term of the lease, and being also of opinion that the appellant company is likewise bound by the said obligation in all its force and vigor, it remains to be determined whether a court of equity will enforce the obligation.

It was earnestly contended by counsel for the appellant that, conceding such obligation to exist, the remedy of the appellee was a suit at law for damages for the breach thereof, and that equity was without jurisdiction in the case. As a general rule, the remedy for the breach of a contract, especially where it does not relate to real estate, is a suit at law for compensation in damages, but, if the remedy be not adequate, full, 44 L. R. A.

and complete, equity will interpose and compel the specific performance of the contract. The true rule is thus laid down in Story, Eq. Jur. § 33: "The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for, if at law it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner, at the present time and in future; otherwise, equity will interfere, and give such relief and aid as the exigency of the particular case may require." *Stuart v. Pennis*, 91 Va. 688.

It cannot be reasonably contended that a suit at law would afford redress for the threatened injury. Only half of the term of the lease has expired. It has seventeen years still to run. It would be impossible to ascertain the amount of damage that the complainant would sustain from an abandonment of the road during the remainder of the lease. The injury from loss of traffic, from the natural and certain decay of buildings and structures, and from the possible, if not probable, forfeiture of its franchises and property, could not be estimated nor compensated by damages. The right of the complainant to have the road operated by the defendant until the expiration of the lease is a continuing right, and, if the injury were reparable in damages, it would require a multiplicity of actions for the daily breach of the agreement. The remedy at law would be neither complete nor adequate. Nothing short of the interposition of a court of equity would meet the exigencies of the situation, and secure the complainant the protection of its rights.

It was objected that, conceding the remedy at law to be inadequate, equity will nevertheless not compel specific performance of a contract having some years to run, which is practically what is sought by the mandatory injunction, that requires continuous acts, involving the exercise of skill and judgment. It may be admitted that the authorities are not uniform, and that there are decisions which sustain the objection, but an examination of the decided cases will disclose the fact that the great weight of authority, and especially the recent decisions of courts of the highest respectability and influence, maintain the jurisdiction of equity in a case like that at bar. The courts are constantly called upon to exercise the very jurisdiction here called in question, in operating railroads through receivers. No particular difficulty is encountered in doing so, although the operation of the road in such case requires a continuous series of acts, involving the exercise of skill and judgment; and, if the court can do this through its receiver, no good reason is perceived why it may not compel a railroad company to operate a road in performance of its contract to do so.

In *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, the St. Louis, Kansas City, & Colorado Railroad Company claimed that it was entitled by succession, under a certain con-

tract, to use, jointly with the Wabash, St. Louis, & Pacific Railroad Company, that portion of the tracks of the latter company which extend from a point on the northern line of Forest Park, through the park, and thence to the Union Depot, in the city of St. Louis, together with the right to use side tracks, switches, turnouts, and other terminal facilities. It was a continuing right, and unlimited in time. The contract contained provisions regulating the running of trains, and prescribing the duties of superintendents, train masters, and other officers. The claim being denied, and the right to use the tracks refused, the court, in a suit brought to enforce the same, decreed the specific performance of the contract, and enjoined the Wabash Company from refusing to permit the Colorado Company to use its tracks.

In *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776, the telegraph company had entered into a contract with Harrison Bros., by which it agreed to allow them the right to put up, at their own expense, maintain, and use, a telegraph wire on its poles between Philadelphia and New York, which, when put up, was to be maintained and kept in good working order at the expense of the telegraph company, and over which Harrison Bros. were to be allowed to transmit messages free of all charge. At the expiration of ten years the wire was to become the property of the telegraph company, after which time it was to lease the same to Harrison Bros. for \$600 per annum, and upon the same terms, in all other respects, as if the wire had not been given up. The ten years having expired, Harrison Bros. continued to use the wire as before, but paying the stipulated sum of \$600 per annum. After this had gone on for about three years, the telegraph company gave notice to Harrison Bros. of its intention to terminate the agreement. The court held that the contract was one proper for specific performance, and enjoined the telegraph company from terminating the agreement, and required it to maintain the wire in good working order for Harrison Bros.

In *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* 144 N. Y. 152, 26 L. R. A. 610, it appears that the plaintiff owned a steam railroad, which extended from Coney Island to a depot at the corner of Ninth avenue and Twentieth street, in the city of Brooklyn, and also owned certain horse-car railroads, extending from the depot to Fulton ferry, and that the defendant operated certain horse-car lines from Fulton and other ferries to Fifteenth street and thence to Coney Island. A contract was entered into between them by which the plaintiff granted to the defendant the right to use the tracks of its horse-car line on Ninth avenue from Fifteenth street to the depot at Ninth avenue and Twentieth street free of charge, for twenty-one years from June 1, 1882, and the defendant covenanted to run cars to plaintiff's depot to connect with its trains run to and from Coney Island. The contract contained a provision that, in case the defendant should use steam as a motive power on its line between the city and the island, either party could ter-

minate the contract on six months' notice. They acted under the contract until October, 1889, when defendant, having adopted the "trolley system" of running cars by electricity upon its road between the city and the Island, ceased to run its cars to the plaintiff's depot, and advised the plaintiff of its intention not to do so. Upon a bill filed by the plaintiff to compel specific performance of the contract, the court so decreed.

In *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 265, a contract between certain railroads for trackage arrangement in all its details, for a period of 999 years, was decreed to be specifically performed upon the refusal of the party, which had contracted for the use of its tracks, to abide by the agreement, and the recalcitrant company enjoined from interposing any obstacle to the enjoyment by the other party of the rights and privileges secured to it under the contract.

The case of *Schmidt v. Louisville & N. R. Co.* reported in 38 L. R. A. 809, 19 Ky. L. Rep. 668, is very similar in its principal features to the case before us. The Northern Division of the Cumberland & Ohio Railroad Company leased its road, right of way, and other property to the Louisville, Cincinnati, & Lexington Railway Company for the period of thirty years. The Louisville & Nashville Railroad Company purchased the entire property of the lessee, including the said lease; took possession of the demised road; and, after operating it for a considerable period, gave notice of its intention to abandon the operation of the road. Suit was thereupon instituted to enjoin it from doing so, and to compel the performance by it of the lease.

The lessor was required by its charter to operate the road, but the defendant contended that no duty rested upon it except such as was imposed by the lease itself, and denied that the duty to operate the road was so imposed. The court held that, as assignee of the lease, it assumed all the obligations thereof, and that it being the statutory duty of the lessor to operate the road, and the lessor having agreed that the lessee should operate it for the term of thirty years, the defendant was obliged, under the agreement, to do so.

In all of the cases above referred to, or in nearly all of them, the same contention was made as is now made here, that a court of equity will not specifically enforce a contract that calls for continuous service, involving the exercise of skill and judgment, and requires constant supervision on the part of the court, but it was overruled, and specific performance decreed. Cases might be multiplied illustrating the maintenance of jurisdiction by courts of equity in cases like that at bar, but it is deemed unnecessary.

The enforcement of the contract is also objected to on the ground of hardship. It is not pretended that the lease was induced by fraud or false representations of facts. On the contrary, it was entered into after due deliberation, was reasonable and fair when made, and, as declared in the preamble, "deemed judicious and beneficial" to both

parties. Operation under it has demonstrated that the Franklin Company, instead of becoming "a valuable feeder" to the main line of the lessee, has proved to be an unprofitable adjunct. The hardship is due, in the main, to miscalculation in making the contract, and in part to subsequent events and a change of circumstances in no wise attributable to the lessor.

It is not doubted that there are adjudged cases which hold that a court of equity will not decree specific performance of the agreement where it would entail great hardship, and the hardship was due, in some measure, at least, to the conduct of the other party. *Booten v. Scheffer*, 21 Gratt. 474; *Gish v. Jamison*, 96 Va. —, 31 S. E. 521; and *Willard v. Tayloe*, 8 Wall. 594, 19 L. ed. 503.

But we question whether a court of equity ever refuses specific performance upon the sole objection of hardship, where the contract in its inception was fairly and justly made, and the hardship is the result of miscalculation, or is caused by subsequent events or a change of circumstances, and the party seeking performance is wholly without fault. In *Rutland Marble Co. v. Ripley*, 10 Wall. 356, 19 L. ed. 960, Mr. Justice Strong, in speaking of contracts that were supposed to be fair and equal when made, but in the lapse of time have become bad bargains, said: "Besides, it is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances or changing events." The element of risk enters more or less into every contract, and the obligation to perform it cannot be allowed to depend upon the question whether it has proved to be advantageous or disadvantageous. It would be a travesty upon justice, and the reputed sanctity of contracts would be of little avail, if parties could refuse the performance of contracts having some years to run, which were fairly entered into, and believed to be just and equal when made, merely because from contingencies, whose possibility might have been foreseen, they had turned out, in the course of execution, to be a losing, instead of a profitable, bargain.

In *Schmidt v. Louisville & N. R. Co.* 19 Ky. L. Rep. 666, 38 L. R. A. 809, it appeared that the lessor was largely indebted to the defendant company, the assignee of the lease, for moneys furnished for it under the contract of lease, and to be repaid by it; that judgment had been recovered for the amount, and an effort made to sell the leased road to pay it, but nothing could be made, because no one would give anything for the road subject to the mortgage subsisting upon it. It also appeared that the leased road was being run at a heavy loss, the necessary cost of operating having exceeded the receipts

in the sum of \$199,411.70. The defendant claimed that it would be harsh and inequitable, under these circumstances, to require it to continue to operate the road; but the court held that the facts in the case were not such as to release the defendant from performing the contract. Nor can the objection of hardship, made in the case before us, avail to stay the hands of the court.

Objection is made to the decree appealed from that it enjoins the appellant from abandoning or ceasing to operate the road as it was then operating it, without regard to the exigencies of the case. The decree simply requires the same train service as the appellant had deemed to be proper and necessary during the three years it had been in control and operation of the road. It is to be presumed that it was then running only such trains and with such cars, as its experience showed were required. This would seem to be reasonable and proper, and to furnish no good ground of complaint.

The further objection is made to the decree that it requires the appellant to operate the entire line from Rocky Mount to Franklin Junction, which includes 7 miles not belonging to the appellee, but is the property of the appellant. This seven miles is a branch road of the Midland Company, running out from its main line to a place called Pittsville, and was in existence when the lease was made; and the provisions of the lease clearly show that it was the understanding and agreement of the parties therein that the Franklin Company was to construct its road to the western terminus of the branch road, so as to obtain connection with the main line. Without the branch road, there would be no connection between the new road and the main line. It was by means of the branch road that the new road was to become "a valuable feeder to the traffic of the main line." It is plainly implied in the lease that the branch road was to be operated in conjunction with the new road. The two have been operated together as one line ever since the beginning of the lease. They were so operated by the original lessee and all of his successors, and were being so operated by the appellant when this controversy arose. The branch road is essential to the use and enjoyment of the road of the Franklin Company, and the court committed no error in the respect complained of.

We find no error in the decree appealed from, except in dismissing the case from the docket. The court should have reserved the right to make additional orders from time to time, as circumstances might require, and kept the case on the docket for that purpose.

The decree will be amended in this respect, and as so amended will be affirmed.

Keith, P., dissents.

NEW YORK LIFE INSURANCE COMPANY, App't.,
v.

J. W. DAVIS, Admr., etc., of J. W. T. Davis,
Deceased, et al.

(.....Va.....)

1. The law never presumes fraud, but the presumption is always in favor of innocence and honesty.
2. The murder of a person whose life is insured by an assignee of the policy, whose claim to it is valid only for a reimbursement of premiums paid, forfeits only the assignee's part of the insurance, and not the residue thereof, to which the estate of the insured is entitled.

(February 8, 1899.)

APPEAL by defendant from a decree of the Circuit Court for Henry County in favor of plaintiffs in an action brought to compel payment of the amount alleged to be due on a life insurance policy. *Affirmed.*

The facts are stated in the opinion.

Mr. E. W. Saunders, for appellant:

The insurance policies on the life of Davis were as truly taken out for the benefit of Lester as the policy on the life of Armstrong, in the case of *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 593, 29 L. ed. 998, was taken out for the benefit of Hunter.

This is an unusual case, but there have been others like it.

Prather v. Michigan Mut. L. Ins. Co. (U. S. C. C. D. Ind.) 7 Ins. L. J. 897.

Messrs. William M. Peyton and Peatross & Harris, for appellees:

New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 593, 29 L. ed. 998, cannot be invoked as an authority in this case. That case occurred in New York, and was decided with reference to the law of New York. Under the law of New York the assignment by Armstrong to Hunter of the policy in that case vested the sole and absolute ownership and beneficial interest in the insurance in the assignee, Hunter. Hunter, therefore, was sole owner of the entire policy and insurance when Armstrong was killed. The forfeiture therefore was as extensive as Hunter's interest; that is, of the whole policy.

Roller v. Moore, 86 Va. 518, 6 L. R. A. 136.

In Virginia an assignee of an insurance policy only becomes entitled to it to the extent that he has insurable interest in the life of the assured, or has paid value for it. He is only entitled to hold it for reimbursement.

Roller v. Moore, 86 Va. 512, 6 L. R. A. 136; *Long v. Meriden Britannia Co.* 94 Va. 601.

By the assignments of these policies, there-

NOTE.—As to the effect of committing murder on the murderer's right to take property by descent or devise, see *Riggs v. Palmer* (N. Y.) 5 L. R. A. 340; *Shellenberger v. Ransom* (Neb.) 10 L. R. A. 810, and 25 L. R. A. 564; *Carpenter's Appeal* (Pa.) 29 L. R. A. 145.

As to killing of insured by insane beneficiary, see *Holdom v. Ancient Order of U. W.* (Ill.) 31 L. R. A. 67.

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fore, by Davis to Lester, Lester became interested in or entitled to them only to the extent that Davis was indebted to him for premiums paid on them by him over and above the amount Lester owed Davis.

Payment of them beyond that should be made to J. W. T. Davis's administrator.

Cleaver v. Mutual Reserve Fund Life Assn. [1892] 1 Q. B. 147; *Cheeves v. Anders*, 87 Tex. 287, 47 Am. St. Rep. 107.

Messrs. Beverley B. Munford and Hairston & Gravelly also for appellees.

Riely, J., delivered the opinion of the court:

On May 29, 1895, a policy of insurance was issued by the appellant to John W. T. Davis upon his life for \$1,000, and on June 30, 1895, it issued to him another policy upon his life for \$3,000. Both policies were taken out by Davis for the benefit of his estate, and were both assigned by him, on June 27, 1895, to W. W. Lester, who had advanced for him the premium on each policy.

On February 24, 1896, Davis died under circumstances indicating that he had been poisoned, and suspicion pointed to Lester as the perpetrator of the suspected crime. He was arrested, indicted, and tried in the county court of Henry county, but acquitted.

In the meantime, the father of Davis, he being the distributee of the deceased, filed his bill to enjoin Lester from collecting, and the insurance company from paying, to him the money due on the policies, and to compel the payment of the policies to the administrator of the deceased when appointed, except so far as necessary to reimburse Lester for the premiums he had advanced. The father subsequently qualified as the administrator of his son, and the suit thereafter proceeded in his name as such fiduciary.

The company resists all liability on the policies, upon the alleged ground that the application for the insurance was not the result of the volition of Davis, and did not emanate from him, but that he was induced by Lester to take out the policies, and that it was only at the instigation and by the persuasion of Lester that he did so; that Lester, at the time he induced Davis to effect the insurance, had formed the purpose to procure from Davis an assignment of the policies, and then take his life, in order to collect the policies; and that when the policies were issued to Davis, Lester did procure from him an assignment of them to himself, and subsequently murdered him.

It was conceded that, if the policies were taken out by Davis in good faith and were valid in their incipency, their subsequent assignment to Lester, although procured by him with a view to the murder of the insured and the collection of the policies, would not prevent a recovery on them for the estate of the deceased.

Upon the company rests the burden of making good its defense and establishing the alleged fraud. This it undertook to do, and it may be conceded that a number of facts and circumstances were shown in evidence which tend to excite suspicion that there was some foundation for the accusation of

the company; but upon a full and careful consideration of all the evidence it falls short of that clear and satisfactory proof required to establish fraud. Fraud may be proved by circumstances as well as by direct evidence, but the circumstances, as in the case of direct evidence, must clearly and satisfactorily establish the fraud. It is not assumed on doubtful evidence or circumstances of mere suspicion. It must be clearly and distinctly proved. The law never presumes fraud, but the presumption is always in favor of innocence and honesty. *Engleby v. Harvey*, 93 Va. 440.

An effort was made to liken this case to that of *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, but the two cases are very dissimilar in their material features.

In that case it was proved that the application for the insurance was instigated by Hunter, and the policy procured wholly for his benefit. It appeared in evidence that on the 3d or 4th of December, 1877, Hunter made inquiry at the office of the company, in Philadelphia, as to the rates of insurance on the life of a person aged about forty or forty-one years, upon an endowment policy of twenty years; stating that he thought of insuring for his own benefit the life of a person in the sum of \$10,000. After some conversation on the subject of insurance generally, he left; stating that the person to be insured would probably call in a day or two. On the 5th of the month, Armstrong called, and informed the agent that he came, at the request of Hunter, to make application for a life insurance. He was thereupon examined, and after answering the questions usually propounded to applicants, he signed a formal application, leaving blank, however, the place for the amount of the insurance desired and for the answer to the question respecting the manner of paying the premiums. He at the same time executed an assignment of the policy, leaving blanks for its date and that of the policy and for the name and residence of the assignee. This was his entire connection with the transaction. In the afternoon of the same day, or on the following morning, Hunter informed the office that the amount of insurance desired was \$10,000, and that it would be more convenient for him to pay the premiums quarterly. The blanks left by Armstrong in the application were thereupon filled, and the application forwarded to the home office of the company in New York. Before the receipt of the policy at the office in Philadelphia, Hunter called and paid the premium, and stated that his lawyer would call for the policy. Some days thereafter his lawyer received the policy and the assignment, and they were subsequently delivered to Hunter. Within six weeks thereafter Armstrong was attacked at night, and died from the wounds he received. Suspicion fell upon Hunter as the perpetrator or instigator of the attack. He was accordingly arrested and tried for the murder of Armstrong, convicted, and sentenced to be hanged, and the sentence executed.

In the case at bar, the application for the

insurance was made by Davis, and not by Lester. It was applied for by Davis, for the benefit of his estate, and not for the benefit of Lester. There is no evidence of any agreement at the time the insurance was applied for, or at any other time prior to the assignment, that Davis was to assign the policies to Lester. It is true that he was encouraged by Lester to take out the policies, but he was also encouraged by the other persons present,—at least when the first policy was applied for. The policies were issued by the company, and delivered to Davis as their owner; and he afterwards assigned them to Lester, in whose employment he was, and who had promised to see the first premiums on the policies paid, and did pay them before the assignment.

In *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, it was stated by the court that, "the assignment conveying to Hunter the whole interest of the assured, his representatives alone would have a valid claim under it, if the policy were not void in its inception;" but Lester, even if he honestly acquired the assignment of the policies on the life of Davis, the policies not being proved to be void in their inception, would have only had a claim under them for the amount necessary to reimburse him for the premiums he had paid. However valid the transaction, this was all that he could recover, in any event, and the residue of the proceeds of the policies belong to the estate of the insured. *Roller v. Moore*, 86 Va. 512, 6 L. R. A. 136, and *Long v. Meriden Britannia Co.* 94 Va. 594.

The court, by its decree, forfeited to the company an amount equal to the premiums paid by Lester, and only decreed the residue of the policies to be paid to the estate of the insured. The evidence does not justify, nor public policy require, a decree more favorable to the appellant.

The decree must be affirmed.

Cardwell, J., absent.

MERCHANTS' BANK OF DANVILLE,
App't.,
v.

C. E. BALLOU et al.

(.....Va.....)

1. Notice to trustees in a deed of trust of the existence of a prior encumbrance is not ineffectual to subordinate the second deed to the first because of the fact that they did not know of the intent to make the later deed to them or of its record at the time it was made.
2. A statute curing the defective acknowledgment of a deed of trust and the consequent defect in the record of the deed is ineffectual to give it priority over

NOTE.—For constitutionality of statutes legalizing invalid private contracts, see note to *Lowe v. Harris* (N. C.) 22 L. R. A. 379; also *Shields v. Clifton Hill Land Co.* (Tenn.) 26 L. R. A. 509, and *Lindsay v. United States Sav. & L. Co.* (Ala.) 42 L. R. A. 783.

a judgment lien which had been acquired before the defect was cured, as the displacement of the judgment creditor's lien would impair the obligation of his contract.

(Keith, P., dissents from proposition 2.)

(February 8, 1899.)

APPPEAL by defendant Merchants' Bank of Danville from a decree of the Circuit Court for Halifax County settling the priority of liens upon property of C. E. Ballou in an injunction proceeding by the Bank of South Boston to enjoin a sale of the property in alleged contravention of its rights under a deed of trust. *Affirmed.*

The facts are stated in the opinion.

Messrs. Green & Miller, for appellant:

A notice to a trustee which binds his *cestui que trust* is either notice that comes to the trustee while acting as agent for the *cestui que trust*, or such notice as it is the duty of the trustee to communicate to the *cestui que trust*, as representing him.

A trustee is a purchaser for value because he represents the *cestui que trust*, because he is the agent of the *cestui que trust*, and stands for him. A trustee seldom parts with anything. It is the consideration furnished by the *cestui que trust* that makes the value. The trustee is a mere agent.

Shurtz v. Johnson, 28 Gratt. 661; *Wickham v. Martin*, 13 Gratt. 432; *Exchange Bank v. Knox*, 19 Gratt. 747; *Evans v. Greenhow*, 15 Gratt. 153.

Whatever knowledge a trustee can have, that will be imputed to a *cestui que trust*; the same knowledge in an agent would be imputed to a principal; in other words, it must be such knowledge, which if it had come to an agent, instead of a trustee, would be imputed to the agent's principal.

Morrison v. Bausmer, 32 Gratt. 225; *Johnson v. National Each. Bank*, 33 Gratt. 474.

There is one line of cases that bases the rule "Notice to agent is notice to principal" on the identity of the two, that the former is the *alter ego* of the latter. In this line of cases it is said, the rule "Notice to agent is notice to principal" "is limited to such notice as comes to the agent while he is acting as agent," that the agent cannot stand in the place of the principal until the relation of principal and agent is created, and "as to all information previously acquired by the agent, the principal is a mere stranger, and not bound."

Trentor v. Pothen, 46 Minn. 298, 24 Am. St. Rep. 228, note.

The other line of cases is based upon the idea that it is the duty of the agent to disclose to the principal all notice and knowledge he may possess and which is necessary for the protection of the principal, whether it was notice received before or after the commencement of the relation.

The Virginia cases follow the first line.

Morrison v. Bausmer, 32 Gratt. 225; *Johnson v. National Each. Bank*, 33 Gratt. 474.

The operation of the rule laid down in the second line of cases would work very curiously in this case, for here the agent never knew

of the agency, never knew that he was an agent so that he could observe the duty imposed upon him to disclose everything, until the deed was recorded and his disclosures then would have been useless.

Notice to a trustee before his appointment will not affect a subsequent purchase by him on behalf of the *cestui que trust*.

Le Neve v. Le Neve, 1 Ambl. 436, 2 Lead. Cas. in Eq. 3d Am. ed. Hare & W.'s notes, 164; *Henry v. Morgan*, 2 Rinn. 497; *Ross v. Houston*, 25 Miss. 591, 59 Am. Dec. 231; *Gold v. Death*, Hob. 92.

Mr. William Leigh, for appellee, Bank of South Boston:

If a subsequent purchaser, though for value, has notice of a prior unrecorded deed, such deed shall be as valid as to him as if actually recorded. The statute was only intended to protect "purchasers for value without notice."

Code 1887, § 2465.

If they have notice they are not within its protection.

Le Neve v. Le Neve, 1 Ambl. 436, 2 Lead. Cas. in Eq. Hare & W.'s notes, pt. 1, * 35; 2 Minor, Inst. 2d ed. 879-881; Pom. Eq. Jur. § 665.

Carrington and Watkins, trustees, being purchasers for value and having notice of the unrecorded deed to Lawson, trustee, they took in subordination and subject to the rights of said Lawson, trustee, and the bank of South Boston the beneficiary therein.

The trustee need not be the authorized or employed agent of the beneficiaries.

Beverley v. Brooke, 2 Leigh, 426.

If there is any question as to the acknowledgment and recordation of the deed of trust to R. W. Lawson, trustee, it is set at rest by the act of assembly approved March 1, 1894.

Being intended as a remedial, curative, and validating statute, it was in the power of the legislature to enact it, and to make it retroactive so as to cure any defect in the recordation of the deed aforesaid, and if any defect so existed it was so cured.

Danville v. Pace, 25 Gratt. 1, 18 Am. Rep. 663; Cooley, Const. Lim. chap. on *Retrospective Laws*, pp. 369-383; *Satterlee v. Matthewson*, 2 Pet. 380, 1 L. ed. 458; *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 876; *Green v. Abraham*, 43 Ark. 420.

The act of March 1, 1894, is retrospective in express terms "and where the language plainly shows the legislative intent that the statute should have a retrospective operation, and the omission to be cured is some act with which the legislature might have dispensed by a prior statute, the courts will so construe the act as to give it the retrospective operation intended."

23 Am. & Eng. Enc. Law, 1st ed. title *Statutes*, p. 452; Freeman, *Void Judicial Sales*, 138, § 62, and p. 137.

Every right is not a vested right.

Green v. Abraham, 43 Ark. 420; *State, Grant, v. Newark*, 28 N. J. L. 497; *Ferguson v. Williams*, 58 Iowa, 717; *Brinton v. Seevers*, 12 Iowa, 389; *Chestnut v. Shane*, 16 Ohio, 599, 47 Am. Dec. 387; Freeman, *Void Judicial Sales*, chap. 6; *Coldiron v. Asheville Shoe Co.* 93 Va. 364.

The acknowledgment of the deed of trust from Ballou to Lawson, trustee, for the benefit of the Bank of South Boston, taken by Joseph Stebbins, an officer of, and stockholder in, said bank, was not void, but was voidable only, and good until set aside and annulled in a proper proceeding.

And while the legislature cannot, by statute, give life to a void judgment or judicial act, it can and has the power to cure any defect or irregularity in judgments, and such legislation being curative and remedial is constitutional and valid.

Cooley, Const. Lim. 5th ed. p. 128; 1 Black, Judgm. § 218; Freeman, Judgm. 2d ed. § 146.

The act of March 1, 1894, cured all the defects and irregularities in the acknowledgment before it was set aside and annulled, and the said deed takes precedence over the judgments asserted in this cause.

Corey v. Moore, 86 Va. 734.

Judgments are not contracts.

1 Black, Judgm. §§ 10, 11; Freeman, Judgm. 2d ed. § 4; *Ratcliffe v. Anderson*, 31 Gratt. 105; Smith, Contr. 2; 7 Lawson, Rights, Rem. & Pr. § 3853.

Judgment liens are creatures of statutes, are not contracts, and can be taken away, or controlled, by statute.

1 Black, Judgm. § 399; *Moore v. Letchford*, 35 Tex. 185, 14 Am. Rep. 363.

The lien of a judgment gives no property in debtor's realty.

Black, Judgm. § 400.

Messrs. Henry Edmunds, R. L. De Jarnette, and Watkins & Watkins, for judgment creditors of C. E. Ballou:

A party interested in the conveyance cannot take the acknowledgment, and the recording of such deed will not be constructive notice to subsequent purchasers.

1 Am. & Eng. Enc. Law, ed. 1, p. 145, note 6.

The act of the notary in taking the acknowledgment of a grantor in a deed is a quasi judicial act, and, being interpreted in the conveyance, he is not allowed to be a judge in his own case, and his act is void.

Davis v. Beazley, 75 Va. 491; *Bowden v. Parrish*, 86 Va. 67; *Barton v. Brent*, 87 Va. 385.

If a retrospective statute is in the nature of an *ex post facto* law or a bill of attainder, or if it impairs the obligation of contracts or divests vested rights, such an act will be unconstitutional and void.

Black, Interpretation of Laws, 248; 3 Am. & Eng. Enc. Law, ed. 1, p. 758; Cooley, Const. Lim. 5th ed. pp. 438, 440; *Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663; Sedgw. Stat. & Const. Law, 406; Kent. Com. p. 455; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Baughner v. Nelson*, 9 Gill, 299, 52 Am. Dec. 694.

The remedy subsisting in a state when and where a contract is made and is to be performed is a part of the obligation; and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution of the United States, and therefore void.

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Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; *The Homestead Cases*, 22 Gratt. 266, 12 Am. Rep. 507; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. ed. 403; *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397.

A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds unless expressly forbidden.

Cooley, Const. Lim. 5th ed. p. 457.

The judgment creditors will be entitled to have a sufficient portion of the fund applied to the satisfaction of their judgments.

Hill v. Rixey, 26 Gratt. 72; *Gurnee v. Johnson*, 77 Va. 712.

Harrison, J., delivered the opinion of the court:

This is an appeal from an interlocutory decree settling the principles of the cause, determining the right of priority between liens, and ordering the sale of certain real estate for the satisfaction of said liens. The appellee contends that the appellant has no standing in this court—First, because the appeal was not taken from the interlocutory decree complained of until after there had been a final decree; and, second, because appellant acquiesced in the decree complained of until it was too late to put the parties *in statu quo* if the same was reversed.

These questions it is unnecessary to consider, for the reason that the decree complained of must be affirmed, and therefore, whether they are decided for or against appellant, the result is the same.

The case presented by the appellant is as follows: On September 21, 1892, C. E. Ballou conveyed to R. W. Lawson, trustee, a certain mill property to secure the Bank of South Boston \$2,000. This deed was not recorded until April 14, 1893. In the meantime, on April 12, 1893, C. E. Ballou conveyed this same property to J. M. Carrington and H. J. Watkins, trustees, to secure numerous creditors; this last-named deed being recorded on April 13, 1893. Soon thereafter Carrington and Watkins proceeded to execute the deed to them by advertising the property for sale, and on May 17, 1893, an injunction was awarded stopping the sale, upon the alleged ground that the trustees, Carrington and Watkins, had notice of the deed for the benefit of the appellee the Bank of South Boston, and that, therefore, neither they nor the beneficiaries under their deed had acquired priority over appellee by its recordation. The rights of all the creditors were determined in this proceeding, the court holding that the beneficiaries under the deed to Carrington and Watkins took in subordination to the Lawson deed securing the Bank of South Boston.

The testimony of Carrington and Watkins shows that each of them had full and complete knowledge all the time of the Lawson deed securing the Bank of South Boston, and that they knew of the existence of said deed at the time the deed from Ballou to them was executed, although they did not know of the intention of Ballou to execute the second

deed, and did not know it was executed until it was recorded; that on the day it was recorded they were notified of the fact, and immediately asked if the Bank of South Boston had been protected.

That Carrington and Watkins had full knowledge of the Lawson deed at the time the deed to them was made and recorded is not denied. That a trustee or trustees in a deed to secure bona fide debts are purchasers for value, and that notice to him, or them, or either of them, is notice to the beneficiaries in said deed, is not controverted.

The contention of appellant is that Carrington and Watkins, being ignorant of the execution and recordation of the deed to them at the time it was executed and recorded, were in no sense agents of the beneficiaries under that deed; that they knew nothing of the claims of the beneficiaries, or of the intention of Ballou to make a deed to secure them, until the deed had been fully executed and recorded; that they were only purchasers of the legal title, and if they had died, or had declined to accept the trust, that notice to them would not have affected the beneficiaries; that their failure to act would have related back to the date of the record of the deed, and their appointment thereunder become void, while the deed would have remained a subsisting security in favor of the beneficiaries; that, under such circumstances, it would be inequitable to allow the rights of the beneficiaries to be affected by knowledge of the trustees, not acquired in their capacity as agents of the beneficiaries, but as agents of the South Boston Bank, it appearing that the trustees acquired their knowledge of the first deed while officers of the South Boston Bank.

In contemplation of law, the relation of principal and agent between the trustee named in a deed and the beneficiaries under it begins when the transaction is completed. The trustee named may not act when informed of his appointment, but his acceptance is presumed until he declines, and when he refuses to act a successor is appointed, who takes his shoes and is substituted to all the rights and responsibilities of the position, as if he had been originally appointed, and the trust in his hands is tainted with all the imperfections that attached to it in the hands of the original trustee. It is not necessary to the validity of the deed that it should be executed by the trustee or the beneficiaries, or even that they, as a matter of fact, should know of its execution. The duties and powers of the trustee are not conferred by the creditor, but arise out of the instrument creating the trust. The rights of the creditor come to him through the trustee, under the provisions of the deed, and so it has been repeatedly held by this court that the knowledge of the trustee of a prior existing deed is imputed to the creditor. Under the settled law of this state, Carrington and Watkins are, under the deed in question, purchasers for value, and under the facts proved they are purchasers with notice; for they were, confessedly, at the time of the execution and recordation of the deed to them, fully possessed of the fatal

knowledge of the first deed, which made the second deed subordinate to the first.

It is not perceived how the position of Carrington and Watkins, as purchasers for value with notice, can be affected by the fact that they were not aware of the intention of Ballou to make the second deed or of its recordation when made; nor is it seen how their ignorance of that fact can take this case out of the established principles already adverted to.

Under rule 9, the Bank of South Boston, one of the appellees, assigns as error to its prejudice the action of the court in giving the lien of certain judgments priority over its deed of trust.

This deed was acknowledged before the president of, and a stockholder in, the Bank of South Boston, the beneficiary thereunder, and was therefore not duly recorded, as against the judgments in question. It is, however, contended that the defect in its acknowledgment and recordation was cured by an act of assembly approved March 1, 1894, which provides "that no acknowledgment heretofore or hereafter taken to any deed or other writing executed by a company for the benefit of a company shall be held to be invalid by reason of said acknowledgment having been taken by a notary public or other officer, who, at the time of taking said acknowledgment, was a stockholder or officer in the company which executed said deed or writing, and who was in no otherwise interested in the property conveyed or disposed of by said deed or writing; and the record of any such deed or writing heretofore made shall in all respects be deemed valid, notwithstanding the fact that the notary or other officer was, at the time of such acknowledgment, a stockholder or officer in the company executing said deed or writing or for the benefit of which such deed or writing was executed; provided, said notary or other officer was in no otherwise interested in the property conveyed or disposed of by said deed or writing when said acknowledgment was taken." Acts 1893-94, p. 580.

The contention is that this act was intended as a remedial, curative, and validating statute; that it was in the power of the legislature to enact it, and to make it retroactive, so as to cure any defect in the recordation of the deed in question, and to give it the same force and effect that it would have had if properly recorded in the first instance.

A statute will not be construed so as to give it a retroactive operation unless there is something on the face of the enactment putting it beyond a doubt that such was the purpose of the legislature. Whether or not the act relied on shows on its face a plain purpose on the part of the legislature to make the imperfect acknowledgments mentioned therein valid from their date, even though it destroyed the rights of judgment creditors whose liens were acquired before the passage of the act, we will not stop here to consider, but will proceed to inquire as to the power of the legislature to enact a law having the retroactive effect claimed for this.

It is unquestionably true that the legisla-

ture has power to pass retroactive laws within certain limits, even though such laws may affect a certain class of vested rights. *Danville v. Paoc*, 25 Gratt. 1, 18 Am. Rep. 663. The opinion of Judge Staples in this case is an elaborate and instructive discussion of the subject under consideration. The reasoning of the learned judge and the authorities cited make it clear that it is not within the proper limits of the lawmaking power to disturb vested rights of property by retroactive legislation.

There can be no doubt that a judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value. *Murphy v. Gaskins*, 28 Gratt. 207, 222; *Ratcliffe v. Anderson*, 31 Gratt. 105, 31 Am. Rep. 716; *Gilman v. Tucker*, 13 L. R. A. 304, 128 N. Y. 190. In the case last cited the power of the legislature to pass retroactive legislation affecting a judgment is denied, and in discussing the subject it is said: "We must bear in mind that a judgment has been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication the fruits of the judgment become the rights of property. These rights became vested by the action of the court, and were thereby placed beyond the reach of legislative power to affect."

In *Murphy v. Gaskins*, 28 Gratt. 207, 222, an act of the legislature was construed which empowered the court, in which any judgment or decree had been rendered prior to the passage of the act, on motion of the defendant, to review such judgment or decree, and abate the same to the extent of the war interest included therein. The court held the act to be in violation of the state and Federal Constitutions, and in the course of an able opinion Judge Burks says: "Judgments and decrees for money being contracts of the highest character, of course, and for the reasons before stated, to abate any portion of the interest included in them would necessarily impair their obligation. Moreover, by such judgments and decrees, the rights of the parties in whose behalf they were rendered, to the money ordered to be paid, whether principal or interest, have become vested, and cannot be divested, as provided by the act of the general assembly."

It is, however, contended that the effect of the statute in question is not to impair the validity of the judgment, but only to modify the remedy for its enforcement. In other words, that though the judgment itself is a vested right, that cannot be impaired or diminished by a retroactive law, yet the lien is not a vested right, but only a remedy provided for enforcing the judgment, which can be taken away by such a law. This position is not tenable. The right to the lien upon the debtor's real estate is in many cases the sole inducement to the credit which constitutes the basis of the judgment. Without the benefit of that lien, guaranteed by the law, at the time the judgment is taken, the credit would not have been given.

In *Cooley*, Const. Lim. 5th ed. p. 440, it is said that a right, to be vested, "must have 44 L. R. A.

become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another"; and at page 445 it is said: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."

In the case of *Edwards v. Kearzey*, 96 U. S. 505, 24 L. ed. 793, it was held: "The remedy subsisting in a state when and where a contract is made, and is to be performed, is a part of the obligation; and any subsequent law of the state, which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution of the United States, and therefore void." Mr. Justice Swayne, in delivering the opinion of the court, says: "It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it [the contract] as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement."

Judge Christian, in delivering the opinion of the court in *The Homestead Cases*, 22 Gratt. 288, 12 Am. Rep. 507, says: "Nothing can be more material to the obligation than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which are guaranteed by the Constitution against invasion. The laws which subsist at the time and place of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated in its terms. It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided that no substantial right secured by the contract is thereby impaired. But any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

If, then, the lien of a judgment be, as contended, a mere remedy for enforcing the judgment, the statute which gives that remedy forms a part of the contract for the lien, and any law which takes away such a remedy impairs the obligation of the contract. When these judgments were obtained, the creditor, unquestionably, had a clear statutory right to enforce them against the real estate in controversy; and it would seem to be equally clear that such a right is a vested right, that cannot be taken away by subsequent legislation. If the constitutional provision relied on can be successfully invoked, as we have seen it can be, to prevent a party from being deprived, by a retroactive law, of a few dollars of war interest included in his judgment, surely the same constitutional guaranty would avail to save the same party from having his whole judgment destroyed by a retroactive law taking away the lien which alone, as in the case at bar, gives that

judgment its life and value. It has been well said:

"You take my house when you do take the prop
That doth sustain my house; you take my life
When you do take the means whereby I live."

For these reasons *the decree complained of must be affirmed.*

Keith, P., dissents from so much of the opinion as affirms the decree appealed from on the question raised by cross appeal, under rule 9. **Cardwell, J.**, absent. **Riely, J.**, absent, counsel in case below.

WASHINGTON SUPREME COURT.

Alexander **FRANKENTHAL et al., Appts.**,

v.

Sol. **SOLOMONSON, Resp't.**

(.....Wash.....)

Examination of a wife on supplementary proceedings against her husband, with respect to property in her possession, is not an examination "for or against her husband," within the meaning of 2 Hill's Code Proc. § 1640, requiring the husband's consent to her examination for or against him.

(January 6, 1899.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Spokane County dismissing a proceeding supplementary to an execution against defendant for the purpose of examining his wife as to property in her possession which was alleged to belong to him. *Reversed.*

The facts are stated in the opinion.

Messrs. Stoll & Macdonald, for appellants:

The character of supplementary proceedings is somewhat analogous to garnishment. The wife may be charged as the garnishee of her husband, and compelled to be examined and make disclosure.

Rood, Garnishment, § 41; Waples, Attachment & Garnishment, 1st ed. § 528; 2 Wade, Attachm. § 350, p. 49; Thompson v. Silvers, 59 Iowa, 670; O'Brien's Petition, 24 Wis. 547; Re Milburn, 59 Wis. 33; Morrell v. Hey, 15 Abb. Pr. 430; Shinn, Attachm. § 529; Jones v. Roberts, 60 N. H. 216.

Mr. Adolph Munter, for respondent:

The wife of Sol. Solomonson, in this case, is not a party to a side issue, and she was to be examined in the main case. She neither in the title nor elsewhere appears as a party.

Stephenson v. Cook, 64 Iowa, 265.

Our statute disqualifies a spouse whenever an effort is made to have them examined for or against the other spouse.

Berles v. Adsit, 102 Mich. 495; DeFarges v. Ryland, 87 Va. 404; Niland v. Kalish, 37 Neb. 47; Wolford v. Farnham, 44 Minn. 159; Copous v. Kauffman, 8 Paige, 584; Macdonald v. Wardle, 26 Barb. 612; Pillow v. Bushnell, 2 N. Y. Code Rep. 19; Erwin v. Smaller, 2 Sandf. 340; Hasbrouck v. Vanderroot, 4 Sandf. 596; Arbogast v. Arbogast, 8 How. Pr. 297.

NOTE.—For husband or wife as witness against the other, see also *People v. Quanstrom* (Mich.) 17 L. R. A. 728; also cases as to libel and slander in note to *Morgan v. Kennedy* (Minn.) 30 L. R. A. on page 529.
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The garnishment proceeding is regarded as a suit.

2 Wade, Attachm. § 332, p. 15.

The husband and wife cannot be witnesses for or against each other. This is a settled principle of law and equity, and it is founded as well on the interests of the parties being the same as on public policy. The functions of society would be shaken, according to the strong language in one of the cases.

2 Kent, Com. pp. 178, 179; Co. Litt. 6b; White v. Stafford, 38 Barb. 419.

Anders, J., delivered the opinion of the court:

On June 21, 1897, the plaintiffs and appellants herein recovered a judgment in the superior court of Spokane county against one Sol. Solomonson for the sum of \$1,315.45 and costs. Execution was issued thereon, placed in the hands of the sheriff of the county, and by him returned wholly unsatisfied. Thereafter the plaintiffs instituted this proceeding against Sarah Solomonson, wife of the said judgment debtor, under an act of the legislature approved March 15, 1893, entitled "An Act Relating to Proceedings Supplementary to Execution" (Laws 1893, p. 435.) Section 3 of that act provides that upon proof by affidavit or otherwise, to the satisfaction of the judge, that execution has been issued as prescribed by § 1 of the act, and also that any person or corporation has personal property of the judgment debtor of the value of \$25 or over, or is indebted to him in said amount, the judge may make an order requiring such person or corporation, or an officer thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same. In accordance with this section, an affidavit was filed on behalf of the plaintiffs, setting forth the rendition of the judgment against said Sol. Solomonson, the issuance and return of the execution, and that the defendant Sarah Solomonson had in her possession or under her control personal property of the value of \$25 or more, and other property, all of which is the separate property of said Sol. Solomonson, and is held in the possession and under the control of said Sarah Solomonson for the purpose of preventing the collection and satisfaction of said judgment and execution. On motion of plaintiffs, the court issued an order directing the said Sarah Solomonson to appear before the court at a time and place designated, then and there to be examined touching what property, if any, she had or controlled, and

which was the separate property of said Sol. Solomonson, or in which he had some separate interest. She appeared at the time and place designated, and, the matter coming on to be heard, the said Sol. Solomonson objected to her being examined, upon the ground that a wife may not be examined for or against her husband without his consent. The consideration of this objection was taken under advisement by the court, and thereafter sustained, and judgment was entered dismissing the proceedings. To these rulings of the court the plaintiffs duly excepted, and the cause is now here upon appeal; and the only question to be determined is whether the court erred in sustaining the objection and dismissing the proceedings.

It is claimed by the respondent that the action of the court was fully justified by § 1849 of the Code of Procedure (2 Hill's Code), which reads as follows: "A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either, during marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during marriage. . . ." It is insisted by the learned counsel for the respondent that this law is based upon higher ground than that invoked by appellants, namely, that of preventing the suppression of truth, or the failure of justice in particular cases. And, as an expression of his position, counsel cites us to the declarations of Chancellor Kent and of Lord Coke. "The husband and wife," says Chancellor Kent, "cannot be witnesses for or against each other. . . . This is a settled principle of law and equity, and it is founded as well on the interest of the parties being the same as on public policy. The foundations of society would be shaken, according to the strong language in one of the cases." 2 Kent, Com. pp. 178, 179. And Lord Coke says: "It hath been resolved . . . that a wife cannot be produced either against or for her husband, . . . and it might be a cause of implacable discord and dissension between the husband and the wife, and the means of great inconvenience." Co. Litt. 6b. It must be borne in mind, however, that both Chancellor Kent and Lord Coke were speaking of the rule at common law. The rule that excluded husband and wife from testifying for or against each other was adopted at a very early day in England, and at a time when husband and wife were in law one person, and when no party to an action was a competent witness because of his interest therein. But this rule of common law has been changed by legislation in this and almost every other state, and the interest of a party in an action is no longer a disqualification as a witness. And our lawmakers manifestly concluded that public policy should not alone prevent a husband or wife from testifying for or against each other. Under the statute above quoted, either may be a witness for or against the other by the consent of that other; and it can hardly be said that that is "public policy," as the term is ordinarily understood, 44 L. R. A.

and therefore beneficial to the public at large, which depends exclusively upon the will or caprice of a particular individual. Counsel for the respondent also cites the following cases as sustaining his contention that the defendant Mrs. Solomonson was not a competent witness in this proceeding: *Berles v. Adsit*, 102 Mich. 495; *De Farges v. Ryland*, 87 Va. 404; *Niland v. Kalish*, 37 Neb. 47; *Wolford v. Farnham*, 44 Minn. 159; *Macondray v. Wardle*, 26 Barb. 612; *White v. Stafford*, 38 Barb. 419. But an examination of these authorities will disclose that they are cases in which both the husband and wife were parties, and in which the plaintiff called either the one or the other as a witness; and neither of the cases involved a proceeding in any wise like the present, except the Michigan case, in which a wife was cited as garnishee in an action pending against her husband, and in which it was held that she could not be compelled to testify over her husband's objection. The rule contended for by respondent here was properly applied in those cases. But this is an entirely different proceeding. Here the husband is not a party, and, we think, it may be said, is not interested in such a sense as to preclude the examination of the wife as a witness for the plaintiff. Mr. Freeman, speaking of supplemental proceedings, says that a defendant is not entitled to notice of a proceeding of this character against his creditor; nor is he a party thereto in such a sense as entitles him to interfere therewith, or to conduct the defense of the party cited. 2 Freeman, Executions, 2d ed. § 411. See also *Gibson v. Haggerty*, 37 N. Y. 555, 97 Am. Dec. 752, and *Jones v. Roberts*, 60 N. H. 216. In the case last cited, it was held that a wife may be charged as trustee of her husband, and that the latter has no such necessary interest in the controversy between the plaintiff and the trustee as to make him the adverse party, within the meaning of the statute. It appears that in some jurisdictions a writ of garnishment may be issued either before or after judgment, and, in considering the nature of such proceeding, Mr. Shinn observes that "it may be stated as a rule that, in states where garnishment is not issued until after the creditor obtains judgment against his debtor, then the proceeding by garnishment against a person indebted to the judgment debtor is a new suit, to which the creditor is plaintiff, and the garnishee the defendant, brought into court by the process. It is governed by the general rules applicable to other suits, and to this suit a judgment debtor is a stranger." 2 Shinn, Attachment, § 469.

"While in this state a proceeding after judgment is not denominated a 'garnishment,' the principle involved is the same: and it would appear from the quotation from this learned author and the authorities therein referred to that the judgment debtor is a mere stranger to this proceeding against his wife. It follows, therefore, that whatever the testimony of Mrs. Solomonson might have been, it would have been neither for nor against her husband, but for or against herself. If the husband had been called as

a witness by the plaintiff, a different question would have been presented. In a proceeding like this, the supreme court of Wisconsin, in *Re O'Brien*, 24 Wis. 547, decided that the judgment debtor's wife may be required to disclose whether she has property of her husband under her control, and may be attached as for a contempt for refusing to answer. At that time the statute of Wisconsin, like ours, permitted parties other than the judgment debtor to be examined in supplementary proceedings. The law was subsequently changed so as to restrict the proceeding to the judgment debtor alone; and the supreme court of the state, in *Blabon v. Gischrist*, 67 Wis. 38, held that, under the new law, the husband was not a competent witness against the wife, who was the judgment debtor. There is nothing in this latter case inconsistent with the former. In New York it was held, at a special term of the supreme court, that the wife of a judgment debtor may be examined under § 294 of the

Code, which authorizes the examination of third persons alleged to have property belonging to the judgment debtor. *Lockwood v. Worstell*, 15 Abb. Pr. 430, note. The same doctrine was announced in *Thompson v. Silvers*, 59 Iowa, 670, by the supreme court of Iowa, and is approved by Mr. Waples in his work on Attachment & Garnishment, 2d ed. §§ 949, 950. See also 2 Wade, Attachm. § 350; Rood, Garnishment, § 41. It seems to us that this rule is both reasonable and just, and not inconsistent with our statute. Any other rule would permit a debtor to put all of his personal property in the hands of his wife, and thereby relieve himself from the payment of his honest debts, though abundantly able to pay them.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Gordon, Dunbar, and Reavis, JJ., concur.

NORTH CAROLINA SUPREME COURT.

Samuel H. TROXLER

v.

SOUTHERN RAILWAY COMPANY, Appt.

(.....N. C.....)

1. Continuing negligence of an employer, such as the failure to furnish safe appliances in general use, which would have prevented the possibility of injury, precludes the defense of contributory negligence.
2. Failure to furnish proper and safe appliances, whereby a servant is injured, cannot be attributed to the negligence of a fellow servant.
3. Failure to furnish automatic car couplers in common use for freight cars is negligence *per se*, which renders a railroad company liable to an employee for injuries received in attempting to couple cars having skeleton drawheads of unequal height.

(March 21, 1899.)

A PPEAL by defendant from a judgment of the Superior Court for Guilford County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. F. H. Busbee, for appellant:

The opinion of the court in the case of *Greenlee v. Southern R. Co.* 122 N. C. 982, 41 L. R. A. 399, falls into what it is respectfully submitted is the cardinal error of treating the date of the rendition of the opinion in May, 1898, as the time of the accident, which was some years previous.

In the case at bar the injury occurred on February 2, 1895.

The opinion in *Mason's Case*, 111 N. C. 490, 18 L. R. A. 845, was delivered about

December, 1892, scarcely more than two years prior to the accident. In the report of the Interstate Commission of December 1, 1895, published nearly a year after the Troxler injury, it is stated, on page 52 that "74.80 per cent of the total equipment is still without train brakes, and 72.70 per cent without automatic couplers."

At that time the Federal law required interstate equipment to be supplied with these safety appliances by January 1, 1898, and this time was afterwards extended to January 1, 1900.

To render the opinion of the court in the *Greenlee Case* applicable to the case at bar, the court must now hold that two years after the indefinite warning by the court in *Mason's Case*, and five years before the national authority required the general use of these safety appliances, a decision can be based upon the warning in the *Mason Case*, and make a failure to use automatic couplers absolute negligence two years after *Mason's Case*, upon the allegation that there was a six years' notice. This seems in all respects to be *ex post facto*.

Messrs. Schenck & Schenck and **Charles M. Stedman**, for appellee:

There was an implied obligation resting on the defendant company that it should provide suitable and safe cars and appliances to enable plaintiff to do his work as safely as the hazards incident to the employment would permit.

Bailey, Master's Liability for Injuries to Servants, pp. 2, 3, note 1 on p. 2, note 3 on p. 3; *Mason v. Richmond & D. R. Co.* 111 N. C. 490, 18 L. R. A. 845; *Cowles v. Richmond & D. R. Co.* 84 N. C. 309, 37 Am. Rep. 620; *Johnson v. Richmond & D. R. Co.* 81 N. C. 453; *Gottlieb v. New York, L. E. & W. R. Co.* 100 N. Y. 467; *King v. Ohio & M. R. Co.* 14 Fed. Rep. 277; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 615; *Northern P. R.*

NOTE.—See also *Greenlee v. Southern R. Co.* (N. C.) 41 L. R. A. 399.
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Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 384, 28 L. ed. 790; *Union P. R. Co. v. Daniels*, 152 U. S. 689, 38 L. ed. 801; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 386, 37 L. ed. 772; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Witsell v. West Asheville & S. S. R. Co.* 120 N. C. 557.

The defendant company owed a duty to plaintiff to exercise reasonable care in supplying for the operation and control of the train a sufficient number of competent servants and for a failure of duty in this respect it is responsible in damages to the plaintiff if he was injured in consequence thereof. The contract was that he should not be exposed to any increased risk by reason of a lack of adequate help.

Bailey, Master's Liability for Injuries to Servants, 68, 69; *Northern P. R. Co. v. Herbert*, 116 U. S. 647, 29 L. ed. 758; *Flike v. Boston & A. R. Co.* 53 N. Y. 550, 13 Am. Rep. 545; *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 312.

These duties cannot be delegated to another.

Bailey, Master's Liability for Injuries to Servants, 131-133; *Trowler v. Southern R. Co.* 122 N. C. 902; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 647, 29 L. ed. 755, 758; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 615; *Union P. R. Co. v. Daniels*, 152 U. S. 689, 38 L. ed. 800; *Laning v. New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Greenlee v. Southern R. Co.* 122 N. C. 977, 41 L. R. A. 399.

The conductor in charge of the train was not a fellow servant of the plaintiff, but was a vice principal of defendant company, and if the injury to plaintiff was caused by the negligent management of said conductor in operating and controlling the train while the coupling was being made, the defendant is liable therefor.

Mason v. Richmond & D. R. Co. 111 N. C. 482, 18 L. R. A. 845; *Purcell v. Southern R. Co.* 119 N. C. 728.

If the neglect by which the accident and injury to plaintiff was brought about was a continuous one it will be regarded as the proximate cause, and defendant would be liable.

Lloyd v. Albemarle & R. R. Co. 118 N. C. 1010; *Mayes v. Southern R. Co.* 119 N. C. 758; *Mesic v. Atlantic & N. C. R. Co.* 120 N. C. 491; *Stanley v. Durham & N. R. Co.* 120 N. C. 516.

Clark, J., delivered the opinion of the court:

The plaintiff was injured in attempting to couple cars of the defendant on which there were no automatic car couplers, but in lieu thereof skeleton drawheads, of unequal height. The court below held that the absence of automatic couplers, in general use, was negligence *per se*, and refused to submit an issue whether the injury was not caused by the negligence of a fellow servant, and refused to instruct the jury, as prayed, that 44 L. R. A.

the plaintiff was guilty of contributory negligence if he could, by proper care, have coupled the cars by hand without accident.

The duty to furnish proper and safe appliances is that of the common master, and injury caused by their absence cannot be attributed to the negligence of a fellow servant. *Trowler v. Southern R. Co.* 122 N. C. 902; *Wright v. Southern R. Co.* 122 N. C. 959. It has been heretofore held in *Greenlee v. Southern R. Co.* 122 N. C. 977, 41 L. R. A. 399, that failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence *per se*, continuing up to the time of an injury sustained by an employee in coupling cars by hand, and renders the company liable, whether such employee was negligent in the manner of making the coupling or not. The same ruling had been previously made as to the duty of furnishing automatic car couplers on passenger trains in *Mason v. Richmond & D. R. Co.* (1892) 111 N. C. 482, 18 L. R. A. 845. Where the negligence of the defendant is a continuing negligence (as the failure to furnish safe appliances, in general use, when the use of such appliances would have prevented the possibility of the injury), there can be no contributory negligence which will discharge the master's liability. This has been repeatedly and uniformly held. *Norton's Case*, 122 N. C. 911; *McLamb's Case*, 122 N. C. 873; *Cone v. Delaware, L. & W. R. Co.* 81 N. Y. 206, 37 Am. Rep. 461. The failure to provide the necessary appliances is the *causa causans*. The defendant, however, frankly asks us to reconsider and overrule *Greenlee's Case*. That case was the expression of no new doctrine, but the affirmation of one as old as the law, and founded on the soundest principles of justice and reason, to wit: That when safer appliances have been invented, tested, and have come into general use, it is negligence *per se* for the master to expose his servant to the hazard of life or limb from antiquated and defective appliances which have been generally discarded by the intelligence and humanity of other employers. *Witsell v. West Asheville & S. S. R. Co.* 120 N. C. 557. This must be so, if masters owe any duties to their employees, and unless economy of expenditures on the part of the railroad management is to be deemed superior to the conservation of the lives and limbs of those employed in their operation. In the twelfth annual report of the Interstate Commerce Commission (1898), published by authority of the United States government, upon returns made by the railroad companies themselves, it is stated (at page 88): "Since the enactment of the law in 1893 [requiring automatic couplers] there has been a decreasing number of casualties. There were 1,034 fewer employees killed, and 4,062 fewer injured, during the year ending June 30, 1897, than during the same period in 1893. The importance of this subject will be realized when the yearly casualties to railway employees are compared with those which occurred during the recent war. In the Spanish-American war there were 299 killed and 1,645 wounded. In 1897, there

were 1,693 men killed and 27,667 injured, from all causes, in railway service. From coupling and uncoupling cars alone 219 less were killed, and 4,994 less were injured, in 1897 than in 1893, when the law was enacted. The number of such employees killed has been reduced one half, and the number of injured, also, practically reduced one half. The reduction in the number of accidents from all causes largely exceeded (by nearly three to one), in a single year, the entire casualties resulting from the prosecution of the late war." Thus, in four years from 1893 to 1897, notwithstanding the increase of thousands of miles of railways, and over 100,000 of employees, and the further fact that the railroad corporations have been able to procure from the interstate commerce commission an extension of the time at which the law of Congress imposing a penalty for operating any cars without self-couplers will come into force, the shadow of the law has procured so general an attachment of these self-couplers that 5,213 fewer employees were killed and wounded in coupling and uncoupling cars in 1897 than in 1893. Can it, therefore, be seriously contended that the absence of such safety appliances is not a negligence *per se*, rendering the railroad company liable for damages? As these appliances have been patented and more or less in use for over thirty years, it should not have required an act of Congress to enforce their universal adoption. Failure to adopt them, after being so long and widely known and used, was negligence in the defendant upon the principles of the common law. *Witsell's Case*, 120 N. C. 557. The act of Congress imposing a penalty for failure to add the appliances, after January 1, 1898, in no wise affected the right of any employee to recover for damages sustained by the negligence of any railroad company to attach them. The action of the Interstate Commerce Commission in extending the date at which such act should come into force (by virtue of authority given in the act) could not set aside the principle of law that failure to adopt such appliances was negligence *per se*, nor have any other effect than to postpone the date at which the United States government would impose the prescribed penalty upon all railroads engaged in interstate commerce failing to equip all their cars with automatic couplers,—a penalty which is imposed irrespective of whether any accidents occur from such failure or not. The indifference of railroad companies shown in not adopting these life and limb saving appliances is all the greater since their cost is comparatively small. Indeed the *Interstate Commerce Commission*, in the above cited report (page 89), state that, considering the less expense required in repairs, they are an actual saving. They say: "Figures submitted by one of the leading railroad companies indicate that the adoption of the automatic coupler will result in saving a very large sum annually, in comparison with the expense incurred in former years in applying and maintaining the link and pin type; and this does not take into account the reduced cost to the roads which must result

from fewer suits for damages by injured employees." And, further, that, there being too much slack in the old pin and link for the brake to act economically or successfully, the automatic coupler "makes the requirements of railroad operation better, as well as minimizes the danger to employees." In *Witsell v. West Asheville & S. S. R. Co.* 120 N. C. 557, 562, it is said: "If any appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it." But not only, as above, the use of self-couplers would be an actual economy to the defendant, but that it is amply able to put on these appliances, if it was not, is shown by the published report of the defendant company that its gross earnings for the year 1895 (when this injury was inflicted) were over \$17,000,000, and its net earnings over and above all expenses, were more than \$5,000,000 (Poor, R. R. Manual, 1898, p. 792),—figures which, for the year just past, have risen to over \$20,000,000 gross earnings and over \$6,000,000 net earnings. With such an array as above of the terrible cost of life and limb by failure to use appliances to avoid coupling and uncoupling cars by hand (in doing which the plaintiff was injured), the small expense—nay, actual economy—of adopting them, and the ample means the defendant possesses, we cannot reverse our ruling in *Greenlee's Case*, that it is negligence *per se* in any railroad company to cause one of its employees to risk his life or limb in making couplings which can be made automatically without risk.

This matter of requiring these great corporations to protect the traveling public, and their employees as well, by the adoption of all safety appliances which have come into general use, is so important that we have gone into the subject at this length. Ordinarily owned by great syndicates out of the state in which they operate, and their management, at all events, removed from any subjection to that sound public opinion which is so great a check upon the conduct of individuals, and of government itself, the sole protection left to the traveler and the employee alike is the application of that law which is administered impartially, and which can lay its hand fearlessly upon the most powerful combination, and protect with its care the humblest individual in the land. The subject is one of transcendent importance; for, notwithstanding the partial adoption of these appliances and consequent reduction in casualties, the twelfth annual report of the Interstate Commerce Commission shows (page 77) that for the year ending June 30, 1897, on the railroads engaged in interstate commerce (which alone report to that commission), there were still 43,168 casualties, of which 6,437 resulted in death. Of these, 1,693 killed, and 27,667 wounded, were railroad employees, among whom 214 were killed and 6,283 wounded in coupling or uncoupling cars. In our own state, the report of the North Carolina railroad commission for 1898 (pages 250, 251) shows that for the year ending June 30, 1898, the railroads reported 879 persons killed and

wounded (of whom 99 were killed), and of these 23 of the killed, and 599 of the wounded, were employees,—total, 622. As, of the 9,000 employees reported in this state, 4,000 (according to the usual ratio) were employees engaged in the actual operation of the trains, it follows that in this state 1 such employee in every $6\frac{1}{2}$ was in that year injured or killed. In view of such mortality, rivaling that of the bloodiest wars, this court cannot reverse its declaration heretofore, which is sustained by every sentiment of justice and humanity, that where a life and limb saving appliance, like automatic car couplers, has come into general use, and its partial adoption has in four years, notwithstanding the increase in railroad mileage and employees, decreased the injuries and deaths from coupling cars one half, the failure to adopt and use it is negligence *per se*. Considering the economy in money of using such appliances, as well as the ample revenues of the defendant, it is passing strange that it, or any other railroad company, should have delayed till now, or even till 1895, to protect the lives and limbs of their employees in this particular, or that there should have been need of an act of Congress or the verdict of a jury to stimulate considerations of humanity towards their patrons and their employees. Counsel for the defendant read, as part of his argument, a clipping from a newspaper, and repeats in his brief, that a noble English lord, who was a railroad manager as well as an hereditary member of Parliament, had changed his party affiliations because the one to which he had belonged had advocated the enforced adoption of self-couplers upon English railways. That simply shows that one such manager, at least, possesses a lordly disregard for the thousands of deaths and injuries of employees yearly caused by the lack of safety appliances; and it may be there are others who entertain sentiments of higher allegiance to the net earnings of the syndicates that employ them than to those great principles which every political party professes to advocate as being for the best interests of the public. But the hostility of one or more railway managers towards the matter cannot affect the impartial enforcement of the sound legal principle that employees and the traveling public alike have a right to be protected against any dangers which can be avoided by the adoption of safety appliances which have been tested by experience, and which have come into general use. In the present case, the defendant has the less excuse because there was uncontradicted testimony, not only that automatic car couplers were in general use at the time of the injury (March, 1895), but that the skeleton drawheads, in attempting to make a coupling with which the plaintiff was injured, were defective in that they were of different heights from the ground, and evidence that the cars could not have been coupled with a stick, or in any other manner, except by hand.

No error.

44 L. R. A.

See also 44 L. R. A. 553; 46 L. R. A. 314; 47 L. R. A. 282.

J. A. PIERCE, Admr., etc., of Frank H. Pierce, Deceased,
v.

NORTH CAROLINA RAILROAD COMPANY, Appt.

(.....N. C.....)

1. The master is liable for injury done by the wanton, wilful, and malicious act of an employee within the scope and in the discharge of his duties.
2. The tortious act of a brakeman in throwing coal at a boy on the tender of an engine, by which he knocks him off or frightens him so that he jumps off, causing him to be run over and killed by the engine, renders the railroad company liable.
3. A broadside exception "to the charge as given" will not be considered.

(March 7, 1899.)

APPEAL by defendant from a judgment of the Superior Court for Rowan County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

Deceased was a lad some twelve years old, who, in attempting to ride upon the tender of one of defendant's locomotives, in some way fell off and was run over and killed by the cars. There was some evidence in the case tending to show that deceased was driven from his position by missiles thrown by the fireman, and plaintiff claimed that the railroad was liable for the fireman's act. The court submitted the following issues to the jury: 1. Was the plaintiff's intestate killed by the negligence of the defendant as alleged? 2. Did the plaintiff's intestate by his own negligence contribute to his death? 3. Could the defendant by the exercise of reasonable care and prudence have avoided the injury notwithstanding the contributory negligence of the deceased? 4. What damage is plaintiff entitled to recover?

Further facts sufficiently appear in the opinion.

Messrs. Charles Price and G. F. Bason for appellant.

Messrs. Lee S. Overman, B. F. Long, and R. Lee Wright, for appellee:

Even if plaintiff's intestate was a trespasser and guilty of negligence in getting upon the tender, if, subsequent to and independent of his carelessness, defendant by ordinary care could have prevented the injury to him, then there is no contributory negligence upon the part of plaintiff's intestate, because the fault of the injured party becomes remote.

Smith v. Norfolk & S. R. Co. 114 N. C. 755, 25 L. R. A. 287.

If the defendant caused him to get off while the train was in motion, or knocked him off, the act of the defendant would be

NOTE.—For master's responsibility for servant's tortious injury to third person in the absence of any contractual relation with him, see note to *Bitche v. Waller* (Conn.) 27 L. R. A. 161.

the proximate cause of his death, and the plaintiff would be entitled to recover.

Troy v. Cape Fear & Y. Valley R. Co. 99 N. C. 308.

If the engineer and fireman saw plaintiff's intestate upon the tender, and by ordinary care could have prevented the injury, then the plaintiff would be entitled to recover damages.

Clark v. Wilmington & W. R. Co. 109 N. C. 430, 14 L. R. A. 749; *Kline v. Central P. R. Co.* 37 Cal. 400, 99 Am. Dec. 287.

The fireman was acting within the scope of his employment.

Hussey v. Norfolk Southern R. Co. 98 N. C. 41; 2 Wood, Railroads, 2d ed. *1404; *Denover & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146.

The defendant was bound to exercise reasonable care to anticipate and prevent injury to deceased although he was a trespasser.

Chicago City R. Co. v. Robinson, 127 Ill. 9, 4 L. R. A. 127; *Northwestern R. Co. v. Hack*, 66 Ill. 238; *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655, 59 Am. Rep. 596.

Children between seven and fourteen are incapable of exercising discretion.

1 Bishop, Crim. Law, p. 368.

It is not necessary to show that the master authorizes the particular act to be done; it is only necessary to show that the servant was acting in the general scope of his employment.

Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597; *Lovett v. Salem & S. R. Co.* 9 Allen, 557; *Carter v. Louisville, N. A. & O. R. Co.* 98 Ind. 552, 49 Am. Rep. 780, 8 Am. & Eng. R. Cas. 347.

If the lessee's employees on the engine could have averted the injury by keeping a lookout on the track and tender, and but for the lack of such prudence and care the injury would not have occurred, the defendant would be liable in damages.

Pickett v. Wilmington & W. R. Co. 117 N. C. 616, 30 L. R. A. 257.

The defendant lessee is liable for the violent conduct of his employees on the shifting engine when they were acting within the scope of their employment or line of duty.

Daniel v. Petersburg R. Co. 117 N. C. 592; *Hussey v. Norfolk Southern R. Co.* 98 N. C. 34; *Kline v. Central P. R. Co.* 37 Cal. 400, 99 Am. Dec. 282; 14 Am. & Eng. Enc. Law, p. 823, and notes; *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655, 59 Am. Rep. 596; *Wabash R. Co. v. Savage*, 110 Ind. 156; *Higgins v. Waterloot Turnpk. & R. Co.* 46 N. Y. 23, 7 Am. Rep. 293; *Northwestern R. Co. v. Hack*, 66 Ill. 238; *Beems v. Chicago, R. I. & P. R. Co.* 58 Iowa, 150; *Keefe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Towanda Coal Co. v. Heeman*, 86 Pa. 418.

Clark, J., delivered the opinion of the court:

The motion to dismiss the complaint and for judgment of nonsuit appears, from the brief of defendant's counsel to be intended to

raise again the question whether the lessor company, the North Carolina Railroad Company, the defendant herein, is liable "for all acts done by the lessee in the operation of the road," as was held in *Logan v. North Carolina R. Co.* 116 N. C. 940, but why the counsel should feel "encouraged to believe" that "this court will retire from the position it has taken upon this question," we are not advised. We have perceived no lack of "soundness of reasoning" therein. The decision in *Logan's Case* was made after full deliberation and with full appreciation and careful discussion of the important principle now again called in question, and it was held that "a railroad company cannot escape its responsibility for negligence by leasing its road to another company unless its charter or a subsequent act of the legislature specially exempts it from liability in such case;" and it was made in an action to which the appellant herein was the party raising the question. The same proposition had been theretofore laid down by Smith, Ch. J., in *Aycock v. Raleigh & A. Air Line R. Co.* 89 N. C., at page 330, with cases there cited; and *Logan's Case* upon this point has been expressly cited and sustained in *Tillett v. Norfolk & W. R. Co.* 118 N. C. at page 1043; *James v. Western N. C. R. Co.* 121 N. C., at page 528; *Benton v. North Carolina R. Co.* (decided May 24, 1898) 122 N. C. 1007; and *Norton v. North Carolina R. Co.* 122 N. C. at pages 936, 937. In the last two cases this point was again held against the same corporation which is the appellant in this case. The verdicts were for considerable sums, and in *Norton's Case* the defendant was represented by the same counsel as in the present case.

The issues excepted to are those suggested for cases of this nature in *Denmark v. Atlantic & N. C. R. Co.* 107 N. C. 185, and which have been time and again approved since. Every phase of the defendant's contention could have been presented upon the issues submitted, and there could be, therefore, no just ground of exception in that respect. *Willis v. Atlantic & D. R. Co.* 122 N. C. 905, and cases there cited.

The exception for refusal of the first prayer, to instruct the jury that there was no evidence of negligence, and of the fourth prayer, to instruct them that there was no evidence that the act of defendant's servant was within the scope of his duties, and of the sixth prayer, to instruct them that there was no evidence that the fireman of defendant's lessee struck the deceased and knocked him off the steps of the tender, were, upon the evidence, properly refused. The other part of the fourth prayer and the seventh prayer for instructions were given in the charge. The charge of the court given in lieu of the fifth prayer for instruction gives the defendant no ground to complain at the refusal of that prayer.

We will now consider the second and third prayers for instructions, which were: "(2) If the jury believe that the intestate of plaintiff was killed by the wanton, wilful, and malicious act of one of the employees of the railroad company, then the company

would not be liable, and the jury should respond to the first issue 'No.' (3) If the jury find that the intestate's death was caused by the wanton and malicious act of the fireman, and that his act was not done in the furtherance of the business of the defendant, they should find the first issue in favor of the defendant, 'No.' The assumption in these prayers that the defendant is not liable if the plaintiff's intestate was killed by the wanton, wilful, and malicious act of one of the employees of the defendant, and especially if such act was not done in furtherance of the business of the defendant, cannot be sustained. The true test is, Was it done by such employee in the scope of the discharge of duties assigned him by the defendant, and while in the discharge of such duties? "In furtherance of the business of employer" means simply in the discharge of the duties of the employment; and the court properly told the jury that the defendant is responsible for the injury if caused by the wrongful act of the employee while acting in the scope of his employment. In *Ramsden v. Boston & A. R. Co.* 104 Mass. at page 120, 6 Am. Rep. 200, Gray, J., says: "If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is wilful or merely negligent (*Howe v. Newmarch*, 12 Allen, 49), or even if it is contrary to an express order of the master (*Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502." The rule is thus laid down in 2 Wood, Railroads, 2d ed. § 316, at page 1404: "Where the act is within the scope of the servant's authority, express or implied, it is immaterial whether the injury resulted from his negligence, or from his wilfulness and wantonness. Nor is it necessary that the master should have known that the act was to be done. It is enough if it was within the scope of the servant's authority. Thus, where a servant of a railway company employed to clean and secure its cars, and keep persons out of them, kicked a boy eleven years old from a railing, while the cars were in motion, whereby he was thrown under the cars and killed, it was held that the act, although in nobody's line of duty, being done in the course of the servant's employment, the company was chargeable therefor"; citing *Northwestern R. Co. v. Hack*, 66 Ill. 238, and other cases as authorities. Among many other cases almost on "all fours" with the present are *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655, 59 Am. Rep. 596, in which it was held that "where a boy fifteen years old gets upon a freight train wrongfully, and as a trespasser, for the purpose of riding without paying his fare, and is commanded by the brakeman to jump off the train while in dangerous motion, in the night-time, and in obedience to that command, and in fear of being thrown off, jumps off the train and is run over and injured, the company is liable"; and it is further held that whether the brakeman acted wantonly and maliciously, or merely failed to exercise due care and caution, the railroad company is liable for damages resulting from the brakeman's conduct,—citing many cases. 44 L. R. A.

In *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597, the defendant was held liable where the plaintiff jumped upon the platform of a baggage car to ride to a place where the cars were being backed to make up a train (this being against the regulations of the defendant), and the baggage master knocked him off, and in falling he fell upon some wood, rolled under the car, and was injured; the court holding that, to "make the master liable, . . . it is not necessary to show that he expressly authorized the particular act; it is sufficient to show that the servant was . . . acting within the general scope of his authority; and this although he departed from the private instructions, . . . abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury." In *Lovett v. Salem & S. R. Co.* 9 Allen, 557, it was held that where a boy ten years old wrongfully got upon a street car, and the driver ordered him to jump off while running at a dangerous speed, the company is responsible for the injuries sustained by the boy in doing so, unless it was found that the injury was caused by the boy's negligent manner of getting off. Another instance of liability for injuries sustained by a trespasser from the servant's violently and forcibly putting the trespasser off is *Carter v. Louisville, N. A. & C. R. Co.* [98 Ind. 552, 49 Am. Rep. 780], 8 Am. & Eng. R. Cas. 347, which cites numerous precedents of like purport. But it is needless to multiply cases. All of them hold that such ejection is done by the servant in the general scope of his employment, and if done recklessly or wantonly and maliciously, and even if in a manner forbidden by the master's orders, the company is liable for the tortious act. The ground is that the proximate cause of the injury is not the trespasser's wrongfully getting on the cars, but the tortious manner in which the servant makes him get off, and that, this act being in the general scope of the servant's employment, the master is liable. In the present case, whether the child jumped off because ordered by the brakeman, or by reason of the hint of a lump of coal whizzing by his head, or was actually struck and knocked off, this mode of getting him off the moving car was tortious, and the defendant is liable for the injury caused thereby. 14 Am. & Eng. Enc. Law, pp. 822, 823, and cases cited in the notes thereto; *Pierce, Railroads*, pp. 278, 279; *Kline v. Central P. R. Co.* 37 Cal. 400, 99 Am. Dec. 282, and notes; *Peck v. New York C. & H. R. R. Co.* 70 N. Y. 587; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146, *Towanda Coal Co. v. Heeman*, 86 Pa. 418, was a case exactly like this,—where the evidence was that a brakeman, by throwing coal at a boy who was wrongfully on a moving train, caused him to fall; and it was held that the company was liable in damages for the injury. The defendant, however, earnestly contends that, if the servant's act was malicious, the company is not liable for negligence. If that theory ever obtained, the above authorities show that it was contrary to reason, and has been duly and fully exploded. The company is

not charged in this case with malice because of the alleged malice of its agent, and whether it could be held liable for punitive damages is not before us. It is certainly liable for compensatory damages for the injury sustained from the tort of its servant.

The brief of the learned counsel for the defendant strenuously insists that a case of this kind cannot be understood by the court, and justice properly administered, unless we translate the action back into one of the old common-law forms of actions, and that when that is done it would be seen that the plaintiff cannot sustain his demand. It is precisely because the old division into forms of action lent itself to finespun metaphysical distinctions, whereby the form of proceeding became more important than the subject-matter, and led to frequent miscarriages of justice, that the common sense of an enlightened age swept the old system away; and for more than fifty years the discarded legal jargon of a former age has sounded strange if referred to at all at Westminster Hall, in which it grew up. In our own state the Constitution abolished the old system, and by statute we have substituted the simple requirement that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action." Code, § 233, subd. 2. That is the case here. We shall not delve in the debris of dead and forgotten centuries, nor disturb the dust that sleeps upon the volumes of an outworn and long-rejected legal system. To do so would be to obscure the substantial justice which it should be the sole object of every legal inquiry to ascertain. We need not darken counsel by multitude of words, nor entangle ourselves in the scholastic disputations which once obtained in legal proceedings, and very often defeated their object. This suggestion of counsel has its precedent in the physician, who, in a difficult case, proposed to give his patient something to throw him into fits, on the ground that he was infallible in curing fits. Here the plaintiff's intestate was admittedly run over and killed by the defendant's train. Upon the uncontroverted facts of this case, the brakeman, as a matter of law, was acting in

the scope of his general employment; and the court properly instructed the jury that if the boy was made to get off the car (though he was on there wrongfully) by the act of the brakeman, whether malicious or not, while the train was moving, so that the boy was killed in consequence of so doing, the defendant was liable for the damage caused by the negligent conduct of its lessee in thus operating its train.

The defendant further excepted "to the charge as given." This is a "broadside" exception, which cannot be considered. This has been uniformly so held for a long series of years, and in possibly more than fifty cases, and has been recently reaffirmed by Furches, J., in *Hampton v. Norfolk & W. R. Co.* 120 N. C., at page 538, 35 L. R. A. 808; and *State v. Moore*, 120 N. C. at page 571, by Faircloth, Ch. J., in *State v. Ashford*, 120 N. C. 588, and by Douglas, J., in *State v. Webster*, 121 N. C. 584; and in other recent cases,—two of them at this term. Indeed, the statute (Code, § 550) is explicit, requiring the appellant to prepare "a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the requests of the counsel of the parties for instructions, if there be any exception on account of the granting or withholding thereof, and stating separately in articles numbered the errors alleged." It would be so eminently unjust to an appellee to have an entire charge excepted to, without any specifications of the errors alleged therein, that he might prepare himself for argument thereof on appeal; and the decisions that such broadside exception will be disregarded here have been so uniform that we would feel impelled to adhere to so just and uniform a ruling, even if the statute law had not so explicitly prescribed it. A careful consideration of the charge shows, besides, that there is no error therein of which the defendant could complain.

The last exception, which is for refusal of judgment in favor of defendant upon the findings of the jury, needs no consideration beyond what is involved in the preceding discussion.

Affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Albert J. HALL *et al.*, *Appts.*,
v.

FIRST NATIONAL BANK OF CHELSEA.

(.....Mass.. ..)

An oral promise by the payee of a note to renew it until such time as the improvement in the business situation would enable the maker to proceed in business without such assistance is not enforceable in equity.

(March 2, 1899.)

NOTE.—For promise to pay when debtor feels able, see *Pistel v. Imperial Mut. L. Ins. Co.* (Md.) 43 L. R. A. 219.
44 L. R. A.

APPPEAL by plaintiffs from a decree of the Supreme Judicial Court for Suffolk County sustaining a demurrer to a bill filed to enjoin defendant from pressing suits on certain promissory notes signed and indorsed by plaintiffs on the ground that defendant had agreed to renew and discount the notes so long as the maker should need it. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. John F. Simmons, for appellants:

The bill prays for specific performance of a contract, and therefore has equity.

Pub. Stat. chap. 151, § 2, cl. 3; *Somerby v. Buntin*, 118 Mass. 279.

An oral contract may be specifically enforced.

Rackemann v. Riverbank Improv. Co. 167 Mass. 1; *Durkin v. Cobleigh*, 156 Mass. 108, 17 L. R. A. 270.

The statement in the bill, "until such time as the improvement in the business situation should enable him to proceed in business without such assistance," is certainly not more indefinite than would have been an entire absence of any time limit, and the decisions in this commonwealth have long and invariably held that in such case the contract will last for a "reasonable length of time."

Atwood v. Cobb, 16 Pick. 227, 26 Am. Dec. 657; *Loring v. Boston*, 7 Met. 409; *Park v. Whitney*, 148 Mass. 278; *Rackemann v. Riverbank Improv. Co.* 167 Mass. 1.

And this is the common law everywhere.

Sugden, Vend. & P. 14th ed. 271; 1 Chitty, Contr. 11th Am. ed. 434; 2 Chitty, Contr. 11th Am. ed. 1062.

While what is a reasonable time has been held to be a question of law, it is not to be determined until "all the facts and circumstances are proved on which it depends."

Loring v. Boston, 7 Met. 409; *Rackemann v. Riverbank Improv. Co.* 167 Mass. 1.

Mr. Henry L. Whittlesey, for appellee:

The plaintiffs have not stated such a case as to entitle them to any relief in equity.

The bill sets forth an oral agreement in regard to an entirely different matter than the suit which it seeks to enjoin. This plaintiff might have set forth the defense in the action he now seeks to enjoin, under Stat. 1683, chap. 223, § 14, in which the right to allege an equitable defense is given. As he was not prevented from so doing by either fraud, accident, or mistake, his failure to allege such defense at law should deprive him of the right to the injunction sought in the bill.

George Woods Co. v. Storer, 144 Mass. 399.

The plaintiffs set forth an action at law against the defendant.

Payson v. Lamson, 134 Mass. 593, 45 Am. Rep. 348; *Fuller v. Caldwell*, 6 Allen, 503; *Williams v. Wilson*, 124 Mass. 257; *Saunders v. Huntington*, 166 Mass. 96; *Amherst College v. Allen*, 165 Mass. 178.

The plaintiff does not offer to pay the debt or the interest thereon which he admits he has legally incurred, or to pay for the money which he has borrowed.

It being a unilateral contract, and therefore not to be enforced, no consideration to bind the bank is set forth, and it is not within the powers of the bank to enter into such a contract.

A party seeking for specific performance must show that damages would not afford an adequate compensation.

Bispham, Eq. § 375.

All agreements in order to be executed by the court of equity must be certain and defined.

Walpole v. Oaford, 3 Ves. Jr. 420; *Bispham, Eq.* § 377; *New York, N. H. & H. R. Co. v. Martin*, 158 Mass. 313.

44 L. R. A.

Holmes, J., delivered the opinion of the court:

The understanding alleged in the bill that the bank would renew the plaintiff's notes until such time as the improvement in the business situation should enable the plaintiff to proceed in business without such assistance, is an understanding which directly contradicts the promise expressed on the face of the notes; for whereas, the promise expressed in the notes is a promise to pay money at the maturity of the instrument, the contemporary understanding cuts it down to a promise to give a new promise to pay. It is not denied, and, on the contrary, rather is implied, in the bill that the agreement to renew was not in writing. *Adams v. Wordley*, 1 Mees. & W. 374; *Young v. Austen*, L. R. 4 C. P. 553. If so, it could not be proved in contradiction of any written contract, and especially not in contradiction of a bill or note in an action at law. *Spring v. Lovett*, 11 Pick. 417, 420; *Batchelder v. Queen Ins. Co.* 135 Mass. 449; *Hoare v. Graham*, 3 Campb. 57; *Young v. Austen*, L. R. 4 C. P. 553; *Abrey v. Crus*, L. R. 5 C. P. 37, 44; *Hill v. Gaw*, 4 Pa. 493; *Heist v. Hart*, 73 Pa. 286, 289.

In *Flight v. Gray*, 3 C. B. N. S. 320, there is an intimation that relief might be given in equity upon such a promise, and some American cases treat the repudiation of an oral understanding, even though entered into with no intent not to perform it, as itself a sufficient fraud. *Kearich v. Swinehart*, 11 Pa. 233, 238, 240, 51 Am. Dec. 540; *Taylor v. Gilman*, 25 Vt. 411; *Murray v. Dake*, 46 Cal. 644. But this last notion has been denied by this court in cases depending upon somewhat similar principles. *Bourke v. Callanan*, 160 Mass. 195, 197. In *Flight v. Gray*, Willes, J., seems to have doubted; and, where there is no fraud other than that of relying upon the principles of law, we see no satisfactory ground for allowing the engagement in a note to be varied in this way in equity any more than at law, at least on behalf of a plaintiff seeking specific performance of the oral agreement. *Dwight v. Pomerooy*, 17 Mass. 303, 9 Am. Dec. 148; *Woolam v. Hearn*, 7 Ves. Jr. 211, 219, 2 White & T. Lead. Cas. in Eq. 6th ed. p. 513, and see note page 525; *Omerod v. Hardman*, 5 Ves. Jr. 722, 730, 731; 2 Pom. Eq. Jur. 2d ed. § 854, note. See *Goode v. Riley*, 153 Mass. 585, 587; *Quinn v. Roath*, 37 Conn. 16, 30.

Again, it is highly improbable that such an agreement as is alleged can mean to leave the determination of the time when money may be demanded to anyone but the holder of the notes. See *Hawkins v. Graham*, 149 Mass. 284. On the face of it, it does not import a legally binding promise, but rather a hopeful encouragement, sounding only in prophecy. We cannot discover an actionable contract; still less one that can be specifically enforced. Every allegation in the bill is too vague and uncertain.

Bill dismissed.

CONNECTICUT SUPREME COURT OF ERRORS.

Lemuel G. HOADLEY

v.

SAVINGS BANK OF DANBURY, *Appt.*

(71 Conn. 599.)

1. A letter written by a broker to his principal pending the latter's negotiations for sale of the property, stating that the purchaser was procured through his efforts, is admissible in evidence in an action for commissions, not to support the truth of the statement, but as a fact relating to the conduct of the parties in respect to the transaction in dispute.
2. It is within the discretion of the trial court to admit a portion of a deposition in chief and the remainder in rebuttal.
3. That one who is led to begin negotiation for property which he finally purchases through the intervention of a

broker had been engaged at some prior time in a bootless negotiation for the same property, and that he finally completes the sale through secret negotiation with the owner, do not deprive the broker of his right to commissions.

4. A broker may be found to be the procuring cause of sale where he calls a person's attention to a certain piece of property, and gives him information as to how to obtain admission thereto, although the owner, without the broker's knowledge, subsequently takes up the negotiation and completes the sale.
5. Facts adjudicated by a trial court cannot be retried on appeal upon the certified testimony.
6. The omission of admitted or undisputed facts from a finding is not an error that affects the judgment unless by correcting the record and including them in the finding it appears that the court erred in some ruling of law material to the judgment.

NOTE.—When real-estate broker is considered as the procuring cause of the sale or exchange effected.

- I. Procuring cause of sale.
 - a. General rule.
 - b. Evidence to establish procuring cause.
 - c. Acts held sufficient to establish.
 - d. Acts held not sufficient to establish.
- II. When several brokers are employed.
- III. In case of a sale by his principal.
 - a. General rule governing.
 - b. Negotiations by principal.
 - c. Before broker has reasonable opportunity to reap result of his efforts.
 - d. Pending broker's negotiations with purchaser.
 - e. After suspension of negotiations.
 - f. After withdrawal or termination of agency, etc.
 - g. After broker has failed to secure purchaser or to close negotiations.
 - h. Within time limited by contract.
 - i. When broker has option or sole agency.
 - j. Effect of modification of terms.

The note to Lunny v. Healey (Neb.) — L. R. A. —, treats of the subject of the performance of the contract by the broker, and the general rules governing the same.

The subject of real-estate broker's commissions as affected by the negligence, fraud, or default of the principal and a defective title will be found in note to Brackenridge v. Claridge (Tex.) 43 L. R. A. 593.

Real-estate broker's commissions as affected by his negligence or fraud or other acts or agreements on his part respecting the sale or exchange of real estate will be found in note to Leathers v. Canfield (Mich.) — L. R. A. —.

I. Procuring cause of sale.

a. General rule.

The general rule is that the broker has performed his contract and is entitled to his commissions when he is the procuring cause of the sale effected with the purchaser, and unless he proves that he stands in such a position he cannot recover.

And the rule is the same even though the sale is effected by the owner himself. Leonard v. Roberts, 20 Colo. 88, 95. (As to the broker's claim of performance in case of a sale by the principal, see *infra*, III.)

44 L. R. A.

Whether the broker is to "introduce" a purchaser, or to "find" or "procure" one, or whether he is to do these things combined, his duties remain practically the same, and the words "find," "procure," and "introduce" are generally used synonymously in the making of such contracts. Whether used conjunctively or disjunctively, the essential thing they require the broker to do is to secure a customer who is or will become a purchaser. Platt v. Johr, 9 Ind. App. 58, 60.

So, the word "procure" means to procure a party, and not the money, and the contract is completed so far as the broker is concerned when he has procured a person who is ready and willing to pay the price, or in the case of a loan to lend the money. Middleton v. Thompson, 163 Pa. 112, 119; Green v. Lucas, 38 L. T. N. S. 584.

And the term "procuring cause" has been held to mean the original discovery of a purchaser by the broker, together with the final closing by or on behalf of the principal with the purchaser through the efforts of the broker. Hamm v. Weber, 19 Misc. 485; Smith v. McGovern, 65 N. Y. 574; Ware v. Dos Passos, 4 App. Div. 32, 35.

So, if the agreement is merely to "introduce" a purchaser it has been held that the agent cannot be said to have performed his duty when he has presented to the owner some person who contemplates buying, without reference to whether a sale is afterwards made to such person or not. Platt v. Johr, 9 Ind. App. 58, 61.

The above rule has been differently stated by the courts, but the decisions all lead to the one conclusion, which is that he must be the procuring cause of the sale in order to entitle him to recover his commissions as upon a performance of his contract.

In the following cases the courts make use of the term "procuring cause": Hill v. Jebb, 55 Ark. 574, 576; Dolan v. Scanlan, 57 Cal. 261, 263; Zeimer v. Antisell, 75 Cal. 509; McCampbell v. Cavis, 10 Colo. App. 242; Lawrence v. Weir, 3 Colo. App. 401; Hallack v. Hinckley, 19 Colo. 88; Wray v. Carpenter, 16 Colo. 273; Babcock v. Merritt, 1 Colo. App. 84, 88; Hungerford v. Hicks, 39 Conn. 259; Odell v. Dozier, 104 Ga. 203; Davis v. Gassette, 30 Ill. App. 41; Keeler v. Grace, 27 Ill. App. 427, 429; Baumgartl v. Hoyne, 54 Ill. App. 496, 503; Plant v. Thompson, 42 Kan. 664; Attrill v. Patterson, 58 Md. 228; Livezy v. Miller, 61 Md. 336, 343; Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706;

7. That a broker was not given the exclusive sale of property, and that the owner himself made the sale, will not defeat the broker's right to commissions if he was the procuring cause of sale.
8. After a broker has rendered the services which make him the procuring cause of sale the owner cannot escape liability by telling him that no commission will be paid in case the property brings only a certain price.
9. A finding by the trial judge is unnecessary when the appeal is used as a substitute for the former motion in error.
10. Conclusions of the trial court from subordinate facts found may be reviewed on appeal.
11. The finding by the trial judge when an appeal is used as a substitute for a motion for new trial may contain a statement of facts on which the judgment is founded, or which are necessary

to present a question of law which was made at the trial and decided by the judge, or it may contain a recital of what took place at the trial for the purpose of presenting for review rulings upon questions of evidence or other rulings not directly affecting the judgment.

12. To get an omitted fact into the record for the purpose of presenting a question of law under the act of 1897, it must appear to have been an admitted or undisputed fact, and that its statement is necessary to properly present a question of law decided adversely to appellant.

(March 9, 1899.)

A PPEAL by defendant from a judgment of the Superior Court for New Haven County in favor of plaintiff in an action brought to recover commissions for the sale of real estate. *Affirmed.*

Tinges v. Moale, 25 Md. 480, 90 Am. Dec. 73; Jones v. Adler, 34 Md. 440; Hannan v. Fisher, 82 Mich. 208, 213; Ranson v. Weston, 110 Mich. 240; Francis v. Baker, 45 Minn. 83; Crevier v. Stephen, 40 Minn. 288; Armstrong v. Wann, 29 Minn. 126; Putnam v. How, 39 Minn. 363; Schmidt v. Baumann, 36 Minn. 189; Ramsey v. West, 31 Mo. App. 676; Crowley v. Somerville, 70 Mo. App. 376, 379; Timberman v. Craddock, 70 Mo. 638; Stinde v. Blesch, 42 Mo. App. 578, 581; Wright v. Brown, 68 Mo. App. 577, 582; Wetzell v. Wagoner, 41 Mo. App. 509; Brennan v. Roach, 47 Mo. App. 290; Henderson v. Mace, 64 Mo. App. 393; Tyler v. Parr, 52 Mo. 249; Bass v. Jacobs, 63 Mo. App. 393; Jones v. Berry, 37 Mo. App. 130; Gaty v. Sack, 19 Mo. App. 476; Bell v. Kaiser, 50 Mo. 150; Millan v. Porter, 31 Mo. App. 576; Woods v. Stephens, 46 Mo. 555; Hambleton v. Fort (Neb.) 78 N. W. 498; Hay v. Platt, 66 Hun. 488, 490; Briggs v. Rowe, 4 Keyes, 424; McClave v. Palne, 49 N. Y. 561, 10 Am. Rep. 431, 432; Hobbs v. Edgar, 22 Misc. 510; Myers v. Dean, 9 Misc. 183; Markus v. Kenneally, 19 Misc. 517; Randrup v. Schroeder, 21 Misc. 52, 22 Misc. 365; Simonson v. Klessick, 4 Daly, 143, 145; Goldstein v. Walters, 29 N. Y. S. R. 323; Chilton v. Butler, 1 E. D. Smith, 150, 151; Carroll v. Pettit, 67 Hun. 418; Lloyd v. Matthews, 51 N. Y. 124; Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Fraser v. Wyckoff, 63 N. Y. 445, 448; Knapp v. Wallace, 41 N. Y. 477; Martin v. Silliman, 53 N. Y. 615; Wylie v. Marine Nat. Bank, 61 N. Y. 415, 416; Hamilton v. Gillender, 26 App. Div. 156; Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 22 Am. Rep. 441; Colwell v. Tompkins, 6 App. Div. 93; Hanford v. Shapeter, 4 Daly, 243; McKnight v. Thayer, 48 N. Y. S. R. 620; Royster v. Mageveney, 9 Lea, 148; Graves v. Bains, 78 Tex. 92, 94; Murray v. Currie, 7 Car. & P. 584; Wilkinson v. Martin, 8 Car. & P. 1, 5.

In Smith v. Smith, 1 Sweeney, 552, it was said that he must be the primary procuring cause.

And in White v. Twitchings, 26 Hun. 503, 504, and Hay v. Platt, 66 Hun. 488, it is said he must be the procuring cause of the "identical contract."

The term "efficient cause" or "agent" is made use of in Henderson v. Vincent, 84 Ala. 99; Birmingham Land & Loan Co. v. Thompson, 86 Ala. 146, 149; Sayre v. Wilson, 86 Ala. 151, 156; Dolan v. Scanlan, 57 Cal. 261, 263; Zelmner v. Antisell, 75 Cal. 509; Babcock v. Merritt, 1 Colo. App. 84, 88; Lawrence v. Welr, 3 Colo. App. 401; Pratt v. John, 9 Ind. App. 58; Gleason v. Nelson, 162 Mass. 245; Francis v. Baker, 45 Minn. 83; Sussdorff v. Schmidt, 55 N. Y. 319; Satterthwaite v. Vreeland, 3 Hun. 152; McClave v. Palne, 49 N. Y. 561, 10 Am. Rep. 431; Hamilton v. Gillender, 26 App. Div. 156; Lloyd v. Matthews, 51 N. Y. 124; Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 22 Am. Rep. 441; Briggs v. Rowe, 4 Keyes, 424; Wylie v. Marine Nat. Bank, 61 N. Y. 415, 416; Colwell v. Tompkins, 6 App. Div. 93, 94; Royster v. Mageveney, 9 Lea, 148; Graves v. Bains, 78 Tex. 92, 94; Earp v. Cummins, 54 Pa. 394, 93 Am. Dec. 718, 719; Murray v. Currie, 7 Car. & P. 584; Wilkinson v. Martin, 8 Car. & P. 5.

The term "immediate cause" is made use of in Gleason v. Nelson, 162 Mass. 245. The phrase the "efficient or effective cause or means of bringing about the actual sale" is found in Whitcomb v. Bacon, 170 Mass. 479; Dowling v. Morrill, 165 Mass. 401; Crowninshield v. Foster, 169 Mass. 237. And the words "controlling cause" of the sale made to the purchaser is the expression made use of in Brooks v. Leathers, 112 Mich. 463.

The "primary, proximate, and procuring" cause is found in Latschaw v. Moore, 53 Kan. 234.

The term "proximate cause" is found in Schmidt v. Baumann, 36 Minn. 189; Gaty v. Sack, 19 Mo. App. 476; Millan v. Porter, 31 Mo. App. 576; Wetzell v. Wagoner, 41 Mo. App. 509; Stinde v. Blesch, 42 Mo. App. 578; Jones v. Berry, 37 Mo. App. 130; Woods v. Stephens, 46 Mo. 555; Brennan v. Roach, 47 Mo. App. 290; Bell v. Kaiser, 50 Mo. 150; Tyler v. Parr, 52 Mo. 249; Bass v. Jacobs, 63 Mo. App. 393; Henderson v. Mace, 64 Mo. App. 393; Timberman v. Craddock, 70 Mo. 638; Wright v. Brown, 68 Mo. App. 577, 582.

In the case of Earp v. Cummins, 54 Pa. 394, 93 Am. Dec. 718, 719, which was an action to recover commissions, the court stated that in matters of agency the law requires only proximate, and not remote, causes. In other words, as stated by Lord Bacon: "It were infinite for the law to judge the cause of causes and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgment of acts by that without looking to any further degree. *In jure non remota causa sed proxima spectatur.*"

The question whether the broker is entitled to a commission on the sale depends upon whether the person introduced by him can be regarded as a purchaser procured by him, and whether the purchase by him of the principal's

Statement by Hamersley, J.:

The finding of the trial court is as follows:

"(1) The plaintiff is, and for a number of years has been, a real-estate agent, doing business in the city of New Haven.

"(2) In December, 1897, John W. Bacon and James Osborne, the president and vice president, respectively, of the Savings Bank of Danbury, the defendant in this action, called at the office of the plaintiff, in New Haven, and placed the property then owned by said bank, and known as the 'Elliott House,' situated on the corner of Chapel and Olive streets, in said city of New Haven, in the plaintiff's hands for sale.

"(3) Both said Bacon and said Osborne were in the practice of visiting New Haven each week, from the time they placed said property in the hands of plaintiff for sale until early in the following February, when

the property was sold to Mr. George H. Bishop, and on each of said visits called at the plaintiff's office to inquire as to the prospects of sale.

"(4) At the first or second visit of the said Bacon and Osborne to the plaintiff's office, in December, 1897, Mr. Bacon produced and read to the plaintiff a letter dated some eighteen months prior to that time, which letter contained an offer of some \$38,000 for said property, made in behalf of one George H. Bishop, the party who became the purchaser of the property in the following February.

"(5) At the time of reading said letter said Bacon or Osborne said to the plaintiff that said Bishop might be a possible purchaser, and requested the plaintiff to see him, and use his influence to induce him to buy the property.

property resulted from the negotiations which the broker induced him to enter into. *Hanna v. Collins*, 69 Iowa, 51.

In some of the cases the broker is held to be the procuring cause of the sale when the same is made or can be referred to his instrumentality. *Henderson v. Vincent*, 84 Ala. 99; *Slevers v. Griffin*, 14 Ill. App. 63, 66; *Hafner v. Herron*, 165 Ill. 242, Affirming 60 Ill. App. 592; *Livzey v. Miller*, 61 Md. 336, 343; *Butler v. Kennard*, 23 Neb. 357, 359; *Gemunder v. Hauser*, 6 Misc. 210, 214; *Ley v. Coogan*, 16 Daly, 137; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 382, 22 Am. Rep. 441; *King v. Bader*, 29 N. Y. S. R. 414; *Lloyd v. Matthews*, 51 N. Y. 124, 133; *Condict v. Cowdrey*, 46 N. Y. S. R. 898.

So, if the broker puts up maps, signs, notices, or otherwise advertises the property, by means of which a person is induced to open negotiations with the owner or principal which result in his buying the property, the sale may be said to have been effected through the broker's instrumentality. *Gleason v. Nelson*, 162 Mass. 245; *Bell v. Kaiser*, 50 Mo. 150; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718, 719.

And in other cases he is said to be the procuring cause when the sale is effected through information derived from him. *Lapsley v. Holdridge*, 71 Ill. App. 652; *Hafner v. Herron*, 165 Ill. 242, Affirming 60 Ill. App. 592; *Sussdorf v. Schmidt*, 55 N. Y. 319; *Stewart v. Mather*, 32 Wis. 344, 349; *Lincoln v. McClatchie*, 36 Conn. 136.

So, his "disclosure" of the purchaser has been held sufficient to establish his standing as the procuring cause of the sale, when the sale is effected with the purchaser whose name is disclosed. *Anderson v. Smythe*, 1 Colo. App. 253; *Beale v. Creswell*, 3 Md. 196, 201; *Keener v. Harrod*, 2 Md. 63, 56 Am. Rep. 706, 708; *Wilkinson v. Martin*, 8 Car. & P. 1; *Howe v. Werner*, 7 Colo. App. 530, 532; *Scott v. Patterson*, 63 Ark. 40, 52; *Tyler v. Parr*, 52 Mo. 249; *Lincoln v. McClatchie*, 36 Conn. 136; *Lloyd v. Matthews*, 51 N. Y. 124; *Beauchamp v. Higgins*, 20 Mo. App. 514, 517; *Wetzell v. Wagoner*, 41 Mo. App. 509, 516; *Bell v. Kaiser*, 50 Mo. 150; *Millan v. Porter*, 31 Mo. App. 563; *Henderson v. Mace*, 64 Mo. App. 393, 396.

And if the broker proves that he has given the names of the purchasers to the principals, and that thereby the sale or exchange was effected, he will establish his claim to commissions. *Campbell v. Vanstone*, 73 Mo. App. 84, 87.

And his "inducement" of the purchaser to apply to the principal, if shown affirmatively, was 44 L. R. A.

held to be the procuring cause, in *Brooks v. Leathers*, 112 Mich. 463; *Leonard v. Roberts*, 20 Colo. 88, 95; *Lloyd v. Matthews*, 51 N. Y. 124; *Sussdorf v. Schmidt*, 55 N. Y. 319; *Smith v. McGovern*, 65 N. Y. 574, 575; *Shipman v. Frech*, 1 N. Y. Supp. 68; *Lincoln v. McClatchie*, 36 Conn. 136; *Anderson v. Cox*, 16 Neb. 10; *Holley v. Townsend*, 2 Illt. 34; *Hafner v. Herron*, 165 Ill. 242, Affirming 60 Ill. App. 592.

Some cases hold that the broker is the procuring cause when he is the "meritorious" cause of the sale. *Hutten v. Renner*, 74 Ill. App. 124, 125; *Bryan v. Abert*, 3 App. D. C. 180; *Pate v. Marsh*, 65 Ill. App. 482, 483; *Tyler v. Parr*, 52 Mo. 249; *Adams v. Decker*, 34 Ill. App. 20.

So, he has been said to be the procuring cause when he produces a party who makes a purchase. *Willes v. Smith*, 77 Wis. 81, 86.

And he has been held the procuring cause where the sale has proceeded from his efforts as broker. *Boyd v. Watson*, 101 Iowa, 214, 221; *Francis v. Eddy*, 49 Minn. 447; *Armstrong v. Wann*, 29 Minn. 126; *Babcock v. Merritt*, 1 Colo. App. 84, 88; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431; *Lloyd v. Matthews*, 51 N. Y. 124; *Lyon v. Mitchell*, 36 N. Y. 235; *Briggs v. Rowe*, 4 Keyes, 424; *Murray v. Currie*, 7 Car. & P. 584; *Wilkinson v. Martin*, 8 Car. & P. 5; *Lawrence v. Welz*, 3 Colo. App. 401; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Hamm v. Weber*, 19 Misc. 485; *Leonard v. Roberts*, 20 Colo. 88, 95; *Sussdorf v. Schmidt*, 55 N. Y. 319; *Lincoln v. McClatchie*, 36 Conn. 136; *Anderson v. Cox*, 16 Neb. 10; *Holley v. Townsend*, 2 Illt. 34; *Lapsley v. Holdridge*, 71 Ill. App. 652; *Hafner v. Herron*, 165 Ill. 242, Affirming 60 Ill. App. 592; *Brooks v. Leathers*, 112 Mich. 463; *Henderson v. Vincent*, 84 Ala. 99; *Stewart v. Mather*, 32 Wis. 344, 349; *Smith v. McGovern*, 65 N. Y. 574, 575; *Wetzell v. Wagoner*, 41 Mo. App. 509, 516; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Wright v. Brown*, 68 Mo. App. 577, 582; *Gemunder v. Hauser*, 6 Misc. 210, 214; *Markus v. Kenneally*, 19 Misc. 517; *Tinkham v. Knox*, 46 N. Y. S. R. 20; *Stinde v. Blesch*, 42 Mo. App. 578; *Brennan v. Roach*, 47 Mo. App. 290; *Henderson v. Mace*, 64 Mo. App. 393; *Tyler v. Parr*, 52 Mo. 249; *Baas v. Jacobs*, 63 Mo. App. 393; *Jones v. Berry*, 37 Mo. App. 130; *Gaty v. Sack*, 19 Mo. App. 476; *Timberman v. Craddock*, 70 Mo. 638; *Bell v. Kaiser*, 50 Mo. 150; *Millan v. Porter*, 31 Mo. App. 576; *Woods v. Stephens*, 46 Mo. 555.

Or if the sale is the result of his services and exertions. *Barnett v. Gluting*, 3 Ind. App. 415; *Beauchamp v. Higgins*, 20 Mo. App. 514, 517.

"(6) The plaintiff then agreed to see Mr. Bishop in reference to the property, and did call at his office twice during December, but failed to find him.

"(7) About the 1st of January, 1893, the plaintiff, on going again to Mr. Bishop's office to see him in reference to this property, met him on Chapel street, and talked with him regarding the property, stating that the bank was particularly anxious to sell, and avoid the expense of alterations in the property, which it would be compelled to make if it was not disposed of, and that he (Bishop) could purchase the property at a very low price, and for a number of thousand dollars less than he had previously offered for the same property, and that the property was as good then as it ever was.

"(8) A few days later said Bishop called twice at the office of the plaintiff to obtain

the keys of the Elliott House to examine the property, and, not finding the plaintiff at his office, left word with his bookkeeper as to the object of the visit.

"(9) The plaintiff, on being informed of Mr. Bishop's call, telephoned him that by going to the Elliott House barber shop, and using his (the plaintiff's) name, he could secure entrance to the property.

"(10) Said Bishop, about the middle of January, after receiving this information from the plaintiff, did call at the Elliott House as directed, and examined the property.

"(11) On another and subsequent occasion, in January, 1898, the plaintiff met Mr. Bishop, while the latter was in his carriage on Chapel or State street, and had a further talk with him regarding the purchase by him of the Elliott House property.

Or through his exertions or agency. *Stinde v. Blesch*, 42 Mo. App. 578, 581; *Campbell v. Vanstone*, 73 Mo. App. 84, 87; *Anderson v. Smythe*, 1 Colo. App. 253; *Howe v. Werner*, 7 Colo. App. 530, 532.

This is so if his acts, however slight, bring about a sale. *Watts v. Howard*, 51 Ill. App. 248, 249; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718; *Wylie v. Marine Nat. Bank*, 61 N. Y. 416; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 481; *Liye v. Ludewick*, 14 Ill. App. 372; *Armstrong v. Wann*, 29 Minn. 126; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441.

So, he is the procuring cause when the sale is traced to his introduction of the purchaser to the owner or principal. *Scott v. Patterson*, 53 Ark. 49; *Hallack v. Hinckley*, 19 Colo. 38; *Wray v. Carpenter*, 16 Colo. 273; *Anderson v. Smythe*, 1 Colo. App. 253; *Howe v. Werner*, 7 Colo. App. 530, 532; *Lincoln v. McClatchie*, 36 Conn. 136; *Sievers v. Griffin*, 14 Ill. App. 63, 66; *Platt v. Johr*, 9 Ind. App. 58; *Beale v. Creswell*, 3 Md. 196, 201; *Schwartz v. Yearly*, 31 Md. 270, 276; *Keener v. Harrod*, 2 Md. 63, 56 Am. Rep. 706, 708; *Campbell v. Vanstone*, 73 Mo. App. 84, 87; *Tyler v. Parr*, 52 Mo. 249; *Goodwin v. Brennecke*, 21 App. Div. 138; *Knapp v. Wallace*, 41 N. Y. 477; *Lloyd v. Matthews*, 51 N. Y. 124; *Wilkinson v. Martin*, 8 Car. & P. 1; *Viaux v. Old South Church Soc.* 133 Mass. 1, 10; *Tombs v. Alexander*, 101 Mass. 255, 256, 3 Am. Rep. 349; *Loud v. Hall*, 106 Mass. 404; *Blake v. Stump*, 73 Md. 160, 10 L. R. A. 103; *Beauchamp v. Higgins*, 20 Mo. App. 514, 517; *Wetzell v. Wagoner*, 41 Mo. App. 509, 516; *Bell v. Kaiser*, 50 Mo. 150; *Millan v. Porter*, 31 Mo. App. 563; *Henderson v. Mace*, 64 Mo. App. 398, 399; *Glider v. Davis*, 137 N. Y. 504, 20 L. R. A. 398; *Royster v. Mageveney*, 9 Lea, 148; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718, 719; *Gerding v. Haakin*, 141 N. Y. 514, 519; *Hammond v. Mitchell*, 61 Ill. App. 144, 147.

And where he substantially effected a sale by procuring and introducing a purchaser to whom the principal sold the property, he was held to be the procuring cause of the sale. *Desmond v. Stebbins*, 140 Mass. 339, 352.

And he will be held to have procured a purchaser and brought the parties together according to the agreement, where he procures a purchaser according to the terms thereof and brings the parties together. *Wood v. Wells*, 103 Mich. 820.

And where it is shown that the sale would not have been effected but for such introduction, to that extent the broker is the procuring cause 44 L. R. A.

of the sale. *Bass v. Jacobs*, 63 Mo. App. 333, 396.

The agent who first brings it to the notice of the person who ultimately becomes a purchaser, is entitled to his commissions as the procuring cause of the sale. *Schlegel v. Allerton*, 65 Conn. 260; *Plant v. Thompson*, 42 Kan. 664; *Glascok v. Vanleet*, 100 Tenn. 603; *Royster v. Mageveney*, 9 Lea, 148; *Arrington v. Cary*, 5 Baxt. 609.

In an action by a real-estate broker to recover commissions on a sale to purchasers "procured" by them, it is not error to instruct the jury that the principals are liable if the brokers "furnished" customers. *Boyd v. Watson*, 101 Iowa, 214.

The broker is the procuring cause of the sale and performs his contract so as to be entitled to commissions when he procures a purchaser who enters into a written contract of purchase satisfactory to the principal and enforceable against either party. *Odell v. Dozier*, 104 Ga. 203; *Burns v. Oliphant*, 78 Iowa, 456, 459. See, as to the necessity of a written contract, *note to Lunney v. Healey* (Neb.) — L. R. A. —.

So, the rule that, when a broker is the procuring cause of the sale, he becomes entitled to his commissions, rests, not only upon the ground that he is the agent of his principal, but also upon the theory that his acts are bona fide. *Pratt v. Patterson*, 112 Pa. 475.

And if the broker gets all his information from the principal, and imparts it to the purchaser who makes the purchase, the broker is the procuring cause of the sale under a contract to pay commissions for making a sale. *Alexander v. Breeden*, 14 B. Mon. 154.

In *Ellismore v. Gamble*, 62 Mich. 543, 545, it is said that anyone who determines the action of the purchaser secures the purchase, and is the procuring cause of the same.

If the broker's action directs the attention of the purchaser to the property as property for sale or exchange, and this leads to negotiations, and the broker's action induced the minds of his principal and the purchaser to meet on the subject, which resulted in an exchange, the broker is the procuring cause thereof. *Smith v. McGovern*, 65 N. Y. 574, 575; *Shipman v. Frech*, 1 N. Y. Supp. 68; *Hambleton v. Fort* (Neb.) 78 N. W. 498.

And the facts that the broker drew the purchaser's attention to the property and urged the sale, and that he was the cause of the application and sale, are sufficient to establish the broker the procuring cause of the sale. *Hefner v. Chambers*, 121 Pa. 84.

"(12) At the time of the sale of the property to Mr. Bishop, and at the request of the bank officials, the said Bishop executed and delivered to the bank a bond" agreeing to

"I, George H. Bishop, in consideration of the sale to me by the Savings Bank of Danbury of the property known as the 'Elliott House Property,' do agree with the Savings Bank of Danbury that I will pay all taxes assessed against said property during the year 1897, and which are now unpaid, and which, having been so assessed, will become due and payable on the first day of October, 1898; and I further agree that I will guaranty said the Savings Bank of Danbury against the payment of any commissions to Lemuel G. Hoadley, of said New Haven, for the sale of said property; and I do hereby agree to save said the Savings Bank of Danbury harmless and free from any payment, loss, damage, costs, or expenses, by reason of any commission or claimed commission, from Lemuel G. Hoadley, for the sale of said property."

So, the parties may meet by chance and finally effect a sale, but if the broker be the means of putting the purchaser's mind into the mood of purchasing he is the procuring cause. *Hambleton v. Fort* (Neb.) 78 N. W. 498.

Representations of fact, as well as persuasions, may be the means by which the purchaser may be secured by the broker. *Ellamore v. Gamble*, 62 Mich. 543, 545.

And if the sale is brought about by the advertisements and exertions of the broker he is the procuring cause of the same. *Bell v. Kaiser*, 50 Mo. 150; *Beauchamp v. Higgins*, 20 Mo. App. 514, 517; *Goffe v. Gibson*, 18 Mo. App. 1; *Anderson v. Cox*, 16 Neb. 10; *Hambleton v. Fort* (Neb.) 78 N. W. 498.

If a stranger seeing the advertisement mentions it to one who looks up the owner and purchases, his actions are sufficient to entitle him to recover as the procuring cause. *Hambleton v. Fort* (Neb.) 78 N. W. 498.

Again, an advertisement, or any other service, will constitute the procuring cause if it is the immediate and efficient cause of the bargain. *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 715, 719.

It is not essential to the broker's right to compensation that he should bring about directly the actual meeting, or that he should even inform the vendor as to the prospective purchaser, provided his influence on the purchaser causes him to become such. *Hambleton v. Fort* (Neb.) 78 N. W. 498; *Burkholder v. Fonner*, 34 Neb. 1.

If through the instrumentality of the broker the buyer and seller meet, and negotiations are thus opened between them which continue without withdrawal by either party therefrom, and culminate in a sale, the broker is the procuring cause of the sale. *Gemunder v. Hauser*, 6 Misc. 210, 214; *Levy v. Coogan*, 16 Daly, 137; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 382, 22 Am. Rep. 441; *Kling v. Bauer*, 29 N. Y. S. R. 414.

If it is shown that the sale was not made or the purchaser procured by any other source than the broker, he will be entitled to recover as the procuring cause of the sale. *Byrd v. Frost* (Tex. Civ. App.) 29 S. W. 46.

So, the broker may be the procuring cause, even though he engaged a third person to make such sale without the knowledge of the principal. *Boyd v. Watson*, 101 Iowa, 221. *Gleason v. Nelson*, 162 Mass. 245, to the same effect.

In the latter case the rule was applied whether such persons were under pay from the broker or not.

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hold the bank harmless from any commission to the plaintiff.

"(13) The property was sold to Mr. Bishop for the sum of \$25,000, he to pay whatever commission there might be due for the sale of the property, as a part consideration thereof.

"(14) On the 5th, 12th, and 17th of January, 1898, said John W. Bacon saw Mr. Bishop in New Haven, and talked with him regarding some changes the bank contemplated making in said property, in case the same was not sold, and also spoke to him regarding his purchase of the property.

"(15) Mr. Bacon, though visiting at the plaintiff's office each week in reference to the sale of this property during said month of January, did not inform the plaintiff that he was having any negotiations with Mr. Bishop; nor did the plaintiff have any notice whatever that anyone connected with the

And where it is shown that through the services of the broker a sale is made which the principal accepts and in consideration thereof promises to pay a commission, the broker will be entitled to recover as the procuring cause of the sale. *Viley v. Pettit*, 96 Ky. 576.

The rule has been held to apply although after the broker had made a verbal contract the principal, without the knowledge of it, sold the property to the same purchaser. *Hutten v. Renner*, 74 Ill. App. 124, 125; *Bryan v. Abert*, 3 D. C. App. 180.

To inform people that he has the property for sale is a necessary act for the broker to carry out the contract of his agency, and which it is proper to prove as a part of what was done in order to procure a purchaser. *Welsh v. Lemert*, 92 Iowa, 116.

A broker is the procuring cause of the sale when he has found a purchaser, and brought him to his employer, and a contract is made between them for the sale of the property, or the purchaser is ready to purchase. *Fraser v. Wyckoff*, 63 N. Y. 445, 448; *Knapp v. Wallace*, 41 N. Y. 477; *Martin v. Stillman*, 53 N. Y. 615; *Lloyd v. Matthews*, 51 N. Y. 124.

And where the broker took the intended purchasers to his principal, and the property was inspected, and negotiations were conducted in part by the broker, which resulted in the principal's entering into a written promise *de vente* on the terms given to the broker, it was held that such promise was as binding on all parties as the sale itself would have been, and so far as the broker was concerned the transaction was closed and he had a vested right to his commissions. *Levistones v. Landreaux*, 6 La. Ann. 26.

So, when a broker brings the parties together, and the price and terms are agreed upon between them, and the contract is signed, he does all that he is compelled to do to entitle him to recover his commissions as the procuring cause of the sale. *Bach v. Emerich*, 3 Jones & S. 548, 551; *Jewett v. Emson*, 2 Robt. 185; *Stillman v. Mitchell*, 2 Robt. 523; *Barnard v. Monnot*, 3 Keyes, 203; *Smith v. Smith*, 1 Sweeney, 552.

And the same is the rule whether the parties are brought together in person or by correspondence, if the purchaser is accepted and the exchange is authorized, and the principal at the time is in the possession of all the knowledge and facts known to the agent, and the whole transaction on the part of the agent is done in good faith. *Lockwood v. Halsey*, 41 Kan. 166.

So, if the broker is employed to purchase

bank was negotiating with Mr. Bishop until after the sale of the property to the latter.

"(16) The Elliott House was a well-known piece of property, and Mr. Bishop was familiar with it, having made an offer some sixteen months previous to December, 1897; but, until the interview with the plaintiff, about the 1st of January, 1898, he had made no move regarding this property since his previous offer, and had abandoned his negotiations for the purchase of the same for a period of a year and a half or more.

"(17) Two per cent is the ordinary, established, and usual commission, in the absence of any agreement to the contrary, for the sale of real estate.

"(18) No agreement for any special rate of commission was made between the parties to this suit.

"(19) The plaintiff was the procuring cause of the sale of said property to said George H. Bishop at the price of \$25,000,

property, and he procures the same and brings it to his principal's notice at a price, and upon terms which are accepted by him, and the transaction is such that the principal may close the contract at the time upon precisely the same terms as those upon which he ultimately purchases, the broker is the procuring cause of the purchase. *Baer v. Koch*, 2 Misc. 334, 336.

The above holdings of the courts may all be included in the language used by the court in the case of *Stewart v. Mather*, 32 Wis. 344, 349, to the effect that whenever the sale is effected through the efforts of the broker, or through information derived from him, so that he may be said to have been the procuring cause of the sale, his services are regarded as highly meritorious and beneficial, and the law leads to that construction which will best secure the payment of his commissions.

So, the rule has been applied where the broker acts in good faith and brings the principals together in his own office, and they make their own bargain uninfluenced by any representations of his. *Cox v. Haun*, 127 Ind. 325, 327.

But whether the broker's actions are to be regarded as the procuring, efficient, meritorious, controlling, or immediate cause of the sale and purchase, or whether the same is due to his efforts, introduction, inducement, disclosure, or instrumentality, or is caused through information derived from him, or by notice given by him, they must be the foundation on which the negotiations are begun and conducted, and the sale made. *Keener v. Harrod*, 2 Md. 63, 56 Am. Rep. 707, 708; *Wilkinson v. Martin*, 8 Car. & P. 1; *Beale v. Creswell*, 8 Md. 196, 201; *Schwartz v. Yearly*, 31 Md. 270, 276.

But something more is ordinarily necessary and implied than merely finding a person willing and desiring to buy; the purchaser must be found, and because of such finding by the broker the sale must proceed. *Boyd v. Watson*, 101 Iowa, 221; *Greene v. Owings*, 19 Ky. L. Rep. 580.

He must show that he is connected with the sale. *Commercial Nat. Bank v. Hawkins*, 35 Ill. App. 463.

The purchaser must be procured through the broker, or he cannot claim to be the procuring cause. *Van Dyke v. Walker*, 49 Mo. App. 381, 384; *Wright v. Beach*, 82 Mich. 469.

The sale must result in consequence of his actions or agency, means or efforts. *McKnight v. Thayer*, 48 N. Y. S. R. 620, 622; *Lloyd v. Matthews*, 51 N. Y. 132; *Markus v. Kenneally*, 44 L. R. A.

and the commission due him for the same is \$500.

"(20) The plaintiff, in his opening testimony, offered a letter, written on the 5th day of February, by himself, to John W. Bacon, then an officer and president of the defendant bank. The letter was written after the plaintiff had learned from Bishop that he (Bishop) had made an offer for the property. The defendant objected to so much of the letter as follows: 'Which offer comes from Mr. Bishop on account of my bringing to his notice the property of the Elliott House being for sale.'

"(21) The entire letter is as follows:

John W. Bacon, Treasurer, Danbury, Conn.

Dear Sir:—

About two weeks ago I called Mr. George H. Bishop's (of Peck & Bishop Company) attention to the Elliott House property as a

19 Misc. 517; *Wylle v. Marine Nat. Bank*, 61 N. Y. 416; *Armstrong v. Wann*, 29 Minn. 126; *Hartley v. Anderson*, 150 Pa. 391; *Keys v. Johnson*, 68 Pa. 42.

He must be substantially the moving cause which leads to the sale. *Carson v. Baker*, 2 Colo. App. 248.

In *Baumgartl v. Hoyne*, 54 Ill. App. 496, 502, it is said that the proximate cause of an act is that which produces it without the interposition of an independent agency, and that it is the proximate cause of which the law takes notice, and not the *causa causarum*. Although the maxim *In jure non remota causa sed proxima spectatur* is most frequently applied in cases of insurance, and in actions of tort, as a principle it may be considered in any case wherein the efficient, promoting cause of a result is to be ascertained.

The information given by the broker to the purchaser must be the controlling cause of the purchase, and his solicitations, and representations regarding the property, must determine the purchaser in his purchase. *Ellimore v. Gamble*, 62 Mich. 543, 545.

He must put the principal in communication with the purchaser. *Baars v. Hyland*, 65 Minn. 150; *Wright v. Beach*, 82 Mich. 469.

He must be the promoting cause which brings about the transaction which subsequently results in the sale or exchange. *Walton v. Cheseborough*, 57 N. Y. Supp. 687, 689.

In order to support an action by a broker for commissions, proof that he effected or procured a sale is necessary, in the absence of evidence of usage or an express or implied contract. *Loud v. Hall*, 106 Mass. 404, 407; *Cook v. Welch*, 9 Allen, 350; *Tombs v. Alexander*, 101 Mass. 253, 3 Am. Rep. 349.

So, he must prove that the person to whom he sold the property was one of his customers, that is a person found, or negotiated with, by him. *Brooks v. Leathers*, 112 Mich. 463.

He must also prove to the satisfaction of the jury by a preponderance of evidence that he made the contract with the principal, and that at the time of the sale such contract was still in existence and in full force between them. *Ibid.*

He must establish by satisfactory evidence that he did something substantial. *Hamilton v. Gillender*, 26 App. Div. 156; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Colwell v. Tompkins*, 6 App. Div. 93.

It may be doubtful whether merely advising

very desirable piece of property to own. At that time he seemingly did not take much interest in the matter; told me he would think it over. He called at my office a few days ago, and requested the keys; and I gave him the instructions left by you some little time ago, as I have previously written you, to go to the barber shop in the Elliott House building, and use my name, where he could get the keys handed him, by request, to inspect the property. He has examined the building, etc., and this A. M. informs me that he has submitted to the bank an offer in writing, which offer comes from Mr. Bishop on account of my bringing to his notice the property of the Elliott House being for sale.

Yours truly,
L. G. Hoadley.

a consummation of a bargain, of which the efforts of a rival are the procuring cause, would entitle the broker to commissions: and in such a case it ought to be shown that the advice given contributed so materially to the result as to be fairly entitled to be regarded as the procuring cause of the transaction. *Davis v. Gassette*, 30 Ill. App. 41, 45.

In *Walton v. McMorrow*, 57 N. Y. Supp. 691, 692, the mere fact that the broker suggested a trade, but had no further dealings with the defendant until after the deal was made, was held not enough to constitute him the procuring cause of the sale.

And, although it is not indispensable that the purchaser should be introduced to the owner by the broker, nor that the broker should be personally acquainted with the purchaser, yet in such cases it must affirmatively appear that the purchaser was induced to apply to the owner through means employed by the broker in order to make the broker the procuring cause of the sale. *Kelly v. Stone*, 94 Iowa, 316; *Sussdorf v. Schmidt*, 55 N. Y. 322; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Gemunder v. Hauser*, 6 Misc. 210, 214.

So, it is essential that the agreement as finally concluded between the principal and the purchaser should be procured or brought about by the broker. *Hamilton v. Gillender*, 26 App. Div. 156; *Baker v. Thomas*, 12 Misc. 432.

To entitle a real-estate agent to commissions in a sale or exchange of land it is only necessary for him to furnish a purchaser who is willing to purchase or exchange upon the terms and conditions agreed to or proposed by the seller, and this, *prima facie*, will entitle him to receive a commission. *Lockwood v. Halsey*, 41 Kan. 166.

It is sufficient if the sale is effected through his agency as the procuring cause, and if his negotiations with the purchaser are the cause or means of bringing him and the owner together, and the sale results in consequence thereof. *McKnight v. Thayer*, 48 N. Y. S. R. 620, 622; *Lloyd v. Matthews*, 51 N. Y. 132.

b. Evidence to establish procuring cause.

The broker is entitled to show all that he does to induce the purchaser to take the property, as well as all conversations relating thereto which either he or the purchaser has had with the principal which bear directly upon the issue. *Doran v. Bussard*, 38 App. Div. 30.

And evidence of conversations with the agent of the purchaser as part of the services rendered and as tending to show that those services were of value to his principal is competent. *Bickart v. Hoffmann*, 46 N. Y. S. R. 886
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"The objection of the defendant to the letter was stated as follows:

"Mr. Stoddard: It seems to me, if your Honor please, that while some parts of this (the first part, possibly) might be admissible for some purposes, that this part which reads as follows: "Which offer comes from Mr. Bishop on account of my bringing to his notice the property of the Elliott House being for sale,"—was no proper matter tending to prove the fact; and I object to that part of the letter, as tending to prove the fact that the sale was brought about by Mr. Hoadley, because it is a declaration in his own interest, and after the sale was made.' The ruling of the court upon the admission of the letter was as follows: 'The Court: I don't think, gentlemen, that that statement is binding upon the bank; but I think

So, the written contract entered into between the broker and the purchaser is admissible in evidence as proving a valid sale enforceable against such purchaser. *Monroe v. Snow*, 131 Ill. 126.

And the deed from the principal to the purchaser containing, and the admission by the principal of, the receipt of the purchase money, is competent evidence to prove the fact of the sale by the broker, and the sum for which the property was sold, and the amount of commission to which the broker would be entitled. *Levy v. Coogan*, 16 Daly, 137.

Again, the transaction or its true significance in case of dispute may be proved by anything which is said, done, or written in the presence of the parties themselves, and which is the immediate, unpremeditated, and spontaneous result of such transaction. *Monroe v. Snow*, 131 Ill. 126.

So, evidence which establishes that the broker was subject to expenses in negotiating the sale is competent, and he can show that he employed another whom he paid to aid him in conducting the negotiations, as such evidence is part of the *res gestæ*. *Fiero v. Fiero*, 52 Barb. 288, 292.

Evidence which shows an oral contract made between the purchaser and his principal upon terms mutually agreed upon, in conformity with which an attorney prepared a written agreement which the purchaser stood ready and willing to perform, sufficiently proves the broker's case. *Dennis v. Charlick*, 6 Hun, 21, 22.

So, the evidence of the purchaser himself showing that it was through the broker's influence and instrumentality that he purchased the property, is properly admissible. *Childs v. Ptomey*, 17 Mont. 502, 509.

In *Anderson v. Wedeking*, 102 Iowa, 446, the purchaser's testimony that it was only through the broker that he became aware of the sale, and that he finally made the purchase from the principal, who did not deny that there was an agreement between himself and the broker upon the question, was admitted.

Where the principal avers that the sale is negotiated by other persons it is not competent to ask the purchaser who has given minute details of the facts in connection with the purchase, and from whom he received the information that the property was in the market, as the question calls for a conclusion of the witness upon a material issue which it is the province of the jury to determine. *Burkholder v. Fonner*, 34 Neb. 1, 3.

And the purchaser cannot testify as to statements made by the broker relative to commissions. *Childs v. Ptomey*, 17 Mont. 502.

And the evidence of a nephew of the pur-

the letter to the bank is admissible. I don't think the fact that this man said that this sale was brought about by his efforts is binding or conclusive; but the fact that he made such a statement to the defendant in this case, I think, is admissible, and I should allow it to come in for the purpose of proving the fact that he said so.'

"(22). The plaintiff, in opening his case, offered the deposition of James Osborne, of the Danbury Savings Bank, and in connection therewith counsel for the plaintiff and defendant made the following statements: 'Mr. Wright: There is a deposition here of Mr. James Osborne, of the Danbury Savings Bank. There is only a portion of this deposition that is pertinent to our case in chief, and I will only read so much of it as I claim now, and leave the balance for rebuttal. The deposition is as follows: [Reading deposi-

tion.] That is as far as I care to read now. Mr. Stoddard: That is down to and including the answer 12 on page 4 of my copy? Mr. Wright: Yes. Mr. Stoddard: Well, very well. Mr. Wright: Let me examine it a little further. It may be possible there is only a question or two. If you have no objection, we might read the whole deposition now. Mr. Stoddard: You must take your own course. Mr. Wright: Well, I will stop there.'

"(23) After the defendant had rested, and in the evidence in reply, the plaintiff offered to read the remainder of said deposition, and, among other questions and answers, the following from his direct examination in said deposition: 'Q. 15. Were you present at a meeting of the directors of the Savings Bank of Danbury when Mr. Bishop's offer for the Elliott House was received and acted upon?'

chaser that he was taken by the broker to see the property, and that the sale was made to his uncle in consequence of his recommendation and interview with the broker, is properly admissible as clearly proving what the broker had done and that his acts resulted in a sale. *Welsh v. Lemert*, 92 Iowa, 116, 121.

So, evidence is properly received to show an agreement and undertaking between the parties as to the terms of the sale to the purchaser as the broker was entitled to prove that he had procured a purchaser and the terms upon which he was willing to buy. *Schmidt v. Baumann*, 36 Minn. 189.

And a letter written by the broker to the manager or agent of the purchaser, which confirmed the broker's testimony, was admitted in evidence as part of the *res gestæ* to corroborate the statement made by the broker that he found a purchaser who was surreptitiously approached by the principal who concluded the sale with him after the broker had intimated who the purchaser was, which latter fact the principal denied, as the letter was proof of the efforts made by the broker. *Carroll v. Pettit*, 67 Hun, 418.

Where there was an apparent variance or contradiction between the entries in the broker's books, which showed an authority to sell at a certain price with power to ask a larger sum, a postal card sent by the broker to his principal asking if there was any change in the price, and stating the larger sum as the price, and referring to the broker's books by letter and page, the broker's books containing such entry, was admitted in evidence to prove and explain such variance or contradiction. *Monroe v. Snow*, 131 Ill. 126.

In that case the principal denied the authority to sell for the smaller sum, and produced the postal card in evidence. The court admitted evidence in rebuttal on behalf of the broker for the purpose of proving that such card was written by his clerk under general instructions, and that he took the larger amount from books and knew nothing about the meaning or the reasons for the insertion of the private marks.

Under a contract to give the broker, or to such purchaser as he should procure, a good and sufficient deed of the premises, and to pay to them all in excess of a stipulated price, and also in case the principal himself sold at a certain price, or at a greater or less price to pay them 3 per cent on such sum paid, evidence of services rendered and money expended in order to procure a purchaser by means of advertisements; and other customary methods adopted by real-

estate brokers, without any result, is admissible in an action to recover the amount agreed to be paid under such agreement upon a sale by the principal. *Goward v. Waters*, 98 Mass. 596.

Yet evidence of subsequent negotiations between different parties is entirely irrelevant, as it tends to divert the minds of the jury from the main issue. *Folinsbee v. Sawyer*, 8 Misc. 370, 378.

Yet in an action by a real-estate broker to recover commissions it is competent for the court to admit evidence of the relation to a purchasing corporation of the party with whom the agent had negotiations and with whom the principal afterwards concluded the sale of the property, *e. g.* that he was a stockholder. *Brooks v. Leathers*, 112 Mich. 463.

And under a denial of an alleged sale made by a principal under a contract to allow his agent certain commissions on sales made by himself, the principal may show that a conveyance absolute in form was made for security only, and was in fact a mortgage. *Terry v. Wilson*, 50 Minn. 570.

Again, it is not error to exclude testimony on behalf of the principal that he had offered another party a commission for effecting a sale,—especially where the offer is made after the sale, and there is no evidence that such parties were the principal's agents to sell the property, and nothing to show that they were entitled to commissions. *Bowser v. Field* (Tex.) 17 S. W. 45.

But the principal cannot produce evidence of disputes between himself and such purchaser arising out of the contract between them where the same have been litigated and the purchaser has been successful in such litigation. *Heaton v. Edwards*, 90 Mich. 500.

See also *Newton v. Ritchie*, 75 Iowa, 91, and *Goin v. Hess*, 102 Iowa, 140, *infra*, 11.

c. Acts held sufficient to establish.

The general rule is that a real-estate broker who advertises the property for sale, calls the attention of the purchaser to it, takes him to see the property, directs him to the house of his principal, and gives him a copy of the papers containing a description of the property, is the procuring cause of a sale made by the principal to such purchaser, and is entitled to his commissions for finding a purchaser. *Ratts v. Shepherd*, 37 Kan. 20.

So, the facts that the parties are brought together: that the negotiations are carried on by and through the broker: that he participates and aids in the transaction at the time of its consummation, and is at that time recognized and regarded by the principal as his agent,—

The defendant objected to the question as immaterial, irrelevant, and not within the issues, and because it should have been offered in the opening if at all. The court overruled the objection, and the defendant duly excepted, and the witness answered: 'I was.'

"(24) Thereupon plaintiff offered question 16 of said deposition, as follows: 'Q. 16. Where was such meeting so held, and who was present thereat?' The defendant objected to this question as immaterial, irrelevant, and not within the issues of the case, and that it ought to have been introduced, if at all, in the opening. The court overruled the objection, admitted the question, and the defendant duly excepted. The witness answered: 'The meeting was held in the directors' room, in the Savings Bank of Danbury. Judge Brewster was there; Henry M. Robinson was there; Mr. Wood-

man of Bethel, and Dwight H. Rogers, Mr. Henry C. Ryder, the treasurer; and myself. I don't recollect whether Mr. Hartwell was there. They'll back up my testimony to-day.' This evidence was claimed to show what the transaction between the bank and Mr. Bishop was, what the property was sold for, what was said regarding the commission, and what arrangements were made regarding the commission on this transaction. Counsel for the plaintiff, in offering this evidence, stated that he was not sure whether it was evidence which should have been introduced in the opening, or rebuttal, and therefore he asked the court, in the exercise of its discretion, to admit the testimony. Testimony admitted, after the court had notified the defendant that he would be given an opportunity to reply to this testimony, if he desired so to do.

"(25) The defendant claimed, upon the

are sufficient to establish the broker's claim to commissions as the procuring cause of the sale. *Howe v. Werner*, 7 Colo. App. 330, 332.

The fact that the broker gave copies of his principal's written application to a number of persons, by one of whom, without the broker's knowledge but upon the strength of such application, the transaction was carried out, is sufficient to entitle him to his commissions as the procuring cause. *Derrickson v. Quimby*, 43 N. J. L. 373.

So, where the broker sent to the principal the man who purchased his farm, and there was an agreement between the parties for commission, the broker recovered his commission as the procuring cause. *Kelly v. Stone*, 94 Iowa, 316; *Ford v. Easley*, 88 Iowa, 603.

And where the party who conversed with the broker intended to purchase either for a corporation, or to have the company buy, and the principal had knowledge at the time he sold to the company that the sale was effected as a result of the broker's negotiations with some of the incorporators of the company, it was held that the question was sufficient to go to the jury, that the company was the one which the party had in view and was negotiating the sale of with the broker, and that they could properly find that he was the procuring cause of the sale made by the principal. *Hosmer v. Fuller*, 168 Mass. 274.

Again, where the broker notifies his principal of previous interviews with the stockholder of the purchasing corporation, it is not wholly unreasonable for the jury to find that the suggestion of the principal to such stockholder that he ought to have the property for himself is made in view of the previous negotiations, and based upon them. *Brooks v. Leathers*, 112 Mich. 463.

So, where a written contract was entered into, and the purchaser gave his check, but the next day sought to be released from the contract, and upon the principal's refusing to release him stopped payment of the check. It was held that the broker was entitled to recover commissions as the procuring cause of the sale, as the principal had a right to enforce his contract with the purchaser. *Hipple v. Laird*, 189 Pa. 472.

And where, in order to escape paying commissions, a deed was made by the principal to a party who conveyed to the purchaser such interest as he wished to buy, a finding that the broker procured the purchaser was warranted by the evidence. *Bogart v. McWilliams* (Tex. Civ. App.) 31 S. W. 434.

So, where brokers offered the property to the

purchaser, who had called upon them for the purpose of placing her property in their hands for sale, and informed the principal of such negotiations, and after a delay of some months the purchaser came to the broker again to ascertain if he was willing to sell, and he finally concluded to consider the matter, and afterwards effected a sale at a larger price, the broker was held really the procuring cause of the sale. *Morgan v. Mason*, 4 E. D. Smith, 636, 638.

And there is nothing to justify a verdict of no cause of action in a case where a large property is sold for cash, and another is taken at a nominal rate, and the principal admits that the broker was instrumental in securing the arrangement, although he disputes the extent and value of his services. *Scribner v. Hazeltine*, 79 Mich. 370, 371.

So, where by his efforts with other real-estate men the broker procures a party to make an offer, which is accepted by his principal, it is through his instrumentality and that of those who assist him that the principal is able to effect the sale. *Carter v. Webster*, 79 Ill. 425, 436.

And the fact that after an unsuccessful attempt to sell at public auction the broker is authorized to act upon his own suggestion that he knows of a party who might buy privately for not less than a given sum is sufficient to establish an agency which will entitle him to commissions as the procuring cause, if he makes a sale. *Chilton v. Butler*, 1 E. D. Smith, 150, 151.

The brokers made out a prima facie case entitling them to have the question submitted to the jury whether they were not entitled to the usual and customary charges paid for such a sale, where parties were brought together by brokers who had previously effected a sale of other property, and a sale was made upon terms somewhat varying from the principal's offer as to the amount of the cash payment. *Henderson v. Mace*, 64 Mo. App. 393, 396.

Where the purchaser obtained a card to view with the terms stated on its back from the broker, and after a time renewed negotiations through a friend of the principal, and ultimately became the purchaser at a less price, it was held there was evidence for the jury that such party became the purchaser of the premises through the plaintiff's intervention, who was therefore entitled to the stipulated commissions. *Mansell v. Clements*, L. R. 9 C. P. 139, 8 Moak, Eng. Rep. 440.

Where the broker called the purchaser's attention to the property by an advertisement, and an offer was submitted to the principal, and

trial, under the above and foregoing evidence, that the plaintiff was not the procuring cause of the sale to Bishop of the property in question, and that, upon the above and foregoing facts, he was not entitled to recover his commission as a broker upon the sale of said property to said Bishop. The defendant also claimed, under the arrangements between the officers of the bank and the plaintiff, that the plaintiff was not entitled to recover any commission, in view of the fact that the property was sold for no more than \$25,000; and the defendant desires to review the above questions of law."

The substance of the correspondence claimed as showing the legal effect of the bond of Mr. Bishop was as follows:

February 2, 1898, Bacon writes to Hoadley: "You spoke once of submitting in writing a lower offer for the place, the buyer

to pay all commissions and taxes. If you have any such, or any other, offer, or any suggestions, I will esteem it a favor if you will let us hear from you this week, so we can talk up the matter at our board meeting next Monday." February 3, 1898, Bishop writes to Bacon: "Since you left have been thinking how I might use the Elliott House, and have decided that, if you wanted to accept \$25,000 cash, that would handle it myself." February 4, 1898, Bacon writes to Bishop: "Replying to yours of yesterday, I cannot answer until our board meets next Monday. We have had two offers for the property at the price you named, which we have declined. I do not think our board would care to consider any such price, unless the purchaser would first agree to pay the taxes becoming due this year, and, second, guarantee us against the claim of any real-

the continuous negotiations led to a sale, the broker was held to be the procuring cause. *Doran v. Bussard*, 18 App. Div. 36, 37, 38 App. Div. 30.

In this case the broker's advertisements directed any intending purchaser to call at the office of a certain broker who acted subject to the directions of the plaintiff broker, and an offer at first declined was increased by the purchaser, and the sale was finally consummated between the parties through the other broker, who had obtained the plaintiff's permission to act, and who found the principal after a search talking with the purchaser at a place where he had left the purchaser, the plaintiff broker recovered his commissions as the procuring cause of the sale.

Where the purchaser's offer was communicated to the principal in a letter to which the principal replied that the purchaser "must offer more," and after an interval another broker repeated the offer, which the principal accepted, the first broker was entitled to recover his commissions upon the sale, as there was no evidence of a termination of the agency,—especially as the principal had declined to negotiate through a third broker on the ground that "the plaintiff" had the matter in hand, and the broker had not abandoned his efforts. *Buehler v. Welfenbach*, 21 Misc. 30.

So, in *Lincoln v. McClatchie*, 36 Conn. 136, the broker recovered his commissions, as his advertisement attracted the attention of parties, who obtained particulars from him for the purchaser, who afterwards concluded a sale with the principal.

And a similar holding was given by the court in *Redfield v. Tegg*, 38 N. Y. 212, where the broker's advertisement and other efforts caused information to reach the purchaser directly or through some other person whose information came directly from the same source, and he was retained by the principal, who agreed to pay the commissions and did not dissent from his actions when informed thereof, but called upon the broker with the purchaser to effect the agreement.

And the court refused to disturb a verdict in the broker's favor where he made overtures to his principal as to the listing of his estate with his agency for sale, but the principal refused to put the property in his hands for sale, saying that so long as he was capable of transacting his own business he did not want anybody to transact it for him, and that he proposed to make whatever there was in it himself, and that if the broker wanted anything out of the transaction he must make it out of the other fellow, 44 L. R. A.

but gave the broker his terms, and he advertised and talked the matter over with a purchaser, who bought from the principal at an increased price, as the evidence showed that the broker was efficiently instrumental in procuring the purchase. *Ellis v. Dunsworth*, 49 Ill. App. 187.

And the fact that the purchaser was informed that the land was for sale through one who drew his attention to the advertisement of the broker in a paper published at the latter's own expense, and that by this means a sale was effected, which fact is not denied, constitutes a strong equity in favor of the broker whatever the contract may have been, although the purchaser may testify that the broker did not point out the property to him, and that he bought from the principal. *Anderson v. Cox*, 16 Neb. 10.

So, where the brokers saw the purchaser and informed their principal of the opportunity to sell, and gave the name of the purchaser, who the principal said wanted to lease and not to buy, and the purchaser, after another interview with the brokers, effected a sale with the principal, this is sufficient to support a verdict that the sale was caused by the agency of the brokers, even though the principal may have reserved to himself the right to sell. *Bowser v. Field* (Tex.) 17 S. W. 45.

Where the broker opened negotiations and an offer was refused and the property was too large for one purchaser, and the principal consented to a sale at one time to several parties for the entire price, and the broker combined purchasers and introduced a party to the intending purchaser, and the property was finally sold, the broker was held to be the efficient cause of the sale. *Johnson v. Bernheimer*, 46 N. Y. S. R. 375.

In *Hambleton v. Fort* (Neb.) 78 N. W. 498, the broker was entitled to his commissions although his services consisted only in first directing the purchaser's attention to the property and in securing his favorable interest, where, after an offer from one whose name or identity the broker did not disclose was rejected, the defendant met such purchaser and sold to him without the plaintiff intervening, through direct negotiations, and the defendant had learned of the purchaser through a former owner of the land who knew that he was able to purchase.

And the broker will be considered as the procuring cause where the principal refuses to sell to the purchaser upon the ground of a change of mind and the negotiations are apparently broken off, but a day or two afterwards the parties consummate a sale without the broker's

estate agent for commission on the sale. If you will make these modifications, I will submit your proposal to our board next Monday, and advise you of their decision." February 5, 1898, Bishop writes to Bacon: "Have received your letter this morning, and, as the sale of this property has been entirely between ourselves, there would be no commission for you to pay to anyone." The writer then declines to pay the taxes, but offers to pay uncompleted insurance, and, if bank desires, to continue a loan for \$25,000, with additional security. February 5, 1898, Hoadley writes to Bacon: [See paragraph 21 of finding, *ante*, p. 326]. February 7, 1898, Bacon writes to Bishop: "Replying to your favor of the 5th, I very much regret that you did not think best to modify your offer, as suggested in my letter of the 4th. Perhaps, after further consideration, you will con-

clude to do so. I inclose confidentially two letters from Mr. Hoadley, which please return, and oblige." February 7, 1898, Bishop writes to Bacon: "Have received your favor of to-day, and, while knowing offer was low, still, for the use I want to put it to, it was as much as I felt like offering. . . . I inclose you the two letters which you kindly sent me, and which amount to nothing, as you and I both understand that there would be nothing coming in that direction from your people, provided the property was sold to me; and thought would ask your opinion confidentially whether your bank would be willing to divide the amount of taxes with me, if I should make that offer; also, whether they would prefer cash, or care to make a loan, and, if so, how much. I expect to leave for Nebraska the first of next week, probably going through to Cali-

intervention, if the principal is put into communication with the purchaser by the broker's efforts. *Lestrade v. Perrera*, 6 La. Ann. 398.

So, if the preliminary acts of the broker in agreeing with the purchaser on the terms of the sale, and drawing up and submitting to him a written contract which the principal shows to an attorney, bring about a sale, he can recover the commission as the procuring cause of the sale. *Ward v. Cobb*, 148 Mass. 518. In this case the contract signed by the defendant and the purchaser was a contract of sale although not in the form required to pass the legal title (an equitable right only passing) binding the defendant to make a conveyance, and the purchaser to take the property, and pay for it, of which specific performance could be decreed.

The court refused to disturb a verdict in the broker's favor where the defendant stated that the property had been taken out of his hands, and denied an agreement to pay him for his services except upon a sale at a certain price, and also that he sold or found a purchaser, where the broker alleged a contract to pay whether he sold or not, and that his efforts made or were the cause of the sale. *Mousseau v. Dorsett*, 80 Ga. 566.

So, an auctioneer and real-estate agent recovered commissions as the procuring cause of a private sale, after an unsuccessful auction, under an agreement giving him 2½ per cent "if the estate should be sold," and a lower sum if not sold, where he referred one who attended the sale and who inquired of him who the owner was, to his principal, and such person ultimately, without any further invitation or interviews with the agent, purchased. *Green v. Bartlett*, 14 C. B. N. S. 681, 32 L. J. C. P. N. S. 261, 8 L. T. N. S. 503, 11 Week. Rep. 834.

And the broker was regarded as the effective agent in bringing about the sale where, after refusing the purchaser's offer, the principal informed his broker he had concluded to take the price so offered, and the broker so notified the purchaser, who wrote to another party through whom the negotiations between the parties were continued and a sale was consummated, as he communicated the principal's desire to reopen the negotiations with the purchaser, and the broker's position was not affected by the fact that the purchaser continued the negotiations through another, with whom the principal treated instead of with his own broker, as the latter was the means of the resumption of negotiations. *Peckham v. Ashhurst*, 18 R. I. 376.

So, facts which show, *inter alia*, that the broker's acts in procuring maps from the seller, and signs to be painted and put up near the

premises, and advertising in the papers referring to himself as broker, were recognized and paid for by the defendants; and that a sale was negotiated by the defendants with a party introduced to them by another real-estate broker whose attention, as well as that of the purchaser, was attracted to the property by the maps, signs, and advertisements of the plaintiff, who had no personal communication with such purchaser or agent before the negotiations for the purchase, and who continued to advertise until the defendants told him not to do so, or make further efforts, as they were negotiating with the parties, and that he should have his commission if the sale was effected,—are sufficient to lead the jury to infer that the purchaser was secured by the plaintiff's efforts, and that his claim for brokerage was recognized by the promise to pay it, although it did not appear as a fact that the defendants knew that the purchaser and his broker came to purchase in consequence of information obtained through the plaintiff, as, if he was the producing cause of the sale, his right to compensation existed, and could not be affected by the circumstance that the defendants were ignorant of it at the time. *Sussdorff v. Schmidt*, 55 N. Y. 319, 321.

And the sale was held to be the fruit of the broker's labor where the purchaser introduced hesitated to buy at the price named, but subsequent negotiations between the principal and such purchaser led to a sale upon virtually the same terms. *Ames v. McNally*, 6 Misc. 93, 94.

So, subsequent negotiations conducted by another on behalf of the broker, which finally result in an exchange, will entitle the broker to recover commissions as the procuring cause. *Brundage v. McCormick*, 69 Hun. 65, 66.

Again, the broker was held to be the procuring cause of the sale where he introduced the purchaser, and assisted in the negotiations which resulted in the sale, where such purchaser had previously been in negotiation with the representatives of a former owner, and was at the place where the broker first met him in response to a letter from such agent, whose authority had terminated by the sale of the property by his principal. *Stauffer v. Bell*, 99 Iowa, 545, 548.

So, a purchase made by a person introduced by the broker for substantially the price at which the property was placed in his hands for sale, under a contract by the principal to pay the agent a commission when a sale was made, without any other and further rendition of services on the broker's part than the production of a purchaser who might buy, is sufficient to establish the broker as the procuring cause of the sale, and the principal cannot escape lia-

fornia; and, if do anything, should have to do it at once, and write this to you in confidence, as do not care to make any more offers which, in your opinion, would be refused." February 8, 1898, Bacon writes to Bishop: "Replying to yours of yesterday, I can only repeat that our board would not consider the price you named, unless the buyer will pay the taxes, and also guarantee us against the claim of any real-estate agent for commission. I trust you will consider our correspondence entirely confidential, as the lowest price we have ever given Hoadley is \$33,000, though he once wrote us asking if \$30,000 would buy the place, and we replied that would consider such proposal, if made." February 9, 1898, the agreement to pay the taxes, and to guarantee the bank against the payment of any commissions to Hoadley, was signed by Bishop.

bility unless there is something in the circumstances which makes out a defense, such as dishonesty or fraud, or the execution of a contract contrary to good morals. *McCampbell v. Cavis*, 10 Colo. App. 242.

And where a fair construction of a letter mentioning a limited time and containing an offer implied that the sale should be made by the time the principal was to pay for certain land, and contemplated a sale in a foreign country to emigrants without any strict limitation of time, and more than a year elapsed between the writing of the letter and the sale, but it was not shown that the land had risen in value, or that the principal had added to its value by improvements, and the broker's statement to his principal that he must be reasonable was consistent with the letter of the principal in which he fixed the price, and it fairly appeared from the evidence that the purchaser sought out the broker who took him to the principal and the result was a sale, the court held that the evidence sufficiently supported the broker's claim for commissions. *Dubols v. Dubols*, 54 Iowa, 216.

Again, the broker was the procuring cause of the sale where he introduced the parties to the principal's agent, who negotiated with one of such parties as to the purchase money required and consented to accept a certain sum for part of the entire premises, when the other party purchased the remaining property and the commissions on such first sale were paid to the broker, and the latter sale, which was postponed by mutual understanding, was completed about a month later. *Levy v. Coogan*, 16 Daly, 137.

And where the principal still continued the broker as his agent after the termination of the broker's exclusive agency with the assurance of commissions if he procured a purchaser, and the broker introduced a purchaser, who was not then ready to conclude the matter as he himself desired to sell a certain property before he purchased, but the minds of the parties did not change and the sale was finally concluded without further efforts on the part of the broker or even his principal, the broker was entitled to recover his commissions as his efforts created a mind to buy which ultimately led to the arrangement by the purchaser which vested the property and the title in the purchasers procured by the agent, even though at the time the principal consummated such sale he was not aware that such party was one of the purchasers introduced to him by the broker in the first instance. *McKnight v. Thayer*, 48 N. Y. S. R. 620, 322.

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The defendant incorporated into its request for a finding a large number of facts which it claimed had been proved, filed exceptions to the finding of the court and to the refusal to find facts contained in the request, and asked that all the evidence in the case be certified. The appeal assigns error in the admission of evidence as stated in the finding, in the judgment as rendered upon the facts found, in the omission to include in the finding certain facts claimed as material to the questions of law raised, and many alleged errors in conclusions of fact.

Messrs. Henry Stoddard and J. Birney Tuttle, for appellant:

Admissions or declarations in one's own interest are not admissible.

Stephen, Digest Ev.; *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 10 L. ed. 535;

The agent was entitled to his commissions as he had procured a purchaser, who entered into a valid contract under a contract to take a specific price in cash and a first mortgage payable on or before a certain day for the balance, where he procured a written contract with the purchaser for the amount stated with a sufficient amount in cash, the balance on or before a given date with interest, the deed to be delivered within thirty days, under which contract no money was paid at the time, although the purchaser gave the agent a check for a smaller amount, and the principal was informed of the contract on the day of the sale, but on the following day himself sold the property to another person, as by the construction of the contract the amount that was to be paid in cash was only to be paid when the principal performed the obligation which rested upon him of executing to the purchaser a conveyance of the property, the presumption being that the purchaser produced was solvent and able to perform the obligation assumed by him under the contract, the defendant's conduct not being affected in any way by the question of responsibility. *Goss v. Broom*, 31 Minn. 484.

And where the principal disputed the broker's authority to do more than procure an option to purchase, evidence which showed that pursuant to the principal's directions the broker had the agreement made as his own personal one, and then offered the principal the option to take as much as he wished, and that the principal got the desired option without being bound to purchase, was held sufficient evidence to entitle the broker to go to the jury. *Giles v. Swift*, 170 Mass. 461, 462.

So, evidence from which the jury can infer that, in procuring from the seller an agreement to sell, the broker acted for himself, and not as the agent of the purchaser, nor as broker for the intending seller, and a certain letter written by the broker to the agent of such seller and the reply thereto were consistent with this view as well as the broker's account of what occurred between the purchaser and himself, is sufficient to go to the jury upon the question whether there was such an agreement upon which the broker could recover, although there may be evidence that the broker had an option to purchase and agreed with the purchaser to give him the benefit of it for a certain amount, and to assist him in procuring a deed, and that the purchaser agreed to give him such sum on obtaining the deed. *Graves v. Dill*, 159 Mass. 74.

Proof which shows the employment of the broker, the introduction of the purchaser, and negotiations subsequently conducted by another

Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 236; *Teller v. Patten*, 20 How. 125, 15 L. ed. 831; *North Stonington v. Stonington*, 31 Conn. 412; *Rockwell v. Taylor*, 41 Conn. 55; *Handly v. Call*, 30 Me. 9; *Nutting v. Page*, 4 Gray, 581.

A party to a suit cannot be permitted to read in evidence an unanswered letter from himself to the adverse party for the purpose of proving the truth of the facts stated therein, although it was in reply to a letter from himself, which he has put in evidence.

Fearing v. Kimball, 4 Allen, 125, 81 Am. Dec. 690; *Heywood v. Heywood*, 10 Allen, 105.

Mr. William A. Wright, for appellee:
The plaintiff is entitled to his commission on the sale if he shows that it was through his instrumentality that the sale was made

on behalf of the broker, which finally result in an exchange of property, and that the buyer and seller are brought to an agreement through the broker and the other party acting for him, is sufficient to sustain an action of the broker for his commissions. *Brundage v. McCormick*, 69 Hun, 65, 66.

And evidence which shows that the principal employed the broker, knowing him to be a real-estate broker, and that the broker called the purchaser's attention to the property, and caused the parties to come together, and a sale for the price asked, makes out a prima facie case for the jury. *Turner v. Putnam*, 87 N. Y. S. R. 395.

d. Acts held not sufficient to establish.

In *Garcelon v. Tibbetts*, 84 Me. 148, 151, it is said that it is now the well-settled doctrine that in the absence of any usage or contract, express or implied, or conduct of the seller preventing the completion of the bargain by the broker, an action by the broker for his commission will not lie until it is shown that he has effected or procured a sale of the property, and it is not enough that the broker has devoted his time, labor, or money in the interest of his employer, as unsuccessful efforts, however meritorious, afford no ground of action, and that where his acts effect no agreement or contract between his employer and the purchaser, the loss must be his own. In such a case he loses his labor and efforts which he staked upon success, and if there is no contract there is no reward, as his efforts are based upon the contract of sale. To the same effect, *Vlaux v. Old South Soc.* 133 Mass. 1, 10; *Loud v. Hall*, 106 Mass. 404, 407; *Tombs v. Alexander*, 101 Mass. 255; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292; *Glentworth v. Luther*, 21 Barb. 147; *Drury v. Newman*, 99 Mass. 256; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 382, 22 Am. Rep. 441; *Cook v. Welch*, 9 Allen, 350; *Vezzie v. Parker*, 72 Me. 443; *Rockwell v. Newton*, 44 Conn. 337; *Watts v. Howard*, 51 Ill. App. 243, 246; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718; *Wylie v. Marine Nat. Bank*, 61 N. Y. 416; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431; *Lipe v. Ludewick*, 14 Ill. App. 372; *Armstrong v. Wann*, 29 Minn. 126; *Davis v. Gassette*, 30 Ill. App. 41, 45; *Dolan v. Scanlan*, 57 Cal. 261, 263; *Roush v. Loeffler*, 3 Ohio Dec. 628; *Goldstein v. Walters*, 15 Daly, 397.

The mere fact that a broker devoted his time and labor and money for the purpose of procuring a purchaser, called the attention of a party to the property, brought the parties together, and created an impression upon the mind which might have had an effect upon the consumma-

tion of the sale, did not entitle him to recover for commissions where it was not shown that he was the procuring cause of the sale. *Ware v. Dos Passos*, 4 App. Div. 32, 35.

Lincoln v. McClatchie, 38 Conn. 136; *Weinhouse v. Cronin*, 68 Conn. 252; *Schlegel v. Allerton*, 65 Conn. 260.

If a broker employed to sell a piece of land finds a purchaser, but has the business taken out of his hands, he is entitled to his commission.

Gottschalk v. Jennings, 1 La. Ann. 5, 45 Am. Dec. 70.

The defendant is estopped from denying that the plaintiff brought about this sale, if its officers requested the plaintiff to use his influence with Mr. Bishop to induce him to purchase the property, and, knowing that he was so using his influence, Mr. Bacon, later on, took up the matter directly with the

tion of the sale, did not entitle him to recover for commissions where it was not shown that he was the procuring cause of the sale. *Ware v. Dos Passos*, 4 App. Div. 32, 35.

And if he does not show that he made or negotiated the sale according to his authority he is not the procuring cause. *Hurd v. Nelson*, 100 Iowa, 555, 557.

If the compensation of the broker is dependent upon his consummating the sale, he can ask nothing unless he is the procuring cause of the sale made. *Hill v. Jebb*, 53 Ark. 574, 576.

If the evidence does not show that the broker in some way influenced the sale he cannot recover commissions, and a verdict in his favor will be set aside. *Commercial Nat. Bank v. Hawkins*, 35 Ill. App. 463.

So, the mere naked fact of the broker's introducing the purchaser to the seller or disclosing names by which they came together is not enough to entitle him to commissions. *Keener v. Harrod*, 2 Md. 63, 56 Am. Rep. 706, 708; *Wilkinson v. Martin*, 8 Car. & P. 1.

And a mere conjecture that the broker is the efficient or procuring cause of the sale will not be sufficient to prove such fact. *Marius v. Kenneally*, 19 Misc. 517.

If the negotiations between the broker and the intending purchaser had not proceeded far enough to authorize the broker to make any definite offer for the land which the principal was required to accept, or with which the purchaser would have been required to comply or respond in damages for noncompliance, the broker does not become the procuring cause, and there can be no recovery of commissions. *Hammond v. Mitchell*, 61 Ill. App. 144, 147.

It is not sufficient that the agent's or broker's acts are one of a chain of causes leading to the contract, as such acts must be the procuring or inducing cause, or, in other words, the *causa causans*. *Ramsey v. West*, 31 Mo. App. 676, 678.

And the mere fact that the broker's act is merely a cause of causes some of which are neither the necessary nor probable result of what he did will not entitle him to commissions. *Baumgartl v. Hoyne*, 54 Ill. App. 496, 502.

Merely being instrumental in putting a purchaser on the track of the property is not of itself sufficient. *Sievers v. Griffin*, 14 Ill. App. 63, 66.

If a broker has not the exclusive sale, merely bringing the property to the attention of the person who finally buys is not enough. *Whitcomb v. Bacon*, 170 Mass. 479; *Dowling v. Morrill*, 165 Mass. 491; *Crowninshield v. Foster*, 169 Mass. 237.

And the mere fact that the broker's act may

plaintiff's client, and closed the transaction without notice to the plaintiff that he was in negotiation with the purchaser.

Winsted Hosiery Co. v. New Britain Knitting Co. 69 Conn. 574.

This letter was between the parties to the cause, respecting the subject-matter of the controversy, and is admissible as part of the *res gestæ*.

13 Am. & Eng. Enc. Law, pp. 258, 263.

It was not the intention of the legislature in passing the acts of 1893, 1895, and 1897, allowing evidence in a case to be brought to this court, to make this a tribunal to review questions of fact in any case where a litigant had the inclination and the means to needlessly prolong a controversy.

Meriden Sav. Bank v. Wellington, 64 Conn. 553; *Styles v. Tyler*, 64 Conn. 432; *C. & C. Electric Motor Co. v. D. Frisbie & Co.*

have contributed to or made the actual agreement entered into by the principal easier is not alone enough to make him the procuring cause of the sale. *Alden v. Earle*, 121 N. Y. 688.

Again, the mere fact that the broker has created impressions, which, under later and more favorable circumstances, naturally lead to, and materially assist in, the consummation of a sale, will give him no claim for brokerage although he may have planted the very seeds from which the others reap the harvest. *Markus v. Kenneally*, 19 Misc. 517; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 383. 22 Am. Rep. 441.

So, if the purchaser, though spoken to by the broker, has abandoned all idea of the purchase, and the broker has no influence at all in bringing it about, he cannot be said to be the procuring cause of the sale. *Doonan v. Ives*, 73 Ga. 296, 301.

A mere intervention in the negotiations commenced by the principal and consummated without the agent's assistance will not affect the sale, even though his conversation with third persons may have, in some degree, contributed to such consummation,—especially where he is to sell at a fixed price, and there is no interference with his dealings by the principal. *Briggs v. Rowe*, 1 Abb. App. Dec. 180, 195.

And under a contract to pay commission to the broker selling, the broker is not the procuring cause of the sale so as to be entitled to commissions where he does not find the purchaser but merely brings parties together who have previously met. *Ludlow v. Carman*, 2 Hill. 107, 112.

And the Maryland courts have held that in the absence of usage the mere fact that the agent introduces the purchaser to the seller or discloses names by which the parties come together to treat, will not entitle him to compensation. *Beale v. Creswell*, 3 Md. 196, 201; *Keener v. Harrod*, 2 Md. 63, 56 Am. Dec. 706.

Under a contract for commission "if he finds a purchaser" he has not found a purchaser unless he produces such purchaser to his principal. *Baars v. Hyland*, 65 Minn. 150.

And the mere securing of one who will take the property on different terms than those fixed by the owner does not amount to procuring a purchaser so as to entitle the broker to commissions. *Darrow v. Harlow*, 21 Wis. 303, 94 Am. Dec. 541.

And an instruction to the jury that, as a matter of law, the mere fact that the broker was instrumental in securing the location of a factory on the principal's land did not make the principal liable to the broker for commission, nor entitle the broker to recover, was held to 44 L. R. A.

66 Conn. 74; *Ryan v. Chelsea Paper Mfg. Co.* 69 Conn. 454; *Thresher v. Dyer*, 69 Conn. 404.

Hamersley, J., delivered the opinion of the court:

The letter of the plaintiff to the president of the defendant corporation was not admitted as a declaration in support of the truth of the statements it contained, but as a fact relating to the conduct of the parties in respect to the transaction in dispute prior to the consummation of the sale. For that purpose it was admissible. The admission of the latter part of Osborne's deposition upon rebuttal was within the discretion of the court. The other claims of the defendant are included under four heads: (1) The alleged insufficiency of the facts found to support the judgment rendered; (2) the al-

be correct. *Chicago Heights Land Asso. v. Butler*, 55 Ill. App. 461, 462.

If, notwithstanding the efforts of the broker, the purchaser buys solely upon his own information and negotiations with the principal, uninfluenced by the broker, the broker is not the procuring cause. *Brown v. Shelton* (Tex. Civ. App.) 23 S. W. 483.

And although the broker may be employed to sell, yet if the purchaser and the principal are brought together through information received by the purchaser from persons other than the broker, and not through the latter's instrumentality, and he does not effect the sale or exchange, he is not the procuring cause. *Burkholder v. Fonner*, 34 Neb. 1.

So, where the parties were brought together, and negotiations were had through a relative of the principals in no way connected with the broker, the latter is not the procuring cause. *Wyckoff v. Bissell*, 24 App. Div. 66, 67.

Where the broker relinquished his efforts to sell to a certain person, and he requested him to send a customer to him, and such purchaser mentioned the property to another, who dealt directly with and purchased of the principal at a lower sum than that given to the broker, the broker's commissions were not allowed. *Warren v. Cram*, 71 Mo. App. 638.

The fact that the broker merely talked with different persons, and one of them of his own accord, not acting in behalf of the broker, mentioned the property to another, who looked into the matter, and finally became a purchaser, does not make the agency of the broker sufficiently direct to entitle him to a commission as the procuring cause. *Gleason v. Nelson*, 162 Mass. 245.

And the broker is not shown to be the procuring cause by the fact that after an unsuccessful auction sale he merely stated the terms on which the property could be bought to one who was an intending buyer at such auction, when it did not appear that these terms were communicated to the person who afterwards purchased. *Chilton v. Butler*, 1 E. D. Smith, 150, 151.

Again, where the principal sells to one who professes to be, and is by the principal believed to be, the purchaser, the mere fact that he buys for the benefit of one to whom the broker sought to sell is not sufficient to render the principal liable to such broker for commission upon the ground that he was the procuring cause of the sale, even though the broker intimated his belief that such party would purchase,—especially where there is no collusion between the principal and the person purchasing.

leged insufficiency of the testimony given to support the facts found; (3) the alleged omission from the finding of facts material to present the questions of law decided by the court; (4) the alleged finding of material facts without any evidence to support them.

1. Where an owner places land with a real-estate broker for sale, he agrees, in the absence of any special contract, to pay the customary commission or brokerage in case a sale is consummated with a purchaser who was led to begin the negotiation through the intervention of the broker. It is immaterial that the purchaser at some prior time had been engaged in a bootless negotiation with the owner in respect to the same property, or that the owner after the broker has interested the purchaser, secretly pursues the negotiation, and himself completes the

and the principal has no notice of anything that can apprise him of the fact that there is a secret purchaser, but that fact is studiously concealed from him. *Goldstein v. Walters*, 15 Daly, 397. In this case a motion for reargument, and for leave to go to the court of appeals, was refused by the court. 20 N. Y. S. R. 323.

And the fact that a broker simply told a friend or acquaintance who the owner was, and such friend gave the owner's name to an intending purchaser, who thereupon went directly to the owner and bought without ever seeing or communicating with the broker, will not constitute the broker the procuring cause. *Colwell v. Tompkins*, 6 App. Div. 93, 94. In this case, however, there was a dissenting opinion by Justice Hatch, in which he considered that under such circumstances the broker might be considered the procuring cause of the sale.

So, where the broker called a party's attention to the property, who in turn brought it to the attention of another with a view to a joint purchase, the consummation of which fell through owing to the first party withdrawing, the broker was not the procuring cause of the sale to the other with whom he had no negotiations with respect to a separate purchase. *Armstrong v. Wann*, 29 Minn. 126.

Again, a mere statement by the broker to his principal that he thought he had a trust company as a customer, the recollection of which statement induced the principal, some two years afterwards, to apply directly to the officers of such company, and to tell them that if they wanted the property they must speak at once or it would be sold to someone else, is not sufficient to make the broker the procuring cause of such sale. *Hay v. Platt*, 66 Hun. 483.

And the broker was not the procuring cause of the sale when all that he did was to call the purchaser's attention to the fact that the property was for sale, without directing his attention to the character or value of it, or to bringing the buyer and seller together, or carrying on negotiations between them, and he was not even present when the terms were agreed upon or the sale consummated. *Greene v. Owings*, 19 Ky. L. Rep. 580.

And one who is not a real-estate broker does not become entitled to commissions as the procuring cause of the sale where he merely notifies his principal that he has a proposition for the purchase and has secured a bona fide purchaser, when the offer is not accepted, and on the following day the owners notify him that they decline to negotiate further and subsequently sell to other parties,—especially where the party found by the broker was in treaty

sale, or that the owner of his own accord effects a sale at a less price than that he gave the broker. If any act of the broker in pursuance of his authority to find a purchaser is the initiatory step that leads to the sale consummated, the owner must pay the commission. *Lincoln v. McClatchie*, 36 Conn. 136, 141; *Schlegel v. Allerton*, 65 Conn. 260, 264. Applying this well-settled law to the facts found, judgment for the plaintiff must follow.

Whether or not a particular person is the "procuring cause" of a sale is a question of fact for the jury; but the defendant claims that, upon a trial to the court, the conclusion of the judge is erroneous if he violates any rule or principle of law in drawing that conclusion from the subordinate facts found, and that, if his conclusion from the subordinate facts is in plain conflict with the set-

with the owners themselves for several months prior to the transaction, at different prices, and his last offer was made upon the same day as the broker's proposition, but varied somewhat in its terms, and the broker obtained his information about the purchaser from another party who did not give him the purchaser's name. *Hartley v. Anderson*, 150 Pa. 391.

And he is not the procuring cause of the sale where he sends to his principal one with whom, without the broker's knowledge, the principal is already negotiating, and the principal, in ignorance of the fact that the broker and customer had any communication, deals with the customer, who is not influenced by the broker's acts. *Neufeld v. Oren*, 60 Ill. App. 350.

Nor where all he does is to drive the purchaser past the property and point it out to him while he is showing him other properties, and he goes down in front of the property, but does not afterwards take the parties to it. *Lawrence v. Weir*, 3 Colo. App. 401.

So, a broker not employed as agent, who is told the net price of the property for a limited time, does not become entitled to compensation as the procuring cause of the sale when he merely procures an offer of such price within such time, without the execution of a binding contract, and without producing a purchaser ready to pay the purchase price within the time limited, which the owner refuses to extend. *Castner v. Richardson*, 18 Colo. 496.

And the broker does not become entitled to recover as the procuring cause of a sale negotiated by the principal at an advanced price to a person from whom he procured an offer for the property which he advised his principal not to accept. *White v. Twitchings*, 26 Hun. 503, 504.

So, if after he has presented a person willing to take the property in part payment of property of his own, and the principal rejects the offer, after which nothing is done for a year and a half, when the principal and the intending purchaser become intimate and visit each other and finally effect a purchase and sale, the broker is not the procuring cause of the sale. *Harris v. Burnett*, 2 Daly, 189.

And he is not the procuring cause of the sale where all that he does is to introduce a purchaser, who makes no binding contract and subsequently declines to take the property, and the sale actually made is the outcome of an agreement between the principal and such purchaser, to put the property up at auction, at which it brings a larger price than such purchaser has agreed to pay. *Tombs v. Alexander*, 101 Mass. 255, 256, 3 Am. Rep. 349.

tled rules of logic and sound reasoning, he does violate a principle of law, and his conclusion is reviewable by this court as an error in law. This claim is correct. *Nolan v. New York, N. H. & H. R. Co.* 70 Conn. 159, 173, 183, 43 L. R. A. 305. Testing the judgment in view of this claim, the court below finds that the plaintiff interviewed Bishop (the purchaser), called his attention to the property, and urged upon him considerations that should induce him to renew his negotiation for its purchase; that, in pursuance of this, Bishop applied to the plaintiff for permission to examine the property, and obtained entrance to the building through information given him by the plaintiff, and examined the property; and that, shortly after his mind had been so directed by the plaintiff to a purchase, the defendant,

through its president, Bacon, without the knowledge of the plaintiff, took up the negotiation with Bishop which resulted in a sale. There are no other facts which essentially affect the force of these upon the question of "procuring cause." We cannot say that the inference drawn by the court from these facts is unreasonable. The procuring cause of sale is such intervention of the broker for that purpose as constitutes the foundation on which the negotiation is begun. The court might reasonably infer that the efforts of the plaintiff to induce Bishop to renew his attempt to purchase were the origin of the negotiation and resulting sale. If so, the plaintiff was the procuring cause.

2. The facts adjudicated by the trial court cannot be retried here upon the certified testimony. This is too firmly settled by re-

So, he cannot be said to be the procuring cause when he only produces a party who declines to purchase but who subsequently informs another party that he has so declined, although the property is worth the money and he advises such party to purchase, where the latter party is not simply to step into the shoes of the former to take the property off his hands and comply with the previous contract made between the principal and such party. *Johnson v. Seidel*, 150 Pa. 396. In this case the purchaser never knew the broker, and was in no way influenced by him, and there was no evidence that the plaintiff was the immediate and efficient cause of effecting the sale or of bringing the parties together.

Again, the broker does not establish his claim when he merely shows that prior to the contract made by the principal he had unsuccessful interviews with the purchaser, and that the party who purchased did so on behalf of himself and another, and that the contract was drawn up by such party, who neither saw nor talked with the broker in connection therewith, or the conveyance made in pursuance of it. *Freedman v. Havemeyer*, 37 App. Div. 518.

And the broker is not the procuring cause of a sale made by his principal where he only shows that he corresponded with the purchaser, called his attention to the property, and received encouragement from him, and obtained a general promise to buy if a reasonable reduction was made in the price; when the negotiations proceeded no further, and no definite proposition was made by the purchaser, who repudiated his agency and refused to have anything more to do with him. *Cullen v. Bell*, 43 Minn. 226, 227.

Where some time after the purchaser found by the broker had declined to purchase a portion of the principal's property the latter exchanged the house he lived in for property previously offered him by the purchaser, but the title was taken in the name of another and not in that of the purchaser originally introduced, and of this transaction the broker made no memorandum, the fact of his original introduction of the party is not sufficient to entitle him to commissions as the procuring cause, even if his influence endured until the date of the sale, as it was not extended to the particular property in compliance with any request upon the part of the principal, or in the course of the employment. *Randrup v. Schroeder*, 21 Misc. 52, 22 Misc. 365.

And he is not entitled to recover full commissions where, after the principal has declined an offer, he afterwards tells the broker to go on and make a noise about the property which

must be sold before a given date; and the broker continues his efforts, and a sale is made, at a lower price, by the principal to the purchaser found by the broker. *Hungerford v. Hicks*, 39 Conn. 259. In this case the court intimated that he might recover upon a claim for work and labor done and services rendered.

So, where the only result of the agent's efforts to find a purchaser was that there was a radical difference in the language used in the original contracts signed by the parties in duplicate, and each absolutely refused to carry out the contract except according to the literal terms of the one he held, and it was almost impossible to reconcile the manifest facts of the case with any theory other than bad faith somewhere, it was held that the broker had not rendered such services as produced a purchaser or a result entitling him to commissions. *Pierce v. Truitt* (Pa.) 12 Atl. 661.

And the court refused to reverse a verdict given against the broker where the conflicting evidence disclosed the fact that the broker procured a purchaser at a certain price per acre, but the principal refused to sell at that price, and claimed that the land was worth more. *Stuart v. Stumph*, 126 Ind. 580.

And the broker did not procure a purchaser where he delivered the contract signed by his principal to the purchaser, but before the latter signed it he received a letter from the principal impeaching the transaction upon the ground of objectionable dealings with regard to the commission, in consequence of which the deal fell through. *Smith v. Nicoll*, 91 Hun, 173, 174.

In *McCarthy v. Cavers*, 66 Iowa, 842, the broker's claim was not allowed as he produced no positive acceptance by the purchaser found by him under his agreement "to consummate the sale to persons with whom he was then negotiating," by a given date, where the principal, who had another offer for the lands at substantially the same price, prepared a deed leaving the name of the grantee blank, which he sent to another agent with instructions to present it to the above-named broker after a given date and receive the money if he effected the sale, and the broker objected to the deed upon the ground that the grantee's name was not filled in, and the acknowledgment was not in legal form, and declined to pay the money, after which the deed was delivered to the person who had made an offer direct to the principal.

And the broker's claim was refused where he did not claim that he procured a purchaser to take the land at the price or on the terms given, or to recover on that ground, but for inducing the purchaser to enter into negotiations with the principal, which resulted in a sale of the

peated decisions to admit of discussion. A record should not be cumbered with such futile assignments of error.

3. The defendant claims that the fact that the sale was made by the defendant, through its president, to Bishop, and the fact that the exclusive sale of the property was not given to the plaintiff, were improperly omitted from the finding of the court. The facts seem to be substantially included in the finding; but, however that may be, an inspection of the evidence certified shows that they were admitted or undisputed facts, and we have treated them as included in the finding. The omission of such facts is not an error that affects the judgment, unless, by correcting the record, and including them in the finding, it appears that the court erred in its ruling on some question of law material to the judgment. The correctness of the

rulings of the court below is not affected by including these facts in the finding. The defendant further claims that the fact that the defendant, through its president, told the plaintiff, before the property was sold, that, if the defendant was compelled to sell the property for \$25,000, no broker's commissions would be paid by the defendant, is improperly omitted from the finding. This fact might be material to present a question of law raised by the defendant on the trial, and, if it were an admitted or undisputed fact, its omission would be an error which, if material, we should correct. An inspection of the evidence certified does not sustain the defendant's claim. If we were to treat this fact as included in the finding, the defendant's claim of law could not be sustained. After a broker has rendered the services which make him the procuring

property, while his contract was to sell the land at a price and on the terms designated, and not merely to furnish a customer to whom the principal might sell if he was able to come to such an agreement. The difference between what he contracted to do and what he really did was very apparent and material. *Blodgett v. Sioux City & St. P. R. Co.* 63 Iowa, 606, 600. In this case, however, the court stated that if what he did was accepted by the principal as a performance of his undertaking, the broker would clearly be entitled to the commissions provided for in the contract, but there would be no such acceptance unless the principal knew, when he was negotiating with the purchaser, that he was dealing with the customer produced by the broker.

Under an agreement for a sale at a specified price with an understanding that the principal may withdraw if he desires, and that if he sells the property himself and the broker has not worked up a sale the latter is not to have any commission, and that if the principal works up a purchaser and puts it in the broker's hands then he is to pay him half commissions, if the broker makes no sale and the principal withdraws the property from his hands and pays his expenses of advertising, on which the broker asks for instructions if he has an inquiry as to price, to which the principal replies that if he finds a person willing to give the net price he will let it go, the broker is not entitled to recover upon a sale finally made by the principal to the purchaser at a less price. *Mallonee v. Young*, 119 N. C. 549.

And the claim to commissions as against the original owners was totally denied in a case where the exclusive option of buying or selling the property on or before a certain date at a given price was given to a party who in turn gave another person (the plaintiff) an option to purchase on or before such date at a higher price, and agreed to give him a certain sum if he did so, and the latter person paid such party the last-mentioned option, and also performed services for him in procuring purchasers for the land, but the sales were not completed on the day upon which the options were to be fulfilled, in consequence of which the land was sold by the original owner direct to the purchasers. *Cummings v. Town of Lake Realty Co.* 86 Wis. 382.

And the broker's right to recover as a purchaser on the ground that he did procure a syndicate to whom the principal did not sell was denied where the syndicate was not full, and the persons who were to make the purchase were not then all known and the whole matter appeared

to be incomplete, nebulous, and uncertain, when the principal sold the property to another and ended the relations between the broker and himself. *Gerding v. Haskin*, 141 N. Y. 514, 519.

So, evidence that the principal's agent employed a broker who only brought the subject to the notice of a party who offered a certain price, which was not accepted; and that, after other offers made to the principal through his agent, the matter rested for a year, when the agent obtained the name of the proposed purchaser, and interviewed him, when another broker who was authorized to find a purchaser at a further increased price finally succeeded in effecting the sale to such purchaser,—is not sufficient to establish the plaintiff broker as the procuring cause of the sale. *Johnson v. Lord*, 35 App. Div. 325.

So, evidence that the sale or exchange is really brought about by the principal himself, and that but for his exertions it would probably not have been effected, does not establish a sufficient procuring cause in the broker, even though it also establishes the fact that, after the negotiations are started by the principal, the broker at his request gives him advice and assistance in conducting the same. *Campbell v. Vanstone*, 73 Mo. App. 84, 87.

Again, testimony of a mere introduction by the broker without any meeting of the parties' minds and a sale two months or more thereafter with no further acts on the broker's part, without any continued negotiations after the introduction and failure of the parties to agree if tending to disclose a cause of action in any event, presents but a scintilla of evidence and is unavailing against a motion for a nonsuit. *Baker v. Thomas*, 12 Misc. 432, Reversing 11 Misc. 112.

And evidence which merely shows that the broker wrote the supposed owner of the principal's property that he had property to exchange; and such letter was sent to the plaintiff broker, who forwarded it to the principal with a suggestion that he should see the writer of it, which he did; and through an arrangement with him, for which he received a commission, the property was exchanged,—is not sufficient to establish the broker's claim as the efficient procuring cause of the sale. *Hamilton v. Gillender*, 26 App. Div. 158.

II. When several brokers are employed.

The owner of real estate, by the general employment of a real-estate agent or broker to effect a sale, does not thereby preclude himself from employing other agents for the same purpose, or from effecting a sale himself, provided that in making the latter sale he acts in good

cause of a sale, the owner cannot escape liability by telling the broker that he will pay no commission if he decides to sell at a certain sum. The alleged remark of Mr. Bacon, to have any force, must have been made prior to the rendition of the plaintiff's services. This does not appear. The law is clear that a broker does not forfeit his commission because the owner avails himself of the services rendered to sell at a price less than that limited (*Schlegel v. Allerton, supra*); and the owner's position is not improved if he seeks to fortify his evasion of liability by telling the broker, after the rendition of the services, that he will pay no commission if he (the owner) sells at such price. The other exceptions to the finding do not call for special notice.

4. The claim that the court has found

material facts without any evidence to support such finding is baseless. On the contrary, it is apparent from the record—and the more apparent the closer the record is studied—that any judge, hearing this evidence, weighing the conflicting testimony, and passing on the credit of the witnesses as they appeared upon the stand, might reasonably reach the conclusion of the trial court. In *Thresher v. Dyer*, 69 Conn. 404, 408, we stated the legal effect of recent legislation, since consolidated in the act of 1897 (Pub. Acts 1897, pp. 888-895), relative to procedure on appeals to this court. The peculiar construction of this appeal suggests the advisability of a more particular statement. A finding by the trial judge is unnecessary, when the record of the court, including the judgment file, discloses the al-

faith. *Cook v. Forst*, 116 Ala. 395; *Levy v. Rothe*, 17 Misc. 402; *Chilton v. Butler*, 1 E. D. Smith, 150; *Goldsmith v. Cook*, 39 N. Y. S. R. 57; *Dole v. Sherwood*, 41 Minn. 535, 5 L. R. A. 720; *Freedman v. Havemeyer*, 37 App. Div. 518.

In such cases the general rule is that the principal is only liable for compensation to the one who effects the sale. *Sussdorff v. Schmidt*, 55 N. Y. 319, 321; *Ahern v. Baker*, 34 Minn. 98; *McGuire v. Carlson*, 61 Ill. App. 295, 297; *Henderson v. Vincent*, 84 Ala. 99; *Martin v. Rillings*, 2 N. Y. City Ct. Rep. 86.

And the employment of more than one broker is a matter of the principal's own choosing, and, until he revokes the authority given, each broker has the right to find purchasers, and earn his commission. *Fox v. Rouse*, 47 Mich. 558.

And if two or more brokers are employed there is no implied contract to pay more than one commission. *Whitcomb v. Bacon*, 170 Mass. 479.

And the one effects the sale who brings the minds of the parties to meet. *Feldman v. O'Brien*, 23 Misc. 341, 344; *Smith v. McGovern*, 65 N. Y. 575.

So, where the several brokers act independently and with knowledge of the fact, the one who first completes the sale is entitled to the commissions. *Glascock v. Vanfleet*, 100 Tenn. 608; *Freedman v. Havemeyer*, 37 App. Div. 518.

And no express contract to that effect is required to give the one who first sells that right. *Tinsley v. Scott*, 69 Ill. App. 352, 355.

The right of the broker who is the efficient cause of the sale to commissions is not affected by the fact that such broker sells to one whose attention has before been called to the property by another broker. *McGuire v. Carlson*, 61 Ill. App. 295, 297.

In *Gibson's Estate*, 3 Pa. Dist. R. 147, 148, it is said that as between several brokers the one entitled to the commissions is the one who introduces the buyer and seller.

So, the commissions are earned by the broker whose exertions are the procuring cause of the sale, and not by the broker who first consummates the sale, unless there is a distinct contract to the contrary. *Brennan v. Roach*, 47 Mo. App. 290, 297; *Dreyer v. Rauch*, 3 Daly, 434, 439, 42 How. Pr. 22, 29, 10 Abb. Pr. N. S. 843; *Wright v. Brown*, 68 Mo. App. 577; *Briggs v. Rowe*, 4 Keyes, 424; *McGuire v. Carlson*, 61 Ill. App. 255; *Martin v. Billings*, 2 N. Y. City Ct. Rep. 86.

The broker who introduces the purchaser, and who is instrumental in finding him, is the procuring cause. *Sherwood v. Kerfoot*, 9 Ill. App. 553, 556.
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In *Brennan v. Roach*, 47 Mo. App. 290, 297. It is said that after one broker has shaken the tree, another cannot be permitted to run up and carry off the fruit; and if the owner allows this to be done he is responsible to the first agent.

And the one who negotiates a contract on his principal's terms, and no other, is entitled to commissions, as the broker entitled must be the procuring cause of the contract finally made. *Martin v. Rillings*, 2 N. Y. City Ct. Rep. 86.

And a broker who first calls the attention of the purchaser to the property, and negotiates with him for a sale, is prima facie the procuring cause of the subsequent sale, unless the parties in good faith withdraw from the negotiations and abandon the proposed purchase and sale, prior to a subsequent renewal of negotiations or unless the party sells by another broker in good faith. *Hendricks v. Daniels*, 46 N. Y. S. R. 384.

In *Goldstein v. Walters*, 15 Daly, 597, the court stated that the opinion entertained by some of the justices of the district court, that the broker who first brings the property to the notice of the purchaser is entitled to the commissions, even though the broker fails to obtain the price named by the seller, and though that price is afterwards obtained by the seller through the independent efforts of another broker, was erroneous.

And if the purchaser produced was first in negotiation with another broker, he continues to sustain that relation to him until it is expressly broken up, or the matter of the purchase has ceased to be held by him under consideration. *Tinsley v. Scott*, 69 Ill. App. 352.

The employer, with notice of the pendency of negotiations with one broker, cannot escape liability to him by selling to the customer through another broker, even though he first discharges the former broker, unless he gives him a reasonable time to effect a sale. *Ibid.*; *Day v. Porter*, 60 Ill. App. 386, 161 Ill. 235.

And a broker employed to sell lands, with notice that the property is also in the hands of other brokers on the same terms, though not thereby authorized to execute a deed or to receive the price, does "sell" the land in the sense of such employment when he produces a party able, willing, and ready to take it on the terms given, if no other such purchaser has been previously produced. *Tinsley v. Scott*, 69 Ill. App. 352, 355.

If, however, a broker introduces a purchaser who declines to purchase there must be some period of time at which the principal may deal with another broker who may himself be able to sell to such purchaser. *Mears v. Stone*, 44 Ill. App. 444, 447.

leged errors; that is, it is unnecessary when the appeal is used as a substitute for the former motion in error, but the ultimate and subordinate facts on which the judgment is founded must, on request of counsel, be stated in the judgment. When the appeal is used as a substitute for the former motion for a new trial, or for such motion as well as for a motion in error, a finding by the trial judge is necessary, and may serve a triple purpose: First, it may contain a statement of the facts on which the judgment is founded. Strictly, these facts should appear in the judgment, as when the appeal serves the purpose only of a motion in error; but the practice is (authorized, inferentially, by the statute), to include these facts in the finding, when one is necessary. No error can be assigned in respect to weighing the evidence from which these conclusions

are drawn. They are adjudicated facts, which this court cannot retry. Where the ultimate facts are mere conclusions from subordinate facts found from the evidence, a party is entitled to have the subordinate facts stated; for such conclusions may be reviewable. But these subordinate facts must be facts found from the evidence, and not a mere recital of the testimony. Second. The finding may contain a statement of facts found which are necessary to present a question of law, and the question of law must be one made at the trial and decided by the judge. Such facts, whether affirmative or negative, are adjudicated facts, which this court cannot retry; but they may not be included in the statement of facts on which the judgment is founded, because the question of law which made them material has been decided adversely by the judge. It is

Where each broker contributed something from which the result could have been reached, as if one found a customer who otherwise would not have been found, but who refused to conclude the bargain through his agency, and another succeeded after the first failed, in the absence of any express contract, that one only was entitled to commission who showed that his services were the really effective means of bringing about the sale, or were the predominating efficient cause. *Whitcomb v. Bacon*, 170 Mass. 479.

In the above case the court said that although there may be another broker whose services are equally meritorious and essential in producing the result, yet in such a case it is not enough to show that one of several causes stood in such a relation to the result that without it the result would not have happened, and that it was one cause among others which assisted or contributed in producing it, as it is necessary to discriminate what the causes are, and to ascertain which was the particular cause which could be called the efficient or effective one.

If one broker places the property before the purchaser, and opens negotiations with him, and at his instance with the principal, and the other broker merely hears incidentally of the negotiations, and urges the purchaser to close the transaction, the second broker cannot recover commissions as he is not the procuring cause of the sale. *Briggs v. Rowe*, 4 Keyes, 424.

And if the broker is the procuring or proximate cause of the sale, the fact that the final transfer of the property may have been conducted by another broker will not affect his right to commissions, even if the terms of the first negotiations may have been varied. *Wright v. Brown*, 68 Mo. App. 577.

Where a broker introduces a purchaser, the point of time at which the principal may deal with another broker is when such purchaser surrenders his position, and declines to have anything further to do with the matter. *Mears v. Stone*, 44 Ill. App. 444, 447.

If the property is openly put in the hands of more than one broker, each is aware that he is subject to the arts and chances of competition, and if he finds a person who is likely to buy, and quits him without having effected a sale, he is aware that he runs the risk of such person falling under the influence of his competitors, and that in such case he may lose his labor, since such is a part of the inevitable risk of the business he undertakes. *Scott v. Lloyd*, 19 Colo. 401; *Vreeland v. Vetterlein*, 33 N. J. L. 247.

And if a broker who has procured
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a purchaser reports his offer to his principal without identifying the person from whom it comes, he cannot recover commissions in case of a subsequent sale through another broker at the same price to the same purchaser, unless it appears that the principal knew these facts, or that notice was given him by the broker before the completion of the contract, and payment of commissions to the second broker. *Tinges v. Moale*, 25 Md. 480, 90 Am. Dec. 73, 76.

A broker who is unsuccessful in effecting a sale does not become entitled to a commission upon the success of another broker. *Ward v. Fletcher*, 124 Mass. 224; *Dowling v. Morrill*, 165 Mass. 491.

If the broker does not have the exclusive sale of the property, and before the deeds are passed another broker intervenes through whom the bargain is closed, a verdict in the broker's favor for commissions cannot be sustained, unless the evidence goes further than merely to justify a finding that the purchaser was one to whose attention the property was brought by the broker's services. *Dowling v. Morrill*, 165 Mass. 491; *Gillespie v. Wilder*, 99 Mass. 170; *Loud v. Hall*, 106 Mass. 404, 407; *Ward v. Fletcher*, 124 Mass. 224.

And if the causal connection between the introducing broker and the procurement of the sale be broken off the first broker is not entitled to any commission. *Platt v. Johr*, 9 Ind. App. 58.

So, a broker will not be entitled to commissions on a sale made by another broker after the termination of his agency. *Green v. Wright*, 36 Mo. App. 298.

And the mere fact that one of several brokers may have called the purchaser's attention to the property, and may have conferred with him upon it, and furnished information respecting the same, is not sufficient to make him the efficient cause,—especially where he has not made such facts known to his principal or to the other brokers. *Glascock v. Vanleet*, 100 Tenn. 603.

Again, the mere fact that a broker hazards a prophecy that the person he is trying to induce to buy will at some future time accede to his principal's terms cannot aid him in an action against his principal where the sale is actually brought about by another broker. *Goldstein v. Walters*, 15 Daly, 397.

Where several brokers are employed they are free to act independently of each other, and the owner cannot interfere, and is under no obligation to decide between their conflicting claims, but only to remain neutral between them, and

for the purpose of securing the statement in the finding of such facts that the process provided in §§ 9 and 10 of the act of 1897 is chiefly efficacious. If such facts are omitted, the appellant may file exceptions to the finding, and have the evidence relevant to the question certified, for the purpose of making it appear by the record that it was an admitted or undisputed fact; or, if this course is not followed, the appellant may, under §§ 11 and 12 of the act, apply to this court to rectify the appeal. But in either case it must appear that the omitted fact was an admitted or undisputed fact, and that its statement in the finding is necessary to properly present a question of law decided adversely to the appellant. If it so appear, then the finding will be corrected by treating

it as containing the fact, and the question of law will be considered in view of the corrected finding. This process is well adapted to prevent the omission from the finding of material facts found by the trial court, but it is an abuse to use the process for the mere purpose of asking the statement of a fact in the language of the counsel, rather than of the judge, or of loading the record with insignificant facts. Third. The finding may contain a recital of what actually took place at the trial, for the purpose of presenting for review rulings of the trial court upon questions of evidence, or other rulings not directly affecting the judgment. Such recital is made from the notes of the judge, which were formerly the only authentic source from which such facts could be made

between them and the purchaser. *Glascock v. Vanfleet*, 100 Tenn. 603.

And the principal performs his duty when he remains neutral between them, and he has a right to sell to a purchaser produced by any of them without deciding which of them was the primary cause of the purchase. *Vreeland v. Vetterlein*, 33 N. J. L. 247, 24; *Farrar v. Brodt*, 35 Ill. App. 617.

And in such cases he may immediately convey to the purchaser brought to him by one of such brokers and pay the broker without any inquiry as to whether one of the other brokers may or may not have had something to do in effecting the sale. *Eggleston v. Austin*, 27 Kan. 245, 247; *McGuire v. Carlson*, 61 Ill. App. 295.

So, under an agreement to pay a commission to the one actually making the sale, the principal's duty is discharged when he pays the commissions to the one who actually closes the sale. *Daniel v. Columbia Heights Land Co.* 9 App. D. C. 483.

Yet an instruction to the jury to the effect that the entire duty of the seller is performed by remaining neutral, and that he had a right to make the sale to a buyer produced by either or any of them without being called upon to decide which of them is the primary cause of the purchase, although good law in the majority of cases, cannot be taken as the law applicable to all cases, and therefore a refusal of the court to so instruct the jury in particular cases may not be error. *Eggleston v. Austin*, 27 Kan. 245, 247. In this case the broker claimed to be the first person to bring the parties together, and to have procured the assistance of a friend of the purchasers in making the sale with the principal's knowledge, and also to have given him notice before the papers were executed that he claimed to be the person who effected the sale, and that he was the primary, efficient, and procuring cause of the sale, but that the principal, after stating he would ascertain who made the sale before he paid commissions, immediately afterwards paid the other broker.

If nothing is said as to the time within which the sale is to be made, and a reasonable time has elapsed, the principal may effect a sale through one of such brokers without incurring liability to the others, where good faith exists, and they have not succeeded in procuring a purchaser. *Feldman v. O'Brien*, 23 Misc. 341, 344.

Upon the question of time of performance of broker's contract, see *note* to *Lunney v. Healey* (Neb.) — *L. R. A.* —

And in such a case the principal is not bound to investigate the respective claims of each agent, and to decide between them at his peril. *Daniel v. Columbia Heights Land Co.* 9 App. D. C. 483.

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Where each broker claims commissions, the principal may compel them to interplead, and in such a case he should pay the money into court, and leave the brokers to try the question as to who was the procuring cause between themselves. *Dreyer v. Rauch*, 42 How. Pr. 22, 29.

But the Illinois courts hold that the principal must make his defense at law, and cannot compel them to interplead. *Sachsel v. Farrar*, 35 Ill. App. 277.

It is competent for the principal to adduce evidence showing that the sale was brought about, and a purchaser procured, through another agent. *Newton v. Ritchie*, 75 Iowa, 91, 93.

But evidence which shows that the principal had employed several agents for the sale of the property, and what he agreed to pay them for finding a purchaser, is wrongly admitted, where such agents are not concerned in what has been done, as the compensation agreed to be paid them is wholly immaterial. *Goin v. Hess*, 102 Iowa, 140, 143.

The fact that one broker has notice of a change of purpose in the principal will not affect the other, and a broker will not be chargeable with notice by reason of the principal's improving the property in a manner inconsistent with a design to sell, where the agency has not been revoked, as such an act does not of itself revoke the agency. *Lloyd v. Matthews*, 51 N. Y. 124.

But by consenting to his principal's proposal to put the property in the hands of another agent also at the same prices, the commission to go to whoever sells, the broker incurs a risk of competition, and the chance of losing the commission, even after the trouble and expense of advertising has been incurred by him, no matter what his previous understanding may have been. *Daniel v. Columbia Heights Land Co.* 9 App. D. C. 483.

In a case where the purchaser first called upon the plaintiff to inquire after another estate, and the plaintiff called his attention to his principal's estate, of which the purchaser took particulars but finally negotiated the sale through the other agent, the question whether the plaintiff found the purchaser was held to be one for the jury, who were not bound to give him the full amount of the commissions, though the fact that commissions were usually paid was some evidence to guide them in their decision. *Murray v. Currie*, 7 Car. & P. 584.

And the court refused to disturb the verdict of the jury denying commissions where each broker had negotiations with the person who purchased, and the terms first offered through the plaintiff broker were not accepted, and there

to appear, but now the notes of the official stenographer furnish another authentic source. And, if necessary, under the provisions of §§ 11 and 12 of the act, such notes may be made to appear in the finding, so that this court may review the rulings complained of, in connection with the state of facts existing at the trial as shown by the recital of the judge, read in the light of the certified evidence. The addition of long extracts from the stenographer's notes is, however, rarely necessary. A brief statement by the judge is clearer, and usually sufficient.

The process authorized by the statute is intended primarily to facilitate the fullest possible exercise of jurisdiction by this court in correcting errors in law, and we have given the statute a very broad construction

to give effect to this purpose. If an appeal is properly prepared by the appellant, it is difficult, if not impossible, for a trial court to so frame a finding that this court cannot get at the substantial errors in law involved. So far, however, as the language of the statute may imply a determination by this court, upon the evidence certified, of facts lawfully adjudicated by the trial court, it was decided in *Atwater v. Morning News Co.* 67 Conn. 504, and in subsequent cases, that we are prevented from giving it effect by the paramount authority of the Constitution.

There is no error in the judgment of the Superior Court.

The other Judges concur.

was an entire abandonment of the idea of investment until the negotiations were renewed by the instrumentality of the other broker, who sold the property on the same terms as originally offered, with a modification on account of a certain lease, as the question involved was properly submitted to the jury. *Livezey v. Miller*, 61 Md. 336, 343.

And where a broker who obtains two different offers, both of which are rejected by the principal, suspends his efforts, and another broker, in ignorance that the first broker has treated with such party, procures from him another and different offer, which is accepted by the principal, instructions to the jury which do not sufficiently point out the difference between two offers, and which are calculated to mislead them so as to cause them to find for the broker, are erroneous. *Dowling v. Morrill*, 165 Mass. 491.

But the mere fact that the sale is concluded by another broker to whom the principal has paid a commission will not affect the first broker's right to commissions where he has introduced a purchaser, and the negotiations of the sale have continued with such purchaser until the sale is consummated; or if the negotiations are renewed by the broker at the instance of the principal, and the sale is consummated by the parties through another broker, the first broker will still be entitled to recover. *Peckham v. Ashhurst*, 18 R. I. 376.

And the broker who enters into a written contract with, and receives part payment of the purchase price from, a party financially responsible, is entitled to compensation for making the sale notwithstanding another broker may have procured a conveyance from the owner in compliance with a verbal agreement made by such owner with the grantee named in such conveyance. *Stewart v. Woodward* (Kan. App.) 53 Pac. 148.

A broker who introduced an intending purchaser without inducing him to do anything at that time more than to view the premises, and later brought the parties together again and effected a sale upon the terms previously declined, can recover commissions as against another broker, who, in the interval, had brought the same parties together, with no result except an offer that was refused. *Ludlow v. Carman*, 2 Hilt. 107, 112.

A writing which places property in the broker's hands for a period of three months, and until withdrawn by written notice, at a certain price, the broker's commission or compensation to be the amount obtained over and above such price, and 5 per cent commissions if the property is sold by the brokers, and one third of the above com-

pensation in case the property is sold or exchanged in the meantime without their agency, is sufficient to establish the liability for the one-third compensation upon a sale made within such period of three months by another broker. *Long v. Herr*, 10 Colo. 380.

Where the evidence justifies the finding that the first broker's services are the efficient or effective means of bringing about the actual sale, and that his work has in fact caused the purchaser to buy, he has in fact procured a customer to purchase the estate. *Dowling v. Morrill*, 165 Mass. 491; *Gleason v. Nelson*, 162 Mass. 245.

And where a broker has started negotiations between the parties, which have continued without interruption, the mere fact that the property is placed in the hands of other brokers, who put a bill upon the premises, and with whom, as well as with the principal himself, subsequent negotiations are continued, is not sufficient ground for the court to infer a revocation of the employment of the first broker so as to bar his right to commission, where it does not appear to have been at any time between the inception of the negotiations and the final consummation of the sale, when the negotiations were broken off. *Gibson's Estate*, 3 Pa. Dist. R. 147, 148.

Brokers recovered their commissions upon a sale made by the principal through another broker where about the day of the expiration of the time named in their contract the principal requested them to write a purchaser who had declined to purchase at the price named, offering to take less, and upon their request for another contract the principal stated that he had one, and that if the purchasers wanted to come down and trade with him the brokers could stand aside and he could make the trade and pay their commissions, no matter who made the sale or at what price. *Holland v. Howard*, 105 Ala. 538.

Under conditions which showed that the purchaser was not quite satisfied with the terms of the contract he had entered into, and stated to the broker that he could take it that he wished "to back out" of the contract if he liked, and another agent of the principal drew up a second contract so modified as to conform to his wishes, which the principal agreed to and which was accepted and executed, the first broker was held to be the procuring cause of the sale. *Wright v. Brown*, 68 Mo. App. 577.

And where one of several agents found a purchaser and negotiated with him to sell at a certain price, on terms different from those specified in the authority to sell, and when the sale

was about to be consummated, another agent with full knowledge of such negotiations sold the property for a less price to the same person on the same terms as to cash down, and time for deferred payment, while the owner was ignorant of the negotiations with the first broker, but ratified the second sale on the terms proposed by the first, the first was held the procuring cause of the sale. *Reynolds v. Tompkins*, 23 W. Va. 229, 235.

And where there was a special agency and the first agent effected a sale which was consummated by a conveyance, and the second agent subsequently contracted to sell without notice of the previous sale, as the agency was special and there was nothing to show that the principal would be estopped from setting up a revocation of the agency prior to the sale by the second broker, the first broker recovered his commissions, since a revocation may be shown by the death of the principal, the destruction of the subject-matter, or the determination of his estate by a sale, as well as by express notice. *Ahern v. Baker*, 34 Minn. 98.

So, the court refused to dismiss the first broker's claim where he showed the property to one who at the time would only pay a much smaller amount as the difference on an exchange, which sum the principal refused, and such party told another broker that he would increase his offer, on which the latter broker effected an exchange and got a commission from both parties, the principal knowing at the time that the first broker claimed it, as the evidence was sufficient to go to the jury upon the question whether the plaintiff was the procuring cause of the exchange. *Smith v. McGovern*, 65 N. Y. 574, 575.

And the plaintiff broker recovered as the procuring cause where the purchasers were his customers and their full acceptance of the offer was merely delayed for a time to hear from a partner, but the bargain was immediately closed on hearing from him, although before full acceptance the principal intimated that unless they sold by a given date the field would be open to anyone to sell, and the deal was closed at the office of another broker, to which the partner went in order to find the principal, because the first broker was out of town. *Jenks v. Nobles*, 42 Ill. App. 33.

In *Atwater v. Wilson*, 13 Misc. 117, 119, affirming 10 Misc. 777, the broker was held to be the procuring cause of the sale where he first called the attention of the purchaser to the property, and for many months continued the negotiations, although the sale was finally closed by another broker whom the purchaser had asked to buy upon a promise of a certain amount, while the principal knew that the purchaser was the party introduced to him by the first broker.

The above case is distinguishable from that of *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 382, 22 Am. Rep. 441, as in the latter case the broker's agency was terminated by the principal in good faith, and for a good cause, while here there was no evidence of a termination.

So, a broker recovered a verdict where he referred his principals to certain houses and lots, and gave them the names of the owner and his agent under their promise that if they exchanged for them they would pay him a commission, but they, ignoring him, conducted their own negotiations for the exchange. *Gillen v. Wise*, 14 Daly, 480.

And the first broker recovered as the procuring cause of the sale, where it appeared that the purchase made by another broker was really made on behalf of the person whose attention was first called to the property by the first 44 L. R. A.

broker, and that the principal objected to the conveyance to him and suggested that commissions might be claimed by the first broker, but was assured that no such claims would be made. *Winans v. Jaques*, 10 Daly, 487.

And where the evidence showed that the broker brought the property and its price to the attention of the purchaser, and had several interviews with his agent in which prices were discussed, but, in consequence of what the broker said to the agent, the latter was not willing to negotiate through him, and upon his suggestion another broker was employed by the principal and the sale was closed with the purchaser, the court held that it could not be said that the evidence did not justify a finding that the purchasers had determined to buy when the agent went to the second broker, and that the services rendered by the first broker up to that time did not in fact procure the purchaser. *Dowling v. Morrill*, 165 Mass. 491.

Evidence which tends to show that another broker did some work in effecting a trade with the purchaser, and that the contract made with the purchaser was the result in whole or in part of services rendered by him, and that he was authorized to act for the principal in effecting the sale, may be admitted in an action by a broker to recover commissions. *Goin v. Hess*, 102 Iowa, 140, 143.

In the following cases the commission or compensation was not allowed the first broker engaged by the principal as he was not considered the procuring or efficient cause of the sale effected.

A broker employed to sell real estate at a given price was refused commissions where he produced a purchaser to whom the property was afterwards sold by another agent at a lower price, since he was only entitled to compensation if such purchaser was accepted by his principal at his hands, and when the principal has availed himself of his services. *Wolf v. Rosenberg*, 67 Mo. App. 403.

When property is put into the hands of two independent brokers, the fact that one of them by advertising finds a purchaser, and induces him to purchase by seeing him, and holding interviews with him, will not entitle him to commissions, if the sale is actually closed by the other broker. *Daniel v. Columbia Heights Land Co.* 9 App. D. C. 483.

And if there is no agreement between the buyer and the seller introduced through a broker, and no mutual assent to the terms, but the sale is finally brought about after the completion of negotiations through another broker, the former's right to commissions will be denied. *Baker v. Thomas*, 12 Misc. 432, 433, reversing 11 Misc. 112.

So, if the principal refuses to take the offer of the purchaser procured by a broker unless the latter will take less commissions, and the matter thereby terminates, the broker cannot recover as the procuring cause of a sale which is made by another broker. *Powell v. Lamb*, 1 N. Y. Supp. 431, 432.

And where all that a broker did was to call the attention of a purchaser to the property without any agreement resulting from what he did, but the negotiations fell through, and some time afterwards another broker, without any knowledge of the former's efforts, sold the property to the same purchaser, it was held that the first broker was not entitled to commissions as the procuring cause of the sale. *Dreyer v. Rauch*, 42 How. Pr. 22, 29, 3 Daly, 434, 439, 10 Abb. Pr. N. S. 343.

And if the negotiations he has set on foot are completely broken off by disagreement as to the price, and the property is afterwards sold

to the same party by another broker on the same terms as originally offered, except a modification somewhat less favorable to the owner, the first broker is not entitled to commissions as the procuring cause. *Armes v. Cameron*, 8 Mackey, 485, 436.

And this is especially so where there is no evidence that he induced such purchaser to change his mind. *Mears v. Stone*, 44 Ill. App. 444; *Earp v. Cummins*, 54 Pa. 894, 93 Am. Dec. 718; *Chandler v. Sutton*, 5 Daly, 112; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Lipe v. Ludewick*, 14 Ill. App. 872; *Sievers v. Griffin*, 14 Ill. App. 63; *Davis v. Gassette*, 80 Ill. App. 41, 45.

So, where the proposed purchaser introduced by the broker, who had refused the property, subsequently mentioned it to the real purchaser, and the latter sale was completed by another broker, the first broker was not allowed commissions. *Thuner v. Kanter*, 102 Mich. 59.

And where the contract with such first agent has terminated before the employment of the plaintiff broker, and the efforts of the first broker are unsuccessful in effecting a sale to the purchaser, the mere fact that another agent has been employed by the principal is not material. *Stinde v. Blesch*, 42 Mo. App. 578.

So, if the agency has been revoked before the broker becomes entitled to his commissions, and the property is placed in the hands of another broker who employs the first broker to assist him in the sale, the principal is not liable for commissions to the latter. *Schwartz v. Yearly*, 31 Md. 270, 278.

And if a broker introduces another broker to the principal as a customer, and the negotiations between them are unsuccessful, and afterwards the principal in good faith employs the latter to procure a purchaser, and he does so, and is the proximate, efficient, and procuring cause of the sale and exchange of the property, he is entitled to the commission rather than the broker originally employed, who introduced him to the principal. *Latschaw v. Moore*, 53 Kan. 224.

In *Davis v. Gassette*, 80 Ill. App. 41, 45, the court refused the broker's commissions as it was shown that a year before the trade was made the purchaser had absolutely declined to have anything to do with the property on the terms upon which the broker was authorized to offer it, and no negotiations of any kind between the principal and the purchaser resulted from the meeting brought about by the broker, but the exchange subsequently made was brought about by another broker on a proposition to trade, not to sell, the property. In this case, however, the court intimated that if the principal put the property into the hands of other brokers when he had given it to one under an agreement that he should have the exclusive agency a question as to whether he could escape liability for commissions under such circumstances might arise.

If a broker, who has the exclusive agency up to a given date, merely approaches an intending purchaser without doing anything definite, and after such date a mere conditional offer never complied with is made by such purchaser, and later the property is sold through another broker without the assistance or help of the first broker, and the principal remains perfectly neutral between them, a verdict denying the broker's right to commissions will not be interfered with. *Farrar v. Brodt*, 35 Ill. App. 617.

And where there was a special contract whereby, in consideration of special efforts, the broker was to have a certain percentage in case the sale was made by either of them, and a less percentage in case the sale was effected by another broker, the broker's claim for com-

missions was refused, upon a sale made by another broker which appeared to be the eventual acceptance by the principal of a standing offer made through the second broker some months previous to the making of the special contract. *Powell v. Anderson*, 15 Daly, 219.

So, a broker was refused commissions upon a sale by a second broker engaged by his principal with notice to the former where he merely brought the purchaser in view of the house, and, seeing that he was pleased with it, looked up the owner and procured the privilege of selling it on certain net terms, which he never carried out, without any agreement about commissions, or anything over and above the net amount mentioned by the principal. *Crowley v. Somerville*, 70 Mo. App. 376, 379.

Where, at the instigation of a real-estate broker, the principal's son telegraphed his father for the lowest price, and such telegram was answered, but no sale was effected by the broker to the purchaser he had in view at the time owing to encumbrances upon the property, and this was all that the broker did, commissions were refused him upon a sale, after the removal of the encumbrances, through another broker. *Chandler v. Sutton*, 5 Daly, 112.

So, the broker was not the procuring cause where neither his efforts nor his influence continued until the date of the sale made by another broker to a purchaser originally found by him. *Randrup v. Schroeder*, 21 Misc. 54, 22 Misc. 365.

So, where the broker found and introduced a person, who at the time was not ready and willing to buy, and did not offer to do so until he was again introduced to the principal by another broker, through whose efforts, some five or six weeks afterwards, he became the purchaser, the claim of the first broker for commissions was disallowed as he was not the efficient agent or procuring cause of the sale. *Platt v. Jahr*, 9 Ind. App. 58.

In *Walton v. New Orleans, J. & G. N. R. Co.* 23 La. Ann. 398, the broker's claim for making a sale was disallowed when other brokers negotiated the sale, although the former claimed that the matter was taken out of their hands without their consent or knowledge.

And the claim of a broker who had not the exclusive agency was disallowed where another broker was employed in good faith after every offer ever made by the first brokers for any prospective buyer had been rejected, and was paid without any knowledge on the part of the principal that the first broker had ever communicated with the second broker in relation to the sale of the property, although there had been negotiations between the two brokers which had ended. *Douville v. Comstock*, 110 Mich. 693, 701.

Again, where it was not even shown that the broker was the first to put the purchaser on the track of the property, since he already knew of the intended sale, and that it was listed with another broker with whom he had some negotiations, and the first broker never made any offer which the purchaser accepted, or, so far as it appears, ever would accept, but the efforts of another broker were the immediate procuring cause of the sale, the first broker's claim was disallowed in the absence of evidence of unfair means on the part of the other broker, as the purchaser was merely experimenting to see where he could get the best terms. *Francis v. Eddy*, 49 Minn. 447.

And a broker's claim was disallowed in *Maracella v. Odell*, 3 Daly, 123, upon a sale by another broker, where the former's bill had been torn down from the house and that of the other broker, posted thereon, first attracted the atten-

tion of the purchaser, who learned from the tenant that the first broker collected the rent, and went to his office to inquire "about the rents," when he was informed of the price and shown the house, but he did not disclose to the vendor his previous interview with this broker, who was never heard of in the matter.

In *Henderson v. Vincent*, 84 Ala. 99, the court also disallowed commissions to brokers, who only submitted an offer which was declined without any attempt to bring the parties to terms, although no abandonment of their expectation to sell was shown, and the sale made was to one purchasing for the first broker's customer at a less sum, of which fact, however, the principal had no knowledge or information.

And where unsuccessful attempts were made by a broker to close a deal on terms which he was authorized to make, he was not allowed commissions for a sale made after the expiration of his contract, by other brokers. *Montgomery v. Blering* (Tex. Civ. App.) 30 S. W. 508.

In a case in which the principal's husband, acting as her agent, put the houses in the hands of real-estate brokers for sale, and afterwards, also as her agent, put them in the hands of the plaintiff broker, and each broker knew that the property was in the other's hands and that the principal's agent told them that he would give the commissions to the one who obtained the best price, and a purchaser testified that she told both of the brokers that she would buy from the one which could get the house for her, and the evidence further disclosed that such purchaser was first introduced by the plaintiff broker, but it was not shown that he was the procuring cause of the sale, or that he brought the minds of the parties together, and the property was subsequently bought by the other broker in the hope that he would be able to transfer the property to such intending purchaser at an advanced price, it was held the principal was not liable to the other broker for commissions. *Feldman v. O'Brien*, 23 Misc. 341.

The case of *Clarkson v. Howard*, 47 N. Y. S. R. 935, was one in which the plaintiff claimed to be the procuring cause of the sale, and in which the court found that the sale was really effected by another broker, and declined to interfere with the ruling of the court below in defendant's favor.

The testimony of a broker that he offered the lots to the purchaser, and was the procuring cause of the sale, is not sufficient to establish his claim for commissions, where, *inter alia*, the purchaser testifies that the property was offered to him by another broker, and that he was introduced to the principal by that broker before a given date, and also that the property was offered to him by at least two other brokers without success, and that he afterwards bought for a less sum, and the principal proves, *inter alia*, that he told the first broker that if his party would not take, the matter was off, to which the broker assented. *Woods v. Burton*, 21 Misc. 326.

If the employment is denied, and the owner avers that he previously placed the property in the hands of other brokers who obtained an offer which he accepted before the plaintiff produced his customer, evidence of the fact of the employment of such other brokers is competent. *Goldsmith v. Cook*, 39 N. Y. S. R. 56, Reversing 34 N. Y. S. R. 688.

III. In case of a sale by his principal.

a. General rule governing.

It is a general rule in cases where real estate 44 L. R. A.

is placed in a broker's hands for sale in the ordinary way, and without any agreement stipulating to the contrary, or specifying any exact period of time within which the broker is to have the exclusive right to sell, that the fact that the property is given to the broker for sale, or for the purpose of finding or procuring a purchaser therefor, does not deprive the principal of the right to sell the same himself when he acts in good faith toward the broker; and in all such cases there is an implied reservation of the right to the principal, free from any charge or liability for commissions. *Cook v. Forst*, 116 Ala. 395; *Blood v. Shannon*, 29 Cal. 393; *Dolan v. Scanlan*, 57 Cal. 261, 263; *Owl Canon Gypsum Co. v. Ferguson*, 2 Colo. App. 219; *Wray v. Carpenter*, 16 Colo. 271; *Hungerford v. Hicks*, 39 Conn. 259; *Bryan v. Abert*, 3 App. D. C. 180, 186; *Doonan v. Ives*, 73 Ga. 295, 301; *Gilbert v. Coons*, 37 Ill. App. 448; *Metzen v. Wyatt*, 41 Ill. App. 487; *Clifford v. Meyer*, 6 Ind. App. 633; *Cullen v. Bell*, 43 Minn. 228, 227; *Dole v. Sherwood*, 41 Minn. 535, 5 L. R. A. 720; *Armstrong v. Wann*, 29 Minn. 126; *Putnam v. How*, 39 Minn. 363; *Baars v. Hyland*, 65 Minn. 150; *Wylle v. Marine Nat. Bank*, 61 N. Y. 415, 416; *Satterthwaite v. Vreeland*, 3 Hun. 152; *Lery v. Rothe*, 17 Misc. 402; *Goldsmith v. Cook*, 39 N. Y. S. R. 56, Reversing 34 N. Y. S. R. 688; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431, 432; *Chilton v. Butler*, 1 E. D. Smith, 150, 151; *Sussdorf v. Schmidt*, 55 N. Y. 319, 321; *Stringfellow v. Elsea* (Tex. Civ. App.) 45 S. W. 418, 421; *Burns v. Hill*, 2 Tex. App. Civ. Cas. (Willson) § 523, p. 468; *Darrow v. Harlow*, 21 Wis. 303, 94 Am. Dec. 541; *McArthur v. Slauson*, 53 Wis. 41.

And therefore where the action for commissions is not based upon the ground that the broker found the purchaser, or in fact did anything with respect to the agency, but solely upon the sale of the land by the principal soon after the broker's employment, without his consent, and without any reservation of the principal's right to do so, the claim for commissions must fail. *Stewart v. Murray*, 92 Ind. 543, 545, 47 Am. Rep. 167.

So, if the principal has reserved to himself a right to sell it makes no matter that after an independent sale by the principal the broker, without notice thereof, finds a purchaser, as his agency has expired by the terms of its creation, and, as he accepts the terms, he cannot complain of the result. *Hill v. Jebb*, 55 Ark. 574; *Ahern v. Baker*, 34 Minn. 98; *Dole v. Sherwood*, 41 Minn. 535, 5 L. R. A. 720; *Lane v. Albright*, 49 Ind. 275; *Dolan v. Scanlan*, 57 Cal. 261.

And the reservation of the right to make a sale in person, independently of the broker, imports a notice to the latter, and an agreement by him that the proprietor may make a sale without the agency of the broker, and thereby terminate it. *Hill v. Jebb*, 55 Ark. 574, 576.

Where the principal has reserved the right to make a sale himself there is no implication that he may not accept a lower price than that specified as a minimum in the agreement with the broker. *Burns v. Hill*, 2 Tex. App. Civ. Cas. (Willson) § 523, p. 468.

So, an instruction to the jury that a man has the right to sell or trade his own property, and that if the principal acts for himself in the matter, and does not employ the broker as his agent to procure him a customer, the broker cannot recover for the alleged services, correctly states the law. *Strawbridge v. Swan*, 43 Neb. 781.

And the rule especially applies after a reasonable opportunity has been given the broker to

effect a sale. *Feldman v. O'Brien*, 23 Misc. 341, 344; *Henderson v. Vincent*, 84 Ala. 99, 100.

But in such cases the principal will be bound to pay the broker for services for which he promised to pay, and which are rendered by the broker pursuant to such agreement. *Stringfellow v. Elsea* (Tex. Civ. App.) 45 S. W. 418, 421.

So, if a broker is entitled to compensation for services rendered during his agency, to be paid out of the proceeds of a sale, his right accrues when the land is sold, and the principals cannot deprive him of that right by selling the property themselves. *Ibid.*

And whenever the broker is authorized to sell, and he finds a purchaser before any sale is completed by the principal, the latter must account for the promised commission, unless there be something in the contract which relieves him from liability. *Owl Canon Gypsum Co. v. Ferguson*, 2 Colo. App. 219, 221; *Wray v. Carpenter*, 16 Colo. 271.

Although the fact that the principal has authorized the broker to sell does not deprive him of the power of selling the property himself, yet he cannot thereby avoid his liability to the broker where the broker has found a purchaser within a reasonable time under his contract. *Lane v. Albright*, 49 Ind. 275, 279.

And in such a case there is an implied undertaking that the broker is to have his commission if he, within a reasonable time before the principal sells, finds a customer who will make the purchase, and notifies the principal thereof. *Darrow v. Harlow*, 21 Wis. 303, 94 Am. Dec. 541.

In a case in which the principal sold the property on the same day that he placed it in the hands of the broker, without any notice to the latter, the principal was held liable for commissions on a sale made by the broker within three or four days after, and by a special effort. *Woodall v. Foster*, 91 Tenn. 195, 197.

So, the owner has no right to take negotiations out of the hands of his agent, especially where he reduces the price of the property, and completes the sale himself, and then escape payment of commission; and in such a case the broker will be treated as the procuring cause of the sale, although by the acts of his principal he was prevented from actually closing the bargain between the parties. *Clifford v. Meyer*, 6 Ind. App. 633.

The owner may sell the property while the agent is engaged in trying to do so, and if he does so before the agent has found a purchaser he will not be liable to him for commissions, unless he has sold to a purchaser procured by the agent. *Armstrong v. Wann*, 29 Minn. 126.

In a case in which a clerical agent was to receive a commission upon the amount of the purchase money upon the sale of an advowson through his agency where the principal sold without communicating with the agent, in the absence of expense or liability incurred by the agent he was not entitled to recover anything. *Simpson v. Lamb*, 17 C. B. 603, 25 L. J. C. P. N. S. 113, 2 Jur. N. S. 91.

And in a case where the broker found a purchaser on a given date, who was able, ready, and willing to purchase all the property at an increased rate, and wrote the principal informing him of the fact, and enclosed his letter in one to the postmaster with a request to deliver it, which letter never reached the principal until after he had sold the property, as no exclusive right to sell was given, and the principal reserved the right to sell the property himself, the broker's claim for commissions failed. *De Cordova v. Bahn*, 74 Tex. 643, 645.

Under a condition that if the land is sold 44 L. R. A.

without the intervention or assistance of the broker he is not to be entitled to commissions, he is not entitled to them upon a sale made by the principal with the knowledge of the broker, where before that is effected the broker procures a purchaser, but it is agreed that he should wait five days, for another person's acceptance of the principal's offer, which is accepted within the time. *Robinson v. Kindley*, 36 Kan. 157.

b. Negotiations by principal.

And if the principal finds a purchaser through information furnished by a broker never actually employed by him, although there may be a moral obligation to give a reasonable compensation for his services, yet the obligation is not of such a character as to be enforceable at law. *Bees v. Spruance*, 45 Ill. 308, 310.

The question of a sale negotiated by the principal with a purchaser introduced to him by the broker will be found treated of in *note* to *Lunney v. Healey* (Neb.) — L. R. A. —, wherein the question of performance of the contract between the principal and the broker is considered.

c. Before broker has reasonable opportunity to reap result of his efforts.

When an agent is employed to perform an act involving the expenditure of labor and money, and has in good faith incurred expense and expended time and labor before he has a reasonable opportunity to avail himself of the results of such preliminary effort, the principal cannot be permitted to determine the agency and take advantage of the agent's services without payment of compensation. *Glover v. Henderson*, 120 Mo. 367, 376, citing *Meachem, Agency*, § 620.

And although the broker is not given the exclusive right to sell, if the principal sells on the very day on which he places the property in the broker's hands without notice to the broker, who has made a vigorous and special effort to sell, and finds a purchaser within three or four days without notice of the prior sale, he is entitled to his full commissions. *Woodall v. Foster*, 91 Tenn. 195, 197.

Upon the question of the principal's interference with the broker in his performance of his contract, see *note* to *Brackenridge v. Claridge* (Tex.) 43 L. R. A. 593.

d. Pending broker's negotiations with purchaser.

The principal cannot, by any arbitrary act of his, prevent the performance of the contract on the broker's part, as by selling to a purchaser with whom the broker is in negotiation, and thus escape liability for commissions, especially if he has knowledge of the fact that the broker is negotiating with such purchaser.

This doctrine is supported by the case of *Reynolds v. Tompkins*, 23 W. Va. 229, 235, which states that if an agent, with authority to sell on a certain commission, in the event of a sale, procures a purchaser at the price and on the terms authorized, who would have taken the property at the price, and the owner of the property steps in, ignores the agent, and sells to the purchaser so secured at the same price and on the same terms, or for a less price and on the terms proposed to the purchaser by the agent, even if they are different from the terms stipulated in the authority to sell, the owner is liable to pay to the agent the amount of commissions stipulated to be paid.

So, if the broker's work has been fulfilled, not only in directing a purchaser's attention to the property, but in affording him information as to encumbrances, etc., and as to the price at

which the property can be obtained, and the probability is that the broker within the scope of a few hours will consummate the sale, the principal cannot surreptitiously step in and take the case out of the broker's hands and complete it himself, for the purpose of avoiding commissions, as in such a case the principal will not be allowed to intervene and interfere with the prosecution of the employment on the part of the broker to his own advantage. *Carroll v. Pettit*, 67 Hun, 418; *Doonan v. Ives*, 73 Ga. 295, 301.

The above doctrine is further supported by the following cases: *Hartley v. Anderson*, 150 Pa. 801; *Chilton v. Butler*, 1 E. D. Smith, 150, 151; *Dailey v. Young*, 37 N. Y. S. R. 903; *Keys v. Johnson*, 68 Pa. 42; *Gibson's Estate*, 3 Pa. Dist. R. 147, 148; *Bryan v. Abert*, 3 App. D. C. 180, 186; *Schuster v. Martin*, 45 Ill. App. 481; *Tinsley v. Scott*, 69 Ill. App. 352; *Clifford v. Meyer*, 6 Ind. App. 633; *Wilson v. Dyer*, 12 Ind. App. 320; *Gillett v. Corum*, 7 Kan. 136; *Lunch v. McKenna*, 58 How. Pr. 42, 43; *Geery v. Pollock*, 16 App. Div. 321; *Wyckoff v. Taylor*, 13 Daly, 564; *Royster v. Magevney*, 9 Lea, 148; *Reynolds v. Tompkins*, 23 W. Va. 229, 236; *Byrd v. Frost* (Tex. Civ. App.) 29 S. W. 46; *Glascok v. Vanleet*, 100 Tenn. 603; *Arrington v. Cary*, 5 Baxt. 609.

If the principal does use the broker's labor, and "puts in to take" the contract out of his hands, so as to escape paying commissions, then, *ex æquo et bono*, the principal owes him commissions, and must pay what the broker could have made by the contract if he had not prevented it. *Doonan v. Ives*, 73 Ga. 295, 301.

In *Ford v. Easley*, 88 Iowa, 603, the broker recovered his commissions upon finding a purchaser for real estate ready and willing to complete the purchase, even though such sale was not consummated owing to a sale of the property by the principal,—especially as he testified that his principals were informed that he was about to make the sale, and they directed him to complete it if possible.

And even assuming that the principal may have obtained the name of the purchaser entirely independent of the broker, yet if, on a given date, the principal obtains from the broker knowledge that the person whom the broker has secured as a proposed purchaser is the same person of whom he has otherwise learned, he owes some duty to the broker, either to terminate the agency, or notify him that he intends personally to conduct further negotiations. *Carroll v. Pettit*, 67 Hun, 418.

And if the broker has procured a purchaser, and has commenced negotiations which are afterwards finally consummated by his principal, and his services as agent have brought about the sale and are the efficient cause of it, the fact that it does not appear that the purchaser had informed the principal of the negotiations he had had with the broker is immaterial, as it is not essential that he should know it in order to entitle the broker to commissions; and any change made between the principal and the purchaser in the terms of the sale will not affect the broker's right. *Graves v. Bains*, 78 Tex. 92, 95.

When the broker's contract is to find a purchaser at a specific price in cash, with a first mortgage for the balance payable at a given date, and the broker procures a written contract with a purchaser at such price, with a sufficient amount in cash, and the balance on or before a certain day with interest, the deed to be delivered within thirty days, under which no money is paid at the time but a check for a smaller amount is given to the broker, of which contract the principal has notice at the time, he

cannot sell the property on the following date and thus defeat the agent's right to commissions. *Goss v. Broom*, 31 Minn. 484.

e. After suspension of negotiations.

In some cases the question has arisen as to whether or not the broker is entitled to his commissions, as upon a performance of his contract, where the negotiations with the purchaser found or introduced by him, although abandoned, have been subsequently renewed and a sale effected.

In *Peckham v. Ashhurst*, 18 R. I. 376, it is said that although the earlier negotiations between the purchaser and the broker's principal terminate without a sale, yet, if they are resumed, and the principal recognizes the broker's agency as continuing by employing him as the medium for such reopening, his right to commission on the consummation of the sale is complete; and in such a case the principal is not at liberty to avail himself of the broker's services, and then decline to pay for them. *Van Doren v. Jelliffe*, 1 Misc. 354, to the same effect.

The fact that the negotiations cease for a time between the parties, and are again renewed, does not necessarily determine the question of the broker's right to commissions, as his right depends upon the continuance of his employment or relation to the transaction, and the introduction of the parties as the means by which the sale is finally consummated. *Goodwin v. Brennecke*, 21 App. Div. 138.

The fact that the principal after making a contract for the broker to effect a sale or exchange of his property, and to pay him a commission for doing so, gave the property to his son, will not incontrovertibly prove that an exchange, while in the hands of the son, was not such as was contemplated by the contract of employment, as it might have been within the intention of the principal, besides giving the property to his son, to procure for him through the efforts of the plaintiff the additional advantage of having an opportunity of making a profitable exchange, and such fact will not necessarily release the principal from payment of the commissions where an exchange follows, even though the negotiations were not successful in the first instance, and were declared off by the principal, but were afterwards continued by him, and proved successful. *Fox v. Byrnes*, 20 Jones & S. 150, 152.

And the court refused to disturb a verdict in the broker's favor, where there was a conflict in the testimony, but the written evidence corroborated the oral testimony given in favor of the broker, and showed that the broker had not waived claim for commissions on a subsequent sale of the property. *Granger v. Griffin*, 43 Ill. App. 421.

There must, however, be a period of time within which, after a party introduced by an agent has declined to purchase, the owner, or another broker, may treat the negotiation as at an end, and entirely new and independent solicitations may begin. *Watts v. Howard*, 51 Ill. App. 243, 246; *Mears v. Stone*, 44 Ill. App. 444; *Carlson v. Nathan*, 43 Ill. App. 364; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718.

So, although the broker may have been the means of first bringing the parties together, and of opening negotiations between them, yet if the negotiations are unproductive and the parties in good faith withdraw therefrom, and abandon the proposed sale and purchase, a subsequent renewal of negotiations for sale upon the same or different terms does not entitle the

broker to the commissions, and he cannot in such a case be said to have performed his contract. *Briggs v. Rowe*, 1 Abb. App. Dec. 189; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Levy v. Coogan*, 16 Daly, 137.

And if the broker abandons the trade or relinquishes his efforts the principal is not precluded from negotiating with any person whom the broker has introduced, and in such a case the broker is not entitled to commissions. *Rouscher v. Larkins*, 84 Hun, 288, 289; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Hay v. Platt*, 66 Hun, 488; *Lipe v. Ludewick*, 14 Ill. App. 372, 375; *Singer & T. Stone Co. v. Hutchinson*, 61 Ill. App. 308.

So, if the principal has revoked the authority after the broker has procured a party to inspect the property, and has made every effort to induce him to buy, and after such party has notified the broker that he will not purchase, the principal incurs no liability for commissions by subsequently selling to such purchaser upon terms less advantageous to himself without any suspicion of collusion between the principal and such purchaser, and without any intention to defraud. *Bailey v. Smith*, 103 Ala. 641.

And where all that the proposed purchaser did was to offer to buy if he could trade a lot for the property in question at a certain price in part payment, which was declined by the principal, and the parties then considered the negotiations at an end, and the failure was reported to the broker, who did not negotiate further, but later a deal was made between the parties themselves, the sale was not made through the efforts of the broker to procure a purchaser. *Putnam v. How*, 89 Minn. 363.

c. After withdrawal or termination of agency, etc.

After the expiration of the time mentioned in the contract and any extension thereof the principal has the right to sell either to a purchaser to whom his attention may have been called by the broker, if the sale is made in good faith, or to anyone else, as the contract has then spent its force. *Fultz v. Wimer*, 34 Kan. 576, 580; *Coleman v. Meade*, 13 Bush, 358; *Charlton v. Wood*, 11 Helsk. 19.

And the same rule holds in cases where the broker fails to find a purchaser within the time named in his contract, and the principal in good faith terminates the same and sells to the purchaser with whom the broker has been unsuccessfully negotiating, provided the sale is made by him in good faith. *McKnight v. Thayer*, 48 N. Y. S. R. 620, 622; *Carroll v. Pettit*, 67 Hun, 418.

So, if the broker fails to effect a sale within a reasonable time, and his agency is terminated in good faith by his principal, who afterwards consummates the sale, he will not be entitled to commissions on such sale, even though the broker may have originally introduced such purchaser, or may in some way have aided the sale; but this rule only applies to cases wherein the proposed purchaser fails to accept the terms named in the contract with the broker, and not to cases in which the purchaser is able, ready, and willing to carry out such terms. *Gaty v. Foster*, 18 Mo. App. 639, 644; *Buehler v. Weiffenbach*, 21 Misc. 80.

And if no specified time is mentioned for the continuation of the agency, and the same is revoked by the principal pending negotiations by the agent for a sale, the broker will be entitled to his compensation or commission if the sale is afterwards continued and consummated by the owner. *Knox v. Parker*, 2 Wash. 34, 37. To 44 L. R. A.

the same effect, *Lapsley v. Holridge*, 71 Ill. App. 652; *Schuster v. Martin*, 45 Ill. App. 481; *McConaughy v. Mahannah*, 28 Ill. App. 169.

If the broker's services inure to the benefit of the principal he cannot be deprived of his right to compensation by the withdrawal of the property from his hands by his principal and the consummation of the sale by other means. *Gottschalk v. Jennings*, 1 La. Adm. 5, 7, 45 Am. Dec. 70.

Where the broker employed to find a purchaser introduces a probable buyer to his principal, and advertises the property, and takes every means to sell the same, and he is subsequently notified by the principal that he does not desire to sell, and the principal withdraws the authority from the broker, and subsequently sells to the very person to whom the broker had introduced him, it is a fair inference that the object of the revocation is to deprive the broker of his commissions. *Smith v. Anderson*, 2 Idaho, 495.

But if there is an abandonment and withdrawal from the negotiations between the parties, and they act in good faith, a subsequent renewal of the negotiations upon the same or different terms does not entitle the broker to his commissions. *Levy v. Coogan*, 16 Daly, 137; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Briggs v. Rowe*, 1 Abb. App. Dec. 189.

And if the principal notifies the broker that the sale must be made by a given date, and that thereafter the authority will be revoked, the broker cannot recover commissions on a sale made by the principal after that date. *Neal v. Lehman*, 11 Tex. Civ. App. 461, 462.

In *Kelly v. Marshall*, 172 Pa. 396, 399, the price of an oil-producing property was reduced several times, and upon the last reduction there was an understanding that if not sold by a given day it would be withdrawn and the agency ended, and finally the principal sold for a much less price to the party who had made the offer through the broker, but the court refused commissions. In this case the plaintiff was not a real-estate broker, and did not have the charge of the property, and his agency was not coupled with an interest or founded upon a consideration, but he had solicited the privilege of offering the property for sale, and it appeared that the salable value of the property was being injured by its repeated offers in a limited market, and was certain to be affected by the other enterprises in the locality.

In a case in which the agreement was to pay commissions upon condition that a sale was made upon the terms prescribed, and the principal revoked the agency after the broker had procured a party to inspect the property and had made every effort to induce such party to buy, and the party had notified the broker that he would not buy, but subsequently purchased from the principal upon terms much less favorable to the latter without any suspicion of collusion or intent to defraud, the broker's commissions were denied. *Bailey v. Smith*, 103 Ala. 641.

So, if the property is withdrawn from the market and the broker's retainer is canceled a subsequent bona fide sale made by the principal without any intent to defraud will not inure to the broker's advantage. *Ames v. McNally*, 6 Misc. 93, 94.

And if the negotiations of the sale conducted by the broker are broken off before any binding agreement is entered into between the principal and the purchaser, but a new contract is executed by them without any agency or intervention on the part of the broker, for a portion of the property, which contract varies in

its terms essentially from that offered by the broker, he cannot recover commissions. *Barnard v. Monnot*, 34 Barb. 90, 93.

So, if the broker makes no effort to find a purchaser, or if he abandons his efforts, his conduct may be treated by his principal as an abandonment of the contract, and in that case he cannot recover commissions where the property is sold to another purchaser, even though it may be sold to a party to whom he had mentioned it,—especially where the principal had no notice of such fact. *Singer & T. Stone Co. v. Hutchinson*, 61 Ill. App. 308.

And if the purchase is brought about by other outside influence, after an abandonment of the business, the broker cannot recover. *Carlson v. Nathan*, 43 Ill. App. 364; *Davis v. Gassette*, 30 Ill. App. 41.

Where, while he was negotiating with a purchaser, at the principal's request the broker agreed to deliver up his written contract and to close the agency, upon condition that the principal would pay what he had agreed to do in case the sale was subsequently made to such purchaser, the broker recovered commission upon a sale subsequently made to such purchaser, as there was a sufficient consideration for the agreement to give up such contract, and to support the oral agreement made for the payment of commissions. *Roush v. Loeffler*, 3 Ohio Dec. 628, 629.

g. After broker has failed to secure purchaser or to close negotiations.

In cases wherein the broker has opened negotiations with a purchaser, but has failed to bring him to the specific terms fixed by his principal, and has then abandoned his efforts, the general rule is that the principal may sell to such purchaser at the price fixed by him, or at a less price, without incurring any liability to the broker, provided he acts in good faith, and the sale is the result of his independent negotiations. *Clark v. Nessler*, 50 Ill. App. 550, 551; *Markus v. Kenneally*, 19 Misc. 517; *Wylie v. Marine Nat. Bank*, 61 N. Y. 416; *Bouscher v. Larkins*, 84 Hun, 288, 289; *Hay v. Platt*, 66 Hun, 488, 490; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *White v. Twitchings*, 26 Hun, 503.

The principal has a right to fix a net value on his property and the terms of the sale, and if the agent cannot effect a sale so that the owner may realize such net value, or upon the terms fixed, the owner has the power to dispose of the property at such price and on such terms. *Cook v. Forst*, 116 Ala. 395.

The fact that a sale or exchange of property is finally brought about by the efforts of the principal or another broker with a person with whom the first broker has previously negotiated without success will not furnish a legal basis for a claim for commissions by the first broker,—especially when such broker has for a long time ceased negotiations and abandoned all efforts. *Davis v. Gassette*, 30 Ill. App. 41, 45; *Lipe v. Ludewick*, 14 Ill. App. 372; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Carlson v. Nathan*, 43 Ill. App. 364; *Singer & T. Stone Co. v. Hutchinson*, 61 Ill. App. 308.

So, the mere fact that the broker has brought the parties together, when considered with the further fact that his full contract time has expired without results, will not debar the principal from disposing of the property himself, even to the parties found or originally introduced to him by the broker. *Page v. Griffin*, 71 Mo. App. 524.

And the broker cannot claim commissions upon

on a subsequent sale made by his principal, even to the identical individual introduced by him if he cannot show that he brought the parties to an agreement. *Baker v. Thomas*, 12 Misc. 432, 438.

In such cases the principal violates no right of the broker in negotiating directly with the proposed customer after the broker has failed to bring such customer to the specified terms, and has abandoned his efforts in that direction: neither is he liable for commissions under such circumstances if his independent negotiations result in a sale, provided he acts in good faith. *Hay v. Platt*, 66 Hun, 488.

But the negotiations of the broker with the purchaser must be fairly terminated before the principal can resume them with the customer and not be liable to the broker. *Woolley v. Loew*, 50 Hun, 294, 295.

After negotiations have been broken off with a customer introduced by the broker, or if such customer has ceased to consider the question of purchase, he does not hold the position of a customer introduced by the broker so as to entitle the broker to recover commissions on a subsequent sale made without fraud or collusion. *Tinsley v. Scott*, 69 Ill. App. 352.

And if the services of the broker, whatever they may be, have failed to accomplish a sale, and some time after the proposed purchaser has decided not to buy he is induced by others to reconsider his decision, and then makes a purchase as a consequence of such second or supervening influence, the broker has no right to commissions, although it may be true that the purchase was in consequence of the broker's advertisement, and had it not been for that, the purchaser might never have looked at the property or entertained a thought of buying it. *Earp v. Cummins*, 54 Pa. 394, 93 Am. Dec. 718, 719.

Again, if the principal knows that the purchaser wishes to purchase without the broker's procuring him as a purchaser, and the principal derives the knowledge from nothing that the broker has done in his employment, and he sells to such purchaser as an original customer or buyer, the broker cannot recover. *Doonan v. Ives*, 73 Ga. 295, 301.

And the rule is the same in cases in which the broker has had a reasonable opportunity to find a purchaser at the price mentioned by the principal, and has failed to do so. *Feldman v. O'Brien*, 23 Misc. 341, 344.

If by the contract between the principal and the broker no time is specified in which the broker is authorized to sell, all that he is entitled to is a reasonable opportunity to find a purchaser at the price, and if he has failed to do so, and proved unable to sell even for a smaller sum mentioned by his principal during the period specified for that purpose, his principal is at liberty to sell for even less than any sums given to the broker without becoming liable for commissions. *Satterthwaite v. Vreeland*, 3 Hun, 152.

So, if a broker so employed fails to find a purchaser he cannot recover commissions where the principal, in order to bring about a sale, negotiates with his adjoining owner, and effects a sale at less. *Buhl v. Noe*, 51 Ill. App. 622.

Yet the fact that a sale is finally made by the owner directly to the purchaser is not alone effectual to defeat the broker's right to commissions. *Atwater v. Wilson*, 13 Misc. 117, 119. *Affirming* 10 Misc. 777; *Lloyd v. Matthews*, 51 N. Y. 124; *Martin v. Stillman*, 53 N. Y. 615; *Hanford v. Shapter*, 4 Daly, 243.

And if the broker has rendered any efficient service in bringing about the sale of the property afterwards made by the owner himself, or

by any other agent or broker of his employed by him for the sale of it he is entitled, not to the commissions upon such sale as agent in the sale of it, but to such just and reasonable compensation for his services as the jury may consider them worth according to the evidence. *Hawkins v. Chandler*, 8 Houst. (Del.) 484.

But the broker was not entitled to recover where he agreed to consummate an exchange by a given date and failed, and afterwards, as a separate undertaking, the principal and the purchaser themselves made the exchange. *Page v. Griffin*, 71 Mo. App. 524, 529.

In a case in which the purchaser's agent saw a broker's advertisement and had an interview with him, but did not disclose the purchaser, and the interview was not communicated to the owner, and another agent of the purchaser, after learning from other sources who was the owner, negotiated with him direct, and bought the property, the broker was not allowed commissions. *Sievers v. Griffin*, 14 Ill. App. 63, 66.

So, where the purchaser was introduced to the principal by an agent, who was unable to effect a sale or even to procure an offer, and the principal subsequently sold the property to such purchaser at the lower of two rates at which the broker was authorized to sell, clear of commissions, the broker's claim for commissions was disallowed. *Babcock v. Merritt*, 1 Colo. App. 84.

And the principal violated no rights in selling to the person with whom the broker had been negotiating, where the broker made unsuccessful efforts to sell at his principal's price, and finally regarded the consummation of the contract as hopeless, and practically abandoned it. *Wylie v. Marine Nat. Bank*, 61 N. Y. 415.

Where a broker told his principal that he thought he had a certain company as a customer and the recollection of this may have induced the principal two years later to tell the officers of such company that if they wanted the property they must speak or it would be sold, the broker had no right to commissions on a sale then made. *Hay v. Platt*, 66 Hun, 488, 490.

So, in *Meyer v. Straus*, 58 N. Y. Supp. 904, where the purchaser declined the broker's offer, and bought from the principal two years later.

And the broker's claim was refused where, after negotiations were ended, the party found by him made a conveyance of his property to his brother, who made an exchange with the principal upon different terms in which the broker took no part, especially when there was nothing to show that the conveyance to the broker was made to defraud the broker of commissions. *Hamm v. Weber*, 19 Misc. 485.

So, the broker failed to recover where his negotiations for a sale at a given sum did not bring about a sale, and the property was burnt down, and afterwards sold by the principal to the same purchaser at a much reduced price. *Cox v. Bowling*, 54 Mo. App. 289.

Where the broker found a purchaser who offered an increased price with immediate possession, which the principal as well as the broker refused, and subsequently the principal moved away and the negotiations ceased, the court refused his claim for commissions upon a sale some half a year later to the proposed purchaser, who met the principal when inspecting other property and renewed negotiations at a greater sum than previously offered, on account of improvements, as the principal was justified in looking upon his negotiations as abandoned, and in making the sale either to such purchaser or to any other, as no specified time was mentioned in the contract, and it was revocable at 44 L. R. A.

any time before it was acted upon. *Ilpe v. Ludewick*, 14 Ill. App. 372, 375.

h. Within time limited by contract.

If, by the terms of the contract between the principal and the broker, the latter is given a specific time within which he is to effect a sale, the principal will still be liable for his commissions if he himself sells the property within the time named in such contract, as he cannot by his action prevent the performance of the contract by the broker, and escape liability for commissions.

So, where he has found a purchaser ready and willing to accept the principal's terms within the time specified he has performed his contract, and the principal's sale within the time cannot affect him. *Schultz v. Griffin*, 5 Misc. 499, 500.

And if the broker is given the option and sole agency to sell for a stated period, the principal cannot sell during such period to a purchaser not found by the broker. *Levy v. Rothe*, 17 Misc. 402.

Under a contract which is construed as giving the broker the exclusive right to sell between certain dates, and as entitling him to commission on any sale made between those dates, by his efforts to find a purchaser, the broker performs his part of the contract whether he is instrumental in procuring a person to purchase or not, and if a sale is made by the principal within the time mentioned the broker is entitled to his commissions thereon. *Metcalf v. Kent*, 104 Iowa, 487.

And the broker was entitled to an immediate right of action under a similar contract upon a sale by the principal to a purchaser through another broker within the time specified. *Dobinson v. McDonald*, 92 Cal. 33, 37.

So, he recovered his commissions upon a sale made by his principal to a third person within the time granted by the principal to the purchaser introduced by the broker to decide upon the terms made by him. *Reed v. Reed*, 82 Pa. 420.

And under a contract by which he was to be paid commissions if the principal withdrew the property from sale or sold the same in any way during the time specified, the broker recovered his commission where the principal effected an exchange of such property within the time. *Crane v. McCormick*, 92 Cal. 176.

In this case the court stated that the principal could not escape liability by showing that the time clause was left in the contract by mistake, and that it was his intention to erase the same therefrom, in the absence of proof that the broker knew of such intention, or that there was a mutual mistake, as no relation of trust and confidence existed, as a mere intention not communicated cannot control the plain provisions of a contract.

A similar question arose in the case of *Shainwald v. Cady*, 92 Cal. 83, wherein the broker's contract called for a percentage upon a sale made by the principal within the time, and the principal contracted a sale within the time, and let the purchaser, who paid part of the purchase money, into possession with a right to sell any portion of the premises, even though the purchaser surrendered his contract.

And the broker recovered under an agreement giving him the exclusive right to sell for one year at not less than a given amount, any amount realized over and above such amount to be received by him as his compensation, where he found a purchaser able and willing to pay the amount and a large sum in excess thereof, but the same had been previously sold by the defendant. *Van Gorder v. Sherman*, 81 Iowa, 403.

And the fact that the principal makes a sale within the time limited by the contract with the broker cannot diminish the extent of the broker's claim for damages; and in such a case the proper measure of damages will be the profit, if any, which the evidence shows would have resulted to the broker had he been allowed to complete the contract and the land had been sold by him under it. *Green v. Cole*, 127 Mo. 587.

And the owner of real estate who, before the end of the broker's term, exchanges the property for another receiving a cash sum to boot must pay the broker the usual commissions, although it does not appear that the latter has done anything to promote the sale, and the terms of the contract would have expired in a few days, and under such circumstances the commission is computed, not upon the sum paid to boot, but upon the total value. *Carle v. Parent*, Mont. L. Rep. 5 Q. B. 451.

And the principal's liability was upheld where he agreed to pay the broker a given sum if he could within a reasonable time find a purchaser, and the broker accepted the proposition and advertised the property for sale and induced persons to purchase at the price and upon the terms named within a reasonable time, but the principal himself sold the property to another purchaser. *Lane v. Albright*, 49 Ind. 275, 279.

And where the broker has an option and sole agency for a stated period the principal can only sell to purchasers found by the broker during such period, and he becomes liable to the broker upon a sale made by himself if during such time he finds a purchaser able, ready, and willing to buy upon the principal's terms. *Levy v. Rothe*, 17 Misc. 402.

And where the principal gave the person, who verbally agreed to purchase at a given price, a written memorandum to sell the property for the price named, and to give him a certain time to complete the search, and the purchaser tendered a performance within the time and in accordance with the terms fixed, when the principal informed him that the land had been sold, the broker recovered his commissions. *Phelan v. Gardner*, 43 Cal. 306, 311.

But, although a broker has the exclusive right to sell for a certain period, during which the principal himself effects a sale, he cannot recover his commissions unless he has produced a purchaser ready and willing to buy. *Waterman v. Boltinghouse*, 82 Cal. 659; *Moses v. Bierling*, 31 N. Y. 462.

And where the broker finds a purchaser, who is not then ready to buy, and the principal notifies him that the sale must be effected by a certain date, or the authority will be revoked, he is not entitled to his commissions on a sale made by his principal after that date, even to the same purchaser, when the limitation of time is reasonable and bona fide. *Neal v. Lehman*, 11 Tex. Civ. App. 461, 462.

His commissions were also refused in the absence of fraud or fault on his principal's part. In *Fultz v. Wimer*, 34 Kan. 576, where, if the property was sold within the time named, either by the broker or by his principal or by others, he was to receive a certain commission, but to receive nothing unless within the time specified a purchaser was produced ready and willing to take the property and pay the money, and a purchaser was introduced to whom the principal granted one extension of time, but nothing further, although after the time had expired the contract with another purchaser was drawn up and signed for which the principal paid the broker at the time.

Upon the question of time in general, see *note to Lunney v. Healey* (Neb.) — L. R. A., 44 L. R. A.

The question of the principal's interference with the broker in his performance of his contract will be found discussed in *note to Brackenridge v. Claridge* (Tex.) 43 L. R. A. 593.

1. When broker has option or sole agency.

If the principal employs a broker upon the understanding that his agency shall be exclusive, the principal will be liable for breach of contract if he negotiates or avails himself of the aid of another for the purposes of the agency. *Levy v. Rothe*, 17 Misc. 402; *Moses v. Bierling*, 31 N. Y. 462.

And in such a case the broker is entitled to reasonable compensation for the services he has rendered as agent,—especially where there is no evidence showing that his right to compensation was made dependent upon a sale of the property. *Harrell v. Zimbleman*, 66 Tex. 292, 294.

The principal is liable under an agreement giving the broker the sole and exclusive control, management, and charge of the sale and disposition of the premises upon a sale to a purchaser introduced by the broker, made under negotiations assumed by the principal, and in such a case the court commits no error in refusing an instruction that the broker could not recover unless the jury were satisfied from the evidence that the principal gave him the exclusive right to sell the property, and in submitting to them the question whether the broker was the procuring cause of the sale. *Wyckoff v. Taylor*, 13 Daly, 564.

Yet, an agreement to give a broker "the exclusive agency for thirty days from and after that date for the sale" of real estate on specified terms at a certain commission if a sale is made does not give the broker the exclusive right to sell, but it merely prohibits the placing of the property for sale in the hands of another agent; and therefore where the broker, after commencing the expenditure of time and labor in finding a purchaser, is informed that the principal himself has sold the property, and is requested to take it off the list, which he does, and ceases his efforts to find a purchaser, and the principal has not in fact made a sale of the property, but has made a verbal agreement of sale for which the proposed purchaser has paid some earnest, but the purchase is never completed, the broker is not entitled to commission upon such sale. *Dole v. Sherwood*, 41 Minn. 535, 5 L. R. A. 720.

But an agreement by the owner of real estate to sell at a certain price, and take part payment in money and the balance in other real estate at a certain valuation, together with his conveyance of the premises, is a sale within the meaning of a contract under which he agrees to forfeit a certain sum if he should sell the land himself. *Goward v. Waters*, 98 Mass. 596.

See also *Levy v. Rothe*, 17 Misc. 402. III. b. *supra*.

3. Effect of modification of terms.

The weight of authority supports the rule that if the broker is employed to find or procure a purchaser, and he secures one who is able, ready, and willing to purchase upon the terms named by the principal, and who is accepted by the principal, he has, in the absence of an express agreement to the contrary, performed his contract, even though the terms and conditions of sale as given by the principal to the broker are modified or varied by the principal in his negotiations with such purchaser,—especially when such negotiations continue without interruption.

The following authorities fully support this.

rule upon the ground that the broker is in such a case really the moving cause of the sale, as he has brought the parties together and thereby procured a purchaser and performed his contract which was contingent upon his success. *Schlegel v. Allerton*, 65 Conn. 260; *Knowles v. Harvey*, 10 Colo. App. 9; *Bryan v. Abert*, 3 App. D. C. 180, 186; *Doonan v. Ives*, 73 Ga. 295, 301; *McConaughy v. Mahannah*, 28 Ill. App. 169, 173; *Lawrence v. Atwood*, 1 Ill. App. 217, 223; *Rees v. Spruance*, 45 Ill. 308, 310; *Mears v. Stone*, 44 Ill. App. 444, 447; *Clark v. Nessler*, 50 Ill. App. 550, 551; *Lapsley v. Holridge*, 71 Ill. App. 652; *Hafner v. Herron*, 165 Ill. 242, Affirming 60 Ill. App. 592; *Adams v. Decker*, 34 Ill. App. 17, 20; *Lane v. Albright*, 49 Ind. 275, 279; *Clifford v. Meyer*, 6 Ind. App. 633; *Corbel v. Beard*, 92 Iowa, 360; *Coleman v. Meade*, 13 Bush, 358, 363; *Haug v. Haugan*, 51 Minn. 558; *Wright v. Brown*, 68 Mo. App. 577; *Stinde v. Blesch*, 42 Mo. App. 578, 581; *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Parr*, 52 Mo. 249; *Timberman v. Craddock*, 70 Mo. 638; *Goffe v. Gibson*, 18 Mo. App. 1; *Gaty v. Foster*, 18 Mo. App. 639; *Blackwell v. Adams*, 28 Mo. App. 61; *Jones v. Berry*, 37 Mo. App. 125; *Wetzell v. Wagoner*, 41 Mo. App. 500, 516; *Millan v. Porter*, 31 Mo. App. 563; *Henderson v. Mace*, 64 Mo. App. 393, 396; *Beauchamp v. Higgins*, 20 Mo. App. 514, 517; *Nicholas v. Jones*, 23 Neb. 813, 816; *Potvin v. Curran*, 13 Neb. 302, 305; *Atwater v. Wilson*, 13 Misc. 117, 119, Affirming 63 N. Y. S. R. 868; *Chilton v. Butler*, 1 E. D. Smith, 150, 151; *Gold v. Serrell*, 6 Misc. 126; *Levy v. Coogan*, 16 Daly, 137; *Baker v. Thomas*, 12 Misc. 432, 433, Reversing 11 Misc. 112; *Jones v. Henry*, 15 Misc. 151, 152; *McKnight v. Thayer*, 48 N. Y. S. R. 620; *Morgan v. Mason*, 4 E. D. Smith, 636, 638; *Ames v. McNally*, 12 Misc. 93, 94; *Lloyd v. Matthews*, 51 N. Y. 124; *Sussdorf v. Schmidt*, 55 N. Y. 319; *Hartley v. Anderson*, 150 Pa. 391; *Keys v. Johnson*, 68 Pa. 42; *Stringfellow v. Powers*, 4 Tex. Civ. App. 199; *Byrd v. Frost* (Tex. Civ. App.) 29 S. W. 46; *Graves v. Bains*, 78 Tex. 92, 95; *Reynolds v. Tompkins*, 23 W. Va. 229, 235; *Stewart v. Mater*, 32 Wis. 344; *Mansell v. Clements*, L. R. 9 C. P. 139, 8 Moak, Eng. Rep. 449.

In the case of *Adams v. Decker*, 34 Ill. App. 17, the above rule is thus expressed: "When the purchaser is brought or sent to him by the agent, he may or may not, as he likes, insist on the terms he gave his agent, and may refuse to sell on any other terms, and if he does so refuse then the agent can claim no commission; but if the seller waives the terms proposed through the agent, and accepts the purchaser under different terms, prices, or conditions, then he is liable for the commission to his agent."

Almost the same language is used by the court in the case of *Levy v. Coogan*, 16 Daly, 137, in which the court stated that if the principal accepted the purchaser upon different terms than those given to the broker he ratified the broker's departure from his instructions. *Glider v. Davis*, 137 N. Y. 504, 20 L. R. A. 398, to the same effect.

And in *Hamm v. Weber*, 10 Misc. 485, the court intimated that if the broker had unceasingly continued his negotiations down to the time the exchange was actually effected, and had made it appear that the consummation of the sale was the result of his agency, the mere fact that the original terms were modified by the contracting parties would not impair the broker's right to commissions, and in support of such contention cited the cases of *Levy v. Coogan*, 16 Daly, 137, and *Glider v. Davis*, 137 N. Y. 504, 20 L. R. A. 398.

The rule as above expressed has full support in the principle expressed in some cases, to the 44 L. R. A.

effect that the principal cannot have the benefit of the broker's services and then seek to avoid his liability for commissions. *Wilson v. Sturges*, 71 Cal. 226, 229; *Phelan v. Gardner*, 43 Cal. 306; *Blood v. Shannon*, 29 Cal. 343; *Plant v. Thompson*, 42 Kan. 664.

It is not essential to entitle the broker to his commissions that he should have procured a purchaser upon the precise terms named by the principal at the time of the employment, where the principal chooses to alter such terms in his contract with the purchaser. *Jones v. Henry*, 15 Misc. 151, 152.

The principal will not escape all liability for commissions because he has sold the land for a less sum than the price given to the broker, where the deduction is made of his own accord. *Plant v. Thompson*, 42 Kan. 664.

In such a case there is no equitable ground in support of the claim that the broker has not been the procuring cause of the sale. *Levy v. Coogan*, 16 Daly, 137.

The fact that the principal let off one purchaser, and sold to another on different terms has been held not to defeat the broker's claim. *Leviston v. Landraux*, 6 La. Ann. 26.

In a case wherein the purchaser, who was negotiating with the broker at the latter's instance, viewed the property and concluded a sale with the principal at a less price, and in which the evidence did not show that the purchaser was procured through any other source, the broker's commissions were allowed. *Byrd v. Frost* (Tex. Civ. App.) 29 S. W. 46.

And the broker will be entitled to compensation for his services, although it might be less than the full commission he would be entitled to if he sold at the price demanded by the owner, as the broker has rendered a service in finding a purchaser accepted by the owner, and must therefore receive a reasonable compensation unless precluded by the terms of the contract of employment. *Rees v. Spruance*, 45 Ill. 308, 310.

And if, under an agreement between the principal and the agent, which does not prescribe how and when the consideration is to be paid, the broker produces an acceptable purchaser, it belongs to the principal and the purchaser to arrange the terms and manner in which the consideration is to be paid, and it is none the less a sale and purchase because other real estate forms part of the consideration. *Dreisback v. Rollins*, 39 Kan. 268.

The mere fact that the principal effects a sale at a larger sum than that given to the broker, whereby the purchaser procures a larger amount upon mortgage, does not affect the broker's right to commissions where the sale is procured by him. *Shipman v. Frech*, 1 N. Y. Supp. 67, 68.

And if the sale as made is more favorable to the principal, he cannot resist the broker's claim for commissions and restrict him to a recovery upon a *quantum meruit*. *McFarland v. Lillard*, 2 Ind. App. 160.

In a case where the negotiations continue without interruption, and the broker is actively instrumental in causing the principal and the purchaser to arrive at the price which they both eventually agree upon, the mere fact that the price for which the sale is made deviates from that which the broker was originally instructed to secure is not sufficient to establish a non-performance by the broker of his contract of employment. *Gold v. Serrell*, 6 Misc. 124, 126; *Levy v. Coogan*, 16 Daly, 137.

And in a case where the purchaser introduced by the broker hesitated to buy upon the original terms named by the principal, but subsequently negotiated a sale with the principal upon vir-

tually the same terms, the broker's claim was allowed upon the ground that the sale was the fruit of his labor. *Ames v. McNally*, 6 Misc. 93, 94.

Again, the broker's claim was allowed in a case where the principal accepted substantially the same offer upon terms more favorable to the purchaser, even though the sale was finally consummated by another broker. *Wood v. Wells*, 103 Mich. 320.

And where the broker showed the principal's property to the purchaser, introduced him to the principal, and by his direction offered the purchaser the property at a price named, and subsequently the principal met the purchaser and modified the proposition which he had made through the broker so as to make it acceptable to the purchaser, the broker was held entitled to recover. *Wetzell v. Wagoner*, 41 Mo. App. 509, 516.

The mere fact of a misunderstanding between the broker and the purchaser as to the amount of the latter's offer for the property, which offer the broker reported to his principal as larger than really made, is immaterial where the minds of the principal and the purchaser meet in the agreement for the sale of the land for the less sum as a result of the negotiations entered into by the broker on behalf of the principal. *Peckham v. Ashhurst*, 18 R. I. 376.

And the mere fact that the principal sees fit to make a sale upon a certain credit with no security for the price except a certain sum paid down when the contract is signed will not excuse him from liability where the sale is effected within the meaning of a contract whereby the broker is to have commissions when he effects a sale, when the terms of the sale are apparently satisfactory and are accepted by the principal. *Ward v. Cobb*, 148 Mass. 518.

So, the broker is entitled to recover for finding a purchaser, although the party he finds objects to the price, and the principal refuses to reduce it, if the principal does not terminate the agency, but afterwards himself negotiates with the purchaser for a smaller sum, stating that "as long as he was doing the business himself he would not have to pay any commissions,"—especially when the principal promises to pay, and offers a sum to the broker after the sale is made. *Dalley v. Young*, 37 N. Y. S. R. 903.

In *Blester v. Evans*, 59 Ill. App. 181, the broker recovered reasonable compensation under an agreement to give the agent all he could get above a certain price, where the principal refused to take an increased price or to negotiate a sale with a purchaser sent by the broker upon the ground that he was not satisfactory, but later sold to him for a much less sum and concealed the fact, and the broker found a purchaser at an increased price before he was informed of the first sale.

So, the broker was allowed commissions in a case where a special contract gave him an exclusive right to sell for a certain period, and all he could receive over a given amount by way of commissions, where the principal deprived him of his rights by making a sale at a lower price, and the broker was entitled to recover any amount over and above the price that was to be netted to the principal, which he proved he could have sold the land for but for the breach of such contract. *Stringfellow v. Powers*, 4 Tex. Civ. App. 190.

In *Hoefling v. Hambleton*, 84 Tex. 517, the broker recovered his commissions upon a sale made by the principal to a purchaser really procured by the broker, although made at a reduced price on account of a mistake in the quantity of land.

If, however, the principal should sell at a less price than that mentioned by the broker, to a 44 L. R. A.

party who purchases direct from the principal although sent to him by an intending purchaser with whom the broker has failed to make a sale. the broker cannot recover, especially where his evidence does not show what the lower price was or the time at which it was made by the principal. *Warren v. Cram*, 71 Mo. App. 638.

In *Childs v. Ptomey*, 17 Mont. 502, 509, a nonsuit was ordered as the broker set forth a special contract to find a purchaser at a specific price and at fixed commissions, but proved a sale negotiated by the principal to a purchaser introduced to him at a less price, as it was not shown that such purchaser was a party ready and willing to purchase at the original price, and as it did not appear that the failure to do so was excusable by reason of a fault on the principal's part.

And where the broker is to have a certain sum if he produces a purchaser for the property at a specified price, he must produce one who is able and willing to pay such price before he is entitled to his commissions, and the principal's stipulation as to price is not waived by the fact that he sells the property himself for a less price, even to a person produced by the broker in the absence of knowledge on his part that such purchaser is willing to pay the price at which he has given the property to the broker for sale. *McArthur v. Slauson*, 53 Wis. 41, 43.

This case is distinguishable from that of *Stewart v. Mather*, 32 Wis. 344, 347, *et supra*, in that the latter case was an action upon a *quantum meruit*, and the principal was to give a certain percentage as commission upon any sale which might be made, and reserved the right to fix the price, and the broker found a purchaser. The court stated that where the price or other terms of the sale are fixed by the seller, in accordance with which the broker undertakes to find a purchaser, yet if, upon procurement of the broker, a purchaser comes with whom the seller negotiates, and thereupon voluntarily reduces the price of the thing to be sold, or the quantity, or otherwise changes the terms of sale as proposed by the broker, so that a sale is consummated, or terms or conditions offered which the party proposing to buy is ready and agrees to accept, then, and in either of these cases, the broker will be entitled to his commissions at the rate specified in his agreement with his principal.

In the case of *McArthur v. Slauson*, 53 Wis. 41, 43, the principal claimed a special contract by which the broker undertook to furnish a purchaser willing and ready to purchase for the full amount specified, for which he was to receive a certain sum as commission, and therefore in that case, and under such a contract, it was incumbent upon the broker to produce such a purchaser before he was entitled to the stipulated commissions.

So, the broker's commissions were denied upon a sale made by the principal at a reduced rate in good faith and without any intention to defraud, to one who had negotiated with the broker where the original price was reduced to a given sum by a written option for ten days, and later the option was revived and extended in writing for a period of thirty days, and these were the only changes shown to have been made in the agreement between the principal and the agent, and no sale was agreed upon, and no purchaser was procured who was willing to purchase at either of those prices, and the broker had no authority at any time to contract for the sale at a less price, and his right to sell at even the lesser price given to him was extinguished by the expiration of the thirty days for which the option was extended. *Satterthwaite v. Vreeland*, 3 Hun. 152.

E. W.

ARKANSAS SUPREME COURT.

LITTLE ROCK & FORT SMITH RAILWAY
et al., Appts.,

v.

OPPENHEIMER & COMPANY.

(64 Ark. 271.)

1. Discrimination between localities in facilities for transportation, such as a better supply of cars at a terminus of the road than at some other point on the road, when there are not cars enough to supply all, does not make the railroad company liable to an action for a penalty under act March 24, 1887, providing that "all individuals, associations, and corporations shall have equal rights to have persons and property transported, . . . and no unjust or undue discrimination shall be made . . . in facilities for transportation," and that "no discrimination in . . . facilities for transportation shall be made between transportation companies and individuals, or . . . any preferences in furnishing cars." The act does not apply to discrimination in facilities at different localities.

On rehearing.

2. A statutory penalty will not be imposed except when the case is brought within the strict letter of the law.

(Wood and Hughes, JJ., dissent.)

(October 2, 1897.)

APPPEAL by defendants from a judgment of the Circuit Court for Conway County in favor of plaintiffs in a suit brought to recover the statutory penalty for discriminating between shippers in the transportation of cotton. *Reversed.*

The facts are stated in the opinions.

Messrs. Dodge & Johnson, for appellants:

No "unjust or undue discrimination" of any character was shown to have been committed by defendants against plaintiffs.

All there is in this case is the result of a slight delay in the movement of plaintiffs' cotton, not after shipment, but before shipment and before any contractual relation existed between plaintiffs and defendants, and there is no proof in this record to show "any unjust or undue" discrimination as against plaintiffs or as against the stations from which they shipped.

Queen v. Railway Comrs. L. R. 22 Q. B. Div. 642.

All discriminations are not undue, that is, unreasonable; nor are they unjust, that is, illegal or improper.

Houston & T. O. R. Co. v. Rust, 58 Tex. 98; Ragan v. Aiken, 9 Lea, 609, 42 Am. Rep. 684.

A delay is not a discrimination. Neither

is it necessarily undue, unreasonable, or unjust.

Wibert v. New York & E. R. Co. 12 N. Y. 245; Parsons v. Hardy, 14 Wend. 215, 28 Am. Dec. 521; Ballentine v. North Missouri R. Co. 40 Mo. 491, 93 Am. Dec. 315; Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 400; Beckwith v. Frisbie, 32 Vt. 559; Conger v. Hudson River R. Co. 6 Duer, 376; Livingston v. New York O. & H. R. R. Co. 5 Hun, 562; Taylor v. Great Northern R. Co. L. R. 1 C. P. 385; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Hutchinson, Carr. 2d ed. §§ 114, 115; Peet v. Chicago & N. W. R. Co. 20 Wis. 595, 91 Am. Dec. 446; Lovett v. Hobbs, 2 Show. 127; Riley v. Horne, 5 Bing. 217; Dawson v. Chicago & A. R. Co. 79 Mo. 296; Faulkner v. South Pacific R. Co. 51 Mo. 311; Hellinell v. Grand Trunk R. Co. 10 Biss. 170; Geismer v. Lake Shore & M. S. R. Co. 102 N. Y. 570, 55 Am. Rep. 837; Houston & T. C. R. Co. v. Smith, 63 Tex. 322.

The statute of this state in nowise varies the common law, but simply is a crystallization of it into a statutory enactment.

Johnson v. Pensacola & P. R. Co. 16 Fla. 623, 26 Am. Rep. 737; Root v. Long Island R. Co. 114 N. Y. 300, 4 L. R. A. 331, 2 Inters. Com. Rep. 576; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291.

A penal statute cannot be extended by implication or construction.

Sutherland, Stat. Constr. § 350; Hall v. State, 20 Ohio, 8; Foster v. Rhoads, 19 Johns. 191; State v. Graham, 38 Ark. 521.

All penal laws which impose, by way of punishment, any pecuniary mulct or damage beyond compensation for the benefit of the injured party, or recoverable by the informer, or which, for like purpose, impose any special burden, or take away or impair any privilege or right, are to be classed as penal statutes, and must be strictly construed.

Allen v. Stevens, 29 N. J. L. 509; Cole v. Groves, 134 Mass. 471; Camden & A. R. & Transp. Co. v. Briggs, 22 N. J. L. 623; Read v. Stewart, 129 Mass. 407; Breitung v. Lindauer, 37 Mich. 217; Cumberland & O. Canal Corp. v. Hitchings, 57 Me. 146; Bayard v. Smith, 17 Wend. 88; Henderson v. Sherborne, 2 Mees. & W. 236; Titusville's Appeal, 108 Pa. 600; Reed v. Davis, 8 Pick. 514; Ordway v. Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455; Endlich, Interpretation of Statutes, § 470; Stevens v. Jeacocks, 11 Q. B. 731; Sedgwick Stat. & Const. L. p. 76; Barden v. Crocker, 10 Pick. 383.

Messrs. A. S. McKennon, R. J. White, and Carmichael & Seawell for appellees.

Battle, J., delivered the opinion of the court:

This action was instituted under an act

NOTE.—The Arkansas statute construed in the above case differs materially, as will be readily seen, from the Act of Congress to Regulate Commerce, under which undue discrimination between localities is prohibited, as to which see Texas & P. R. Co. v. Interstate Commerce 44 L. R. A.

Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405.

For another recent state statute regulating carrier's rates, see Louisville & N. R. Co. v. Com. (Ky.) 43 L. R. A. 541.

entitled "An Act to Prevent Unjust Discrimination, . . . and to Prevent Discrimination between Transportation Companies and Individuals in Furnishing Cars or Motive Power," and approved March 24, 1887, for the purpose of collecting a penalty. The plaintiffs recovered a verdict, and a judgment thereon, against the defendants for the sum of \$1,500.

The basis of the action was the failure of appellants to furnish the same facilities for transporting cotton from Altus (the shipping station for Roseville) as were furnished at Van Buren. This, it was insisted, was an undue and unjust discrimination in favor of the shippers at Van Buren against the appellees. The important facts are undisputed, and are substantially as follows: The cotton crop of 1891 was unusually large. In Arkansas it exceeded anticipation, and was 100,000 bales larger than the preceding crop. The weather favoring, it was rapidly gathered and hurried to the railroads for transportation to market. The railroad companies were not prepared to ship it at many stations as rapidly as it was offered for shipment. At these stations it soon filled their platforms, after which they refused to receive more until room for it was made by the shipment of that already received. At Roseville, where the appellants had established a receiving station for freight to be shipped at Altus over their road, the platforms were covered with it, and appellants were unable to ship it for many days, because they did not have cars sufficient to meet the demands for transportation upon their road.

During the months of October, November, and December of that year (1891) appellees hauled to Roseville several hundred bales of cotton, to be shipped at Altus over appellants' road and tendered them to their agent, and he refused to receive them, giving as his reason for so doing that the station platform at Altus was filled, and he had no room to store or care for it. This cotton lay at Roseville several days awaiting transportation. At Van Buren, a town on appellants' road, however, cotton was promptly shipped. The facilities there for shipping were greater than at any other place on the road, except at Little Rock. This was owing to the fact that there are several roads running to that town called the Kansas & Arkansas Valley Railway, the St. Louis & San Francisco, the Greenwood Branch of the St. Louis, Iron Mountain, & Southern Railway, and appellants' railway, the two roads first mentioned competing with the last, and to the fact that appellants proportionately furnished more cars at that place than at others.

The reason more cars were used at Van Buren, in proportion to freight shipped, than were furnished by appellants to other stations or depots, was, it is at one of the termini of their road; and another was, there were wholesale merchants at Van Buren, who shipped goods there by the car load, and thereby caused many cars to be unloaded at that town. Being a terminal point, many empty cars necessarily accumulated there.

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In such cases it was the duty and custom of the agent at the terminals to use as many of the cars as were needed there, and to report the remainder to the transportation department for distribution.

The statute upon which this action is based (act March 24, 1887) is as follows:

"Sec. 1. All individuals, associations, and corporations shall have equal rights to have persons and property transported over railroads in this state, and no unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state," etc.

"Sec. 4. No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad, or any lessee, manager, or employee thereof shall make any preferences in furnishing cars or motive power," etc.

"Sec. 12. That any railroad corporation that shall violate the 1st, 4th, . . . sections of this act, . . . shall forfeit and pay for every such offense any sum not less than \$50 nor exceeding \$1,000 and costs of suit, to be recovered by civil action by the party aggrieved, in any court having jurisdiction thereof," etc.

The only parties this act declares shall have equal rights to have persons and property transported over railroads in this state are individuals, associations, and corporations. Having declared that they are entitled to these rights, it further declares that "no unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers." Against whom is this discrimination prohibited? Manifestly, those the act declares are entitled to equal rights. If it meant that it shall not be made against any party without regard to those named, the first clause would be entirely superfluous. Having declared who are entitled to equal rights, it follows that the refusal to them of the same rights allowed to others would be a discrimination. Hence the act forbids unjust or undue discrimination against them in the transportation of persons or property, and imposes a penalty upon any railroad company who shall be guilty of the forbidden act.

Appellees sued for the penalty on account of a discrimination against them as an association,—as a partnership. Are they entitled to it?

The act makes no changes in the common law as to the rights of the parties named therein to equal facilities for shipping, or as to unjust discrimination. At common law it was the duty of the common carrier to receive and carry all goods offered for transportation upon receiving a reasonable hire, and every one had equal rights to transportation by them. Yet under this rule different facilities, furnished under circumstances essentially different, did not constitute an unjust or undue discrimination, when the difference was in accordance with the difference in circumstances, and the difference was not intended to injure another shipper, or give,

or did not tend to give, the favored shipper material advantages over him in their competition in business. The observance of this rule accomplished the design and object of the law in prohibiting discrimination, which was to prevent common carriers from favoring one shipper to the injury of another in the same business, from suppressing or diminishing competition, and from creating monopolies. *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309; *Samuels v. Louisville & N. R. Co.* 31 Fed. Rep. 57, 4 Inters. Com. Rep. 420; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 410, 13 Am. Rep. 457; *Phipps v. London & N. W. R. Co.* [1892] 2 Q. B. 229, 50 Am. & Eng. R. Cas. 497; *Hutchinson, Carr.* § 302; 1 Wood, Railroads, §§ 197, 198; 4 Elliott, Railroads, § 1676.

Was there any unjust or undue discrimination by appellants against appellees? Superior facilities for shipping were furnished at Van Buren. If this was a discrimination, it was not against any particular individual or association, nor against the shippers at any particular station, but against the shippers collectively at every station on the railroad, except at Van Buren; that is to say, in favor of one locality against all others. They furnished the same shipping facilities to all persons, associations, and corporations at Van Buren which they refused to all parties at other stations. Hence there was no discrimination against individuals or associations, they being treated alike under the same circumstances.

There was no intention to injure appellees by discrimination. The facilities furnished at Van Buren in the months of October, November, and December of 1891 were no greater than those furnished in previous years. The evidence does not show that a sufficient number of cars were not furnished at all the stations on the road prior to the fall and winter of 1891. Previous to that time Van Buren had enjoyed the same facilities as it did then, by reason of its being one of the terminals of the railroad, and the same distribution of cars was made. The complaint of unjust discrimination grew out of the unusually large cotton crop of 1891. Sufficient transportation was not furnished then, because appellants had not anticipated it.

In the months of October, November, and December of 1891 appellees were merchandising at Paris, in Logan county, and were not injured by reason of advantages gained, through superior facilities for shipping, by those engaged in the same business. If they suffered, their competitors suffered in like manner. All were treated alike, and suffered in the same manner.

It follows there was no unjust or undue discrimination against appellees, and that they are not entitled to a penalty.

Judgment of the Circuit Court is reversed, and final judgment is rendered here in favor of appellants.

Bunn and Riddick, JJ., concur.

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Wood, J., dissenting:

Necessarily, under the construction given the act by the court, there could be no discrimination between individuals at different stations. So long as all the individuals at any given station are treated alike, there can be no discrimination between these and the individuals at some other station, although at the one station all facilities desired or required are furnished, while at the other they are wholly denied. This, in our opinion, was not the intention of the legislature, and such construction is not justified by the language of the act. There is nothing in the act limiting the discrimination to individuals of the same station, and, without some such restrictive words in the act itself, we can find no authority for so limiting it. The legislature evidently intended to prevent any undue or unjust discrimination between "individuals, associations, and corporations" anywhere in the state, whether shipping from the same or from different stations. If the construction of the court be correct, any railroad in the state may arbitrarily furnish shipping facilities to one station, and withhold all facilities from another rival station, similarly situated, without being subject to the penalties of the act. (When we speak of place or station, we mean the individuals, associations, or corporations, as the case may be, shipping from said place or station; for the abstract thing called the "station" or "locality" makes no shipments, and has no commercial or financial life, apart from the individuals, etc., residing and doing business there.) It is manifest that the exercise of such absolute power upon the part of railway corporations would be disastrous to the business prosperity of the individuals so discriminated against at any given station. Nor can it be denied that oftentimes the most powerful incentives exist for these corporations to make such discriminations. For instance, they may own little property at one station, and have large possessions at another and rival business point, and it may be to their interest to destroy the town where they have little in order to build up the place where they have much. In what more effectual way could this be done than by denying transportation facilities to the one while furnishing them to the other. Again, at one station on their road there may be competing lines, while at another, and maybe its commercial rival, there are none. Now, to meet the competition at the one station, and to do it with the least expense possible, they may take away from the other station, where there is no competition, all, or nearly all, its facilities for transportation, in order to furnish to the station where there is competition. Can it be said that there would be no discrimination in cases of this kind, under the act, or that a discrimination based upon such considerations as these, alone, would not be undue and unjust? We think not. Doubtless, to prevent just such acts of discrimination as these, and all others, between individuals, etc., shipping from different sta-

tions, as well as acts of undue and unjust discrimination between individuals, etc., shipping from the same station, the act under consideration was passed. The supreme court of Illinois, in speaking of a case where there had been a discrimination in freights between individuals at different stations, used this pertinent language: "The discrimination, in such a case, is as much a discrimination between individuals as it would be in reference to two persons living in the same locality, and shipping at the same station, unless, as before stated, a satisfactory reason can be given for discrimination between the points of shipment;" and, further: "So, too, in the case before us. The resident of Bloomington, who sends to Chicago for a car of lumber, is charged by the company at the rate of \$5 per thousand feet for transportation. The resident of Lexington, who orders the same lumber at the same time, is charged \$5.65 per thousand feet for transportation 16 miles less in distance. Is there not here, unless an explanation can be furnished by the company, an unjust discrimination between individuals, quite as much within the prohibition of the principles of the common law as would be an unjust discrimination between individuals of the same town?" And the court holds that the fact of there being a competing line of road at the station where the individual lived in whose favor the discrimination was made would not be a sufficient explanation. *Chicago & A. R. Co. v. People, Koerner*, 67 Ill. 11, 16 Am. Rep. 599. Precisely the same principle would apply whether the acts of discrimination were in the matter of freight charges or facilities of transportation.

The act under consideration is: "All Individuals, Associations, and Corporations shall Have Equal Rights to Have Persons and Property Transported over Railroads in This State, and no Unjust or Undue Discrimination shall be Made in Charges for, or in Facilities for, Transportation of Freight or Passengers within the State," etc. There are no terms of limitation as to locality, except "within the state" (and, of course, the legislature had no power to legislate beyond the state). The restrictive words as to the discrimination are that it shall not be "unjust or undue." The use of these terms "unjust or undue" shows that the legislature knew that there would be, necessarily, some discrimination, but that it was only such as was "unjust or undue" that was inhibited. Section 6193, Sand. & H. Dig., makes it the duty of railroads to furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer, or be offered, for transportation at the place of starting and junctions of other railroads, and at sidings and stopping places established for receiving and discharging way passengers and freights, and shall take, transport, and discharge such passengers and property at, from, and to such places on the due payment of tolls, freight, or fare legally authorized therefor. The next section provides "that the railroad shall pay to the party aggrieved all damages sustained by

reason of a violation of this act, with costs of suit." See § 6194, Sand. & H. Dig. The statute prohibiting unjust discrimination, *supra*, furnishes an additional remedy to the statutes just quoted, by way of penalty, against those coming within its terms. All these statutes are but declaratory of the common law, which makes it the duty of common carriers to furnish facilities for and to transport all goods offered in the ordinary course of business, and to prohibit any unjust and undue discrimination in furnishing such facilities of transportation. 4 Elliott, Railroads, § 1467, and authorities cited in note; 1 Wood, Railroads, § 195. "It is," says Judge Elliott, "safe to say that the rule is that a railroad carrier, so far as concerns the receipt and transportation of goods, however it may be as to rates of freight, must, where the conditions and circumstances are identical, treat all shippers alike. It cannot furnish facilities to some shippers, and deny them to other shippers, unless there is a difference in condition or circumstances such as makes the discrimination a just one." 4 Elliott, Railroads, § 1468. A common carrier, for such goods as he undertakes to carry, is bound to provide reasonable facilities of transportation to all shippers at every station who, in the regular and expected course of business, offer their goods for transportation. The carrier is not required to provide in advance for any unprecedented and unexpected rush of business, and therefore will be excused for delay in shipping, or even in receiving goods for shipment, until such emergency can, in the regular and usual course of business, be removed. *Id.* § 1470; Hutchinson, Carr. § 292. The supreme court of Wisconsin voices our opinion of the duty of railroads to distribute cars at different stations as follows: "The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars, under the same circumstances, are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon . . . [the company's] different lines of railroad, loaded or unloaded. Many will necessarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. . . . It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice

and injury of the business of another station of the same importance." *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372. In *Riddle v. New York, L. E. & W. R. Co.* 1 Inters. Com. Rep. 787, 1 Inters. Com. Com. 594, Walker, C., said: "It is the duty of a common carrier to provide adequate equipment for the business of his line; if in time of special pressure someone must wait, the annoyance must be distributed with all possible equality." Again: "A common carrier is under obligation to serve the public equally and justly. It is unlawful for him to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality." True, this was said under the interstate commerce act expressly naming locality; but, under the construction we give the act before us, it is equally applicable to the case in hand. See also *Hutchinson, Carr.* § 297; 1 *Wood, Railroads*, § 195.

The statute seeks to enforce equality of treatment to all shippers under like circumstances. As we have seen, not every act of discrimination is unlawful. But there is always a presumption against it. It devolves upon the shipper in the first instance to show the discrimination, and then the burden is upon the railroad to show circumstances that would justify or excuse it; i. e., to show that the discrimination is just. 1 *Wood, Railroads*, § 198; 4 *Elliott, Railroads*, § 1477. The statute does not define what is unjust or undue discrimination. The Supreme Court of the United States in *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 219, 40 L. ed. 947, 5 Inters. Com. Rep. 405, says that "such questions are questions, not of law, but of fact." But we agree with Judge Elliott that this can only be so in a loose sense, and that, "in strict accuracy, it is a question in which the elements of law and fact are component parts." 4 *Elliott, Railroads*, § 1679. As was said by the supreme court of Texas: "It is a question of law and fact in the given case, and whether the discrimination be or not unlawful must be ascertained by applying to the facts of the case the principles of the common law," since, as we have shown, our statute is but declaratory of the common law. *Houston & T. O. R. Co. v. Rust*, 58 Tex. 98, 9 Am. & Eng. R. Cas. 126. Whether there has been a discrimination undue or unjust in any case depends upon the situation and circumstances of both the shipper and carrier, and is generally a question for the jury, under proper instructions. So far as the shipper is concerned, the relation or situation of one shipper towards the railroad is the same as that of any other shipper having the same class of goods to ship, although they may be at different stations. For example, the merchant at one station having 100 bales of cotton ready, and which has been offered for transportation, is in the same relation or situation to the railroad as a merchant at some other station, who has the same quantity and quality of cotton ready for shipment. Both are alike desiring and are entitled to prompt transportation and to equal facilities. But the relation of the railroad

company to each of these shippers may be very different. For instance, one station may be the end of a division,—a distributing point for cars; may have commission merchants shipping goods by the car load; or at the one station there may be an unprecedented rush of business. These circumstances of the railroad company existing at the one station, and absent at the other, may enable the railroad to ship promptly for the shipper at the one while denying it to the shipper at the other. Here would be a discrimination, but no reasonable man could say it would be unjust or undue. But if it should turn out that there was no unexpected rush of business at the one station that did not exist at the other; that the demand for transportation for cotton was about the same at both stations; but that at the station where the favored shipper lived there was a competing line of road, and that the cars which accumulated there (on account of its being a distributing point and on account of large shipments by commission merchants) were held there, and not distributed to the other station *pro rata*, in order that the railroad might be able at all times to meet the competition, and to control the business of shipping cotton,—if there was testimony to justify a conclusion of this kind, a verdict against the railroad for unjust or undue discrimination could not be disturbed. There was evidence upon which the jury might have reached this conclusion. The foregoing principles of law are applicable to cases of the kind under consideration. We have not closely scrutinized the instructions, to see whether they conform to our views of the law as above set forth, since the opinion of the court makes a reversal inevitable in any event. Assuming, however, that the directions to the jury are in accord with the views we have expressed, the judgment of the court should be affirmed.

Hughes, J., concurs.

A petition for rehearing having been filed, **Riddick, J.**, on November 20, 1897, handed down the following response:

We held in a former opinion in this case that a shipper at Altus, a station on appellant's railway, could not recover a penalty against the railway company because it furnished to shippers at Van Buren, another station on its line, facilities superior to those furnished at Altus. We did not hold, nor was it necessary to hold, that the laws of this state do not forbid railroad companies from making unjust discrimination between different localities along their line; but we did hold that, under the facts of this case, appellees were not entitled to a penalty, and that their remedy for the wrongful failure of the company to furnish adequate facilities at Altus was an action for damages. Learned counsel for appellees, in this and other cases in which the same questions are involved, have favored us with able and elaborate printed arguments in support of the motion to rehear, but, after giving such arguments careful consideration, our conclusions announced in the former opinion re-

main unchanged, and the motion must be overruled. As the question determined is important, and as there is division among the judges of the court, I will endeavor to give some further reasons for our judgment in addition to those stated by Mr. Justice Battle in the former opinion. The facts are fully stated in that opinion, and I will only briefly refer to them again.

The crop of cotton raised along the line of appellant's railway in 1891 was unusually large. The appellant company furnished sufficient cars at Van Buren and Little Rock, where there were competing lines and superior advantages for shipment, to carry all cotton offered, but at Altus and other intermediate points, where there were no competing lines, it failed during the months of November and December of that year to furnish cars sufficient to ship cotton as fast as it was offered, and there was delay in shipping cotton offered by appellees and other shippers at those stations. The contention is that it was an unjust discrimination, within the meaning of our penal statutes, for the company to furnish a sufficient number of cars to carry all cotton offered at Van Buren, when not enough cars were furnished at Altus. Now, we do not deny that if the appellant company wrongfully failed to furnish sufficient cars to carry cotton of appellees offered for shipment it became liable to said shippers for all damages suffered in consequence of the failure to furnish cars. Not only our statute (Sand. & H. Dig. § 6193), but the common law, fully covers a case of that kind, and appellees have already, in another action, recovered a judgment against the appellant company for a large amount to compensate them for all damages suffered by reason of the delay in shipment complained of here, and that judgment has been affirmed by this court. But the mere fact that the company has wrongfully failed to furnish cars to appellees does not necessarily entitle them to a penalty in addition to their damages. To justify the court in awarding them a penalty, they must bring their case within the strict letter of the law affixing the penalty. *Hawkins v. Taylor*, 56 Ark. 45; 2 Elliott, Railroads, § 710. The statute under which the penalty is claimed in this case provides that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over railroads in this state, and no unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state." Act March 24, 1887, § 1. And again, in another section, it provides that "no discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad, or any lessee, manager, or employee thereof shall make any preferences in furnishing cars or motive power." Id. § 4. The punishment provided for violation of the above provisions is a penalty of not less than \$50 nor more than \$1,000, for each offense, to be recovered by the party aggrieved in a civil action. Now, the rule at common law, as

stated by a recent writer, is that a railroad carrier, so far as concerns the receipt and transportation of goods, must, where the conditions and circumstances are identical, treat all shippers alike, but there is no requirement to furnish the same facilities where conditions and circumstances are essentially different. 4 Elliott, Railroads, § 1468. There is nothing in the language of the statute above quoted that expressly says that railway companies shall furnish the same facilities to different localities, or that they shall furnish the same facilities to different individuals, unless they are demanded under similar circumstances. But another clause of the 1st section of the act above referred to does refer to localities by providing that "persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station." It will be noticed that the portion of the statute which mentions localities has reference to overcharges in the transportation of passengers and freight, and not to discriminations in the matter of facilities. The fact that stations are mentioned in the clause referring to overcharges, and not mentioned in the clause in which discrimination in facilities for transportation is condemned, seems to indicate that the legislature recognized that it was impracticable to regulate the facilities furnished at one town by a comparison with those furnished at another, where the conditions and circumstances might be altogether different. It is doubtless true that a railway company should so distribute its cars as to give adequate transportation facilities to the different stations along its line, and if, by reason of a neglect to properly distribute its cars, it wrongfully fails to furnish shippers at any station adequate transportation facilities, it must respond in damages to the party injured; but we deny that every such shipper is entitled to a penalty in addition to his damages. We do not believe that the legislature intended that this penal statute should apply in such a case, for it would be utterly impossible to distribute the cars of a large railway so as to give each station its exact proportion. But, if the construction contended for is correct, the railroad company would have to furnish, not only a proportional number of cars, but cars of the same kind, drawn by engines of the same speed. A fast through train is a great facility in the transportation of both passengers and freight. The railroads of the state have for years run fast trains, which stop only at certain stations, selected by the company. If the contention of appellees is correct, that the intention of this act was to prohibit and punish discriminations as to facilities in transportation between different localities, it is not easy to see why this is not an unjust discrimination which subjects the company to a penalty in favor of every person who is prevented from riding upon a fast train, or from shipping his fruit or other products upon it, by reason of its failure to stop at his station. Certainly under

our view of this statute, which is that it forbids and punishes favoritism between passengers or shippers, if the company should permit certain persons to ride upon or ship property upon its fast train, and deny the use of such train to other persons who offered themselves as passengers at the same station, and under the same circumstances, it would become liable to a penalty. If this be true, and if it be also true, as counsel contend, that it makes no difference at what station the passenger offers himself for passage or his property for shipment, he is still, under this statute, entitled to like facilities, then it necessarily follows that the company must stop its fast trains at every station at which a passenger offers, or incur a heavy penalty, whether that station be a great city or a side track in the swamp. Of course, if such trains were compelled to stop at every station, they would cease to be fast trains, and the result would be not only a great inconvenience to the people of the state, but a heavy loss to the railroads of the state; for, under such a restrictive law, the railroads of this state would be utterly unable to compete for the through traffic, and the competing lines of railway which pass around the state would carry such traffic, both freight and passenger.

But cars and trains are not the only facilities within the meaning of this act. A depot, a house for freight, or a waiting room for passengers is a facility for the transportation of passengers and freight, within the meaning of this statute. If a railway company should at one of its stations permit the use of its depot, yard pen, or other station facility to one shipper, and refuse them to other shippers, under the same conditions and circumstances, I think there could be no doubt that it would become liable for a penalty; for the object of the statute was to prevent favoritism,—in other words, to prevent discrimination in facilities between passengers or shippers when demanded under like conditions and circumstances. Along the railways of this state are depots, both old and new, in different stages of repair, and there are flag stations without a depot or station house of any kind. If the construction contended for is correct, why is this not a discrimination? But under that construction it would be hazardous for a railway company to make any decided improvement in this respect at one of its stations that it did not at once repeat at every other station.

Again, it is necessary for the company to keep at certain stations along its lines a telegraph operator on duty during the night to send despatches in regard to the movement of its trains. At such stations it is usual to keep the depot open during the night for the convenience of the patrons of the road. Under our construction of this statute, the company must in this respect treat all alike, and cannot allow the use of its depot or station house to one passenger or shipper after night, and refuse it to others who apply for it under like circumstances. But, under the broad construction contended for here, that this statute was intended to prevent and

punish discrimination in facilities between different stations, if the company kept its depot open at night for the reception of freight or passengers at one station it would have to furnish like facilities to passengers and shippers at all other stations, or subject itself to an action for a penalty in favor of each passenger or shipper denied the use of a depot during such hours. The company would thus be compelled to close the depots at all stations to avoid incurring penalties for discrimination. It would, of course, be absurd to suppose that the legislature intended that railway companies should furnish to way stations and small villages facilities the same or equal to those furnished to cities and larger towns, for this would deny to such towns and cities the legitimate advantages due to different circumstances and conditions. But, if we say that the intention was to compel the railroad company to furnish proportional facilities to each station, then it would follow that the legislature intended that the railway company in furnishing such facilities should exercise its judgment as to what were proportional facilities. It would be a difficult matter to determine the dimensions and size of depots, the quality and quantity of train service, and other facilities to be furnished to the different towns and villages of the state, differing, as they do, in size and commercial importance, so as to make their facilities proportional to those furnished other towns and cities of the state. But, under the construction contended for, if the company erred in this matter, however honestly, it would at once become liable, not only for one penalty, but probably for hundreds of them. As it is not usual to inflict penalties for mere errors of judgment, this should incite the court to adopt a different construction from that contended for.

From these and other reasons it can, I think, be seen that the construction contended for by appellees, that the word "locality" should be read in the statute so as to make it a penal offense for a railway company to furnish passengers or shippers at one locality facilities not furnished to all other stations along its line, would necessarily result in great embarrassment to railway companies. It would cast upon the courts for decision many difficult questions as to what were proportional facilities and what were not; for the courts would, in effect, be discharging the duties of a board of railroad commissioners, without any discretion whatever to relieve against the hardships of the statute. The ingenious answer to these objections is, in effect, that the court need not consider such difficulties seriously, for they would be questions for the jury. And that is true. If the construction contended for by appellees is correct, then, whether the failure to stop a fast train at a certain station, or whether the failure to furnish a depot as good as some other on the line, or to keep it open during the same hours, whether these and other matters were unjust discriminations, would, indeed, be a question for the jury. A passenger desiring to recover the penalty pronounced by the statute (\$50 to \$1,000)

would naturally ask himself whether the depot at which he was compelled to wait was as commodious as that at some other station, or whether the train upon which he rode was as superb and elegant in its appointments and as convenient in its time schedules as the fast passenger that stopped only at larger towns. As most people are not disposed to underestimate the importance of their own town or village, it would be easy for him to conclude that the company was unjustly discriminating against himself and his town. As the question might be answered differently by different persons, it can be seen that such a construction would open up a rich field of litigation. If not satisfied with one lawsuit, the passenger could return the next day, and suffer the same inconveniences, and obtain another cause of action. Every man could have his own lawsuit and one for each member of his family.

Now, while the people of this country are not unduly prone to litigation, still the records show that they do not hesitate to appeal to the courts when they believe their rights to be invaded. But the remarkable fact in connection with this statute, if the construction contended for by appellees be correct, is that, although there are similar statutes in other states, learned counsel, as I shall presently attempt to show, have not been able to produce a single reported case of this kind,—a case where, under a statute like this, a plaintiff has demanded a penalty of a railroad company for failing to furnish him the facilities it furnished to shippers at another and different station. I do not say that this shows that use construction they contend for is correct, but I do say that when we consider the great diversity in the facilities furnished to different towns and stations, and the frequent complaints made against railways on account of defective train service and facilities,—that considering these things, the fact that, so far as we can ascertain from the Reports, no one has heretofore brought such an action, is conclusive proof that the construction contended for by appellees is not the construction usually placed upon this statute. It shows that the language of the statute does not plainly express what appellees say it means. But this is a penal statute, and cannot be extended by implication. "The rigid rules of the common law with reference to the liability of common carriers should not," says Judge Elliott, quoting the language of the supreme court of North Carolina, "be applied in cases involving the violation of a penal statute." 2 Elliott, Railroads, § 710. The statute should not, of course, be defeated by a forced or overstrict construction, but the intention of the legislature must be gathered from the words, and they "must be such as to leave no reasonable doubt upon the subject." *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830; *Whitehead v. Wilmington & W. R. Co.* 87 N. C. 255; *Dwyer v. Gulf, C. & S. F. R. Co.* (Tex.) 23 Am. & Eng. R. Cas. 654; *Hawkins v. Taylor*, 56 Ark. 45. Following this well-settled rule, the supreme court of Iowa held that a statute of that state against railway discriminations did not in-

clude the failure to furnish cars, because, as stated by the court, the statute was penal, and could not be extended by implication. The court pointed out in that case, as we have in this, that the plaintiff had a clear remedy by an action for damages, but that did not include a penalty. *Bond v. Wabash, St. L. & P. R. Co.* 67 Iowa, 712, 23 Am. & Eng. R. Cas. 608. And so the supreme court of Texas, declining to apply a penal statute in a case against a railway company not clearly within its meaning, said that it could not award a penalty in any case not expressly denounced by the act. To do so, said the court, "would be judicial legislation of the most reprehensible character." *Dwyer v. Gulf, C. & S. F. R. Co.* (Tex.) 23 Am. & Eng. R. Cas. 654.

Let us now, for a moment, consider the character of the act of which the appellant company was guilty. On account of a rush of cotton to market, it was unable, during two months, to carry promptly all cotton delivered at stations between Little Rock and Van Buren. Now, admitting that the company by the use of due care and foresight might have foreseen this accumulation of freight, and have guarded against it by providing sufficient cars to carry it, still it must be admitted that there was no intention or desire to injure Altus or any other station. The company, taking the worst view against it possible under the evidence, had but negligently failed to supply itself with sufficient cars to handle the increased business, and when the rush came it endeavored to avoid injury to itself by carrying first the freight offered at points where there were competing lines, and, after that, the freight from the other stations. The wrong was not in furnishing sufficient cars to Van Buren and Little Rock, for this its duty required it to do, but in failing to furnish sufficient cars to Altus and other intermediate points. The failure to furnish cars brought the company squarely within the scope of another statute (Sand. & H. Dig. § 6193), under which it has been compelled to respond in damages. Appellees are not now asking for compensation, but for a penalty, and they must stand upon the strict letter of the law. Now, as was stated by Mr. Justice Battle in his opinion, if there was a discrimination against appellees, within the meaning of this statute, there was a discrimination against every shipper who offered cotton or other freight at any station between Van Buren and Little Rock during the months of November and December, 1891. More than that, every separate offer of cotton or other freight, and failure to carry, was under the statute a separate offense. Under such construction, the aggregate amount of the penalties for which the company became liable during those two months would be simply stupendous. When asked to adopt a construction that, in addition to compensatory damages, visits such severe punishment for an act of mere negligence, I recall to mind the words of a distinguished English judge, who, speaking of an action brought against a railway company under the railway and canal traffic act of England, said: Very

extensive powers are conferred upon the court by this act,—“powers which may be exercised for the benefit of the public, but which may be also exercised to the wrong and detriment of persons carrying on a great trade; and we ought, therefore, to be very cautious to ascertain that there is reasonable ground for believing that the act has been infringed before we interfere.” Cresswell, J., in *Caterham R. Co. v. London, B. & S. C. R. Co.* 1 Ry. & Canal Traffic Cas. p. 34. But if it was proper to exercise caution in the application of a remedial statute which inflicted no penalty, and was administered under a board of commissioners with large discretionary powers, how much more necessary is it to do so in construing an unbending penal act, against the punishment of which no tribunal has power to relieve. The construction of the act contended for here is far-reaching. To adopt it would be to change the statute from a simple and easily understood law to a very complex one, difficult either to understand or obey. It would be certain to subject railway companies to heavy penalties in many cases in which they were guilty of no intentional wrong. It is not called for by the language of the act itself, nor included within the plain meaning of the legislature. We cannot, therefore, adopt it without violating what we conceive to be fundamental rules regarding the construction of penal acts.

I will now briefly notice some of the cases which counsel for appellees have cited in support of their views: First, they refer to certain decisions of the Federal courts under the Interstate Commerce Act, and to decisions of the English courts under the railway and canal act of England. It is sufficient to say of those cases that the acts which they construe are neither of them penal, but are remedial acts, and are therefore to be construed liberally, to advance the remedy. The most hasty examination of those acts will show that they are altogether different from the one under consideration. Not only is the language of the acts different, but those acts are enforced under the supervision of a board of commissioners with discretionary powers to relieve special hardships imposed by the letter of the law. No railroad company under those acts becomes liable for a penalty unless for disobedience of an order of the court after the discrimination has been adjudged and pointed out. The shipper, under those acts, recovers only his actual damages, and the usual relief granted is not even a judgment for damages, but an order that the railway company in future refrain from such discrimination. It is evident, therefore, that a much broader construction can properly be given those statutes than the one we have under consideration. If, in construing a highly penal act, we undertake to follow the decisions under those statutes, we shall inevitably be led into the grossest and most inexcusable errors. This is sufficient to dispose of those cases, but, if it were necessary to go further, it could be shown that the reasoning of those cases, instead of opposing, tends strongly to support, the conclusions at which we have arrived. I

will next notice the cases of *Chicago & A. R. Co. v. People, Koerner*, 67 Ill. 11, 16 Am. Rep. 599, and the case of *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372. I call special attention to these two cases, not only because they are cited by counsel for appellees, but because they are extensively quoted in the dissenting opinion delivered by my two learned associates. The Illinois case, *supra*, was for discrimination in freights. The company made a greater charge for freight from Chicago to Lexington than it did from Chicago to Bloomington, a more distant station on the same line, the freight being of the same kind, and being hauled in the same direction. The case came within the words of a statute similar to our own, to the effect that persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction, to a more distant station. The judge who delivered the opinion said something about discrimination between localities, but he was speaking of discrimination in freights. He had no reference to discrimination in facilities, and to suppose that he referred to a case of the kind we have here would be altogether misleading. It must also be noticed that, after discussing discriminations to a considerable extent, he concluded by giving judgment in favor of the company, for the reason that the statute upon which the prosecution was based was void. We are unable to understand how that decision can be considered as in conflict with our decision here. The Wisconsin case (*Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372) was an action, not for a penalty, but for damages for wrongfully failing to furnish cars to carry freight. We fully agree with the judgment of the court in that case, but it was unnecessary for counsel to go so far to cite a decision on that point. Only a few months ago this court affirmed a judgment against appellant in favor of appellee for damages for failing to furnish cars in which exactly the same question was involved as that determined by the Wisconsin court. We felt so little doubt about the law of the case that it was disposed of by an oral opinion. Appellees knew of the case, as it was in their favor, and they might just as well have cited it as the case from Wisconsin, although we are not able to see that either case has any bearing upon the question here. In the Wisconsin opinion, as well as that from Illinois, there are expressions which might mislead, if you disregard entirely the facts of the case, and suppose the judge to be discussing the law as applied to the facts of this case; but to get at the meaning of an opinion you must, of course, consider the language of the judge as referring to the facts of the case before him, and not to an altogether different state of facts. The next and last case that I shall notice will be a case from the Supreme Court of the United States: *Union P. R. Co. v. Goodridge*, 149 U. S. 680, 31 L. ed. 896. The case arose under a Colorado statute, and was a prosecution for an overcharge in freights. Counsel say that both the statute and case are similar to those before us. There is

some similarity in the two statutes, but little between the two cases. The Colorado statute is a much more comprehensive act than our act. It provided, among other things, that railway companies should keep posted schedules of their rates, and that, while such schedules were in force, no rebate or drawback therefrom should be allowed one shipper, unless the same was open and allowed to all persons alike, except in a special case, where the approval of the railroad commissioner was procured in writing. The evidence in the case showed that there were two rival coal companies, one owning a mine at Erie, and the other at Marshall, these places being stations upon lines of the defendant's railway, and each place about the same distance from Denver, to which place the two companies shipped their coal. The railway company posted a schedule of rates, showing that the charges on coal from both Erie and Marshall were \$1 per ton. In other words, the railway company's schedule showed that the rate to Denver on coal was the same from both places, but it made a secret agreement with the Marshall company by which it allowed it a rebate of 40 cents on the ton, and this was done without the written consent of the commissioner. These facts brought the case clearly within the express language of the act, and the company was held guilty. The judge, in speaking in that case of discriminations between localities, had reference to discriminations in charges of the kind forbidden by the act, and not to discrimination as to facilities. I have now noticed the cases upon which counsel for appellees seem to place most reliance, and, in my opinion, none of them furnish authority for holding the company liable for a penalty for a discrimination in facilities between different localities, much less between localities where the conditions and circumstances are widely different, as we find them here. Van Buren has competing lines of railway. It is the end of a division of appellant's railway. It is a much larger town than Altus, and has not only a much larger retail business, but has several wholesale houses. These and other advantages which Altus does not possess cause empty cars to accumulate at Van Buren, which are used in the shipment of cotton from that point. Conceding that the statute was intended to punish discriminations between different localities, it could not apply to a case such as this, where the conditions and circumstances surrounding the two localities are altogether different; and this is the ground on which, as I understand it, rests the opinion of Mr. Justice Battle, ordering a dismissal in this case. But it seems plain to me that the purpose of this act, so far as it forbids discrimination in facilities for transportation, was to require the railroad company to treat all shippers alike who ship from the same place and under the same conditions, and to forbid and punish favoritism on the part of the company under such circumstances. It has, in my opinion, no application to discrimination in facilities when furnished at different localities: for that is covered by another statute, and the common law, which require railway companies to fur-

nish reasonable and adequate facilities for transportation at every station, and provide an ample remedy for any failure in this respect by means of an action for damages. Sand. & H. Dig. § 6193; 4 Elliott, Railroads, § 1479. For these reasons I adhere to the decision made in this case.

The motion to rehear is overruled.

Bunn, Ch. J., and Battle, J., concur in the conclusion that the motion to rehear should, under the facts of this case, be overruled.

Wood, J., dissenting:

The railway and canal traffic act of England, passed in 1854, provides: "Every railway company," etc., "shall, according to their respective powers, afford all reasonable facilities for receiving and forwarding and delivering traffic upon and from the several railways," etc., "belonging to such companies," etc. "And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company," etc., "to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever." Section 2, chap. 31, 17 & 18 Vict. See 27 Am. & Eng. R. Cas., Append. p. 22. State legislation upon this subject has, in all salient features, followed this English statute. 5 Am. & Eng. Enc. Law, p. 178. Our statute (Sand. & H. Dig. § 6301), like the English act, in naming the objects protected against discrimination, does not mention "locality." In *Vahlberg v. Keaton*, 51 Ark. 534, 4 L. R. A. 462, the court, through Judge Hemingway, in speaking of a statute modeled after an English statute, said: "As the American states have adopted the English statute as a model, so the American courts have adopted the construction given it by English courts." *Bank of Newport v. Cook*, 60 Ark. 288, 29 L. R. A. 761; *McDonald v. Hovey*, 110 U. S. 619, 28 L. ed. 269. In *Richardson v. Midland Railway Co.* 4 Ry. & Canal Traffic Cas. 1, upon a complaint by two firms at Newark that their traffic was unduly prejudiced by the railway company, by not being carried on as favorable terms as to rates and in other respects as Burton traffic, the court said: "It is not contended on the part of the railway company that it is any answer to a complaint of inequality of charge that the traffic favored and the traffic prejudiced are not in the same locality; and assuming that there is a competition of interests, and that circumstances in other respects are not dissimilar, the traffic of two localities, both on the same system of railway, but it may be at a distance from each other (and Newark is 40 miles distant from Burton), is as much within the traffic act of 1854 as the traffic of two or more individuals in the same locality is;" citing and quoting the earlier cases of *Ransome v. Eastern Counties Railway Co.* 1 Ry. & Canal Traffic Cas. 63, and *Nicholson v. Grant Western Railway Co.* 1 Ry. & Canal Traffic Cas.

121. See also *Newry Comrs. v. Great Northern R. Co.* 7 Ry. & Canal Traffic Cas. 184; *Gerard v. Railway Co.* 4 Ry. & Canal Traffic Cas. 291. There is nothing in the railway and traffic act as to freight rates, etc., between different localities. Nor was the act of 1873 (36 & 37 Vict. chap. 48), providing for commissioners for the better enforcing the railway and traffic act, passed until long after the earlier of the above cases were decided. The case of *Richardson v. Midland Railway Co.* 4 Ry. & Canal Traffic Cas. 1, although decided after the passage of the act of 1873, as we have seen, distinctly approved the construction given the railway and canal traffic act by the earlier cases. It thus appears that the English courts construe the railway and canal traffic act as applying to acts of undue and unreasonable discrimination between shippers of different localities; otherwise they would not have enforced it in such cases. But localities are not mentioned. Our statute is modeled after this act. Therefore, upon the authority of *Vahlberg v. Keaton*, 51 Ark. 534, 4 L. R. A. 462, and *Bank of Newport v. Cook*, 60 Ark. 288, 29 L. R. A. 761, the same construction should be given the act under consideration as was given the railway and canal traffic act by the English courts. But this is also the construction of the Supreme Court of the United States. The Constitution of Colorado provides: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges, or in facilities for transportation of freight or passengers within the state." Art. 15, § 496, § 6. This is the identical language of the statute under consideration. Sand. & H. Dig. § 6301, § 1. An act of the legislature of Colorado provided: "No railroad corporation shall charge, demand, or receive from any person, company, or corporation, for the transportation of persons or property, or for any other service, a greater sum than it shall . . . charge, demand, or receive from any other person, company, or corporation for a like service from the same place, or upon like conditions and under similar circumstances, and all concessions of rates, drawbacks, and contracts for special rates shall be open to, and allowed all persons," etc., "alike at the same rate per ton per mile, upon like conditions, and under similar circumstances." An action was instituted by G. & M. coal merchants at Erie, and selling coal at Denver, against the railroad to recover triple damages, under the statute, for unjust discrimination in freights for coal from Erie to Denver, and in favor of the town of Marshall, which was 2 miles further from Denver than the town of Erie. The rates from the two places to Denver were the same. Mr. Justice Brown, speaking for the court, said: "This act was intended to apply to intrastate traffic the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the states, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enter-

prises, or favored corporations, and to put all shippers on an absolute equality. . . . It is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon absolute equality." *Union P. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896. The Colorado statute was highly penal, the railroad being subject to a forfeiture of "three times the actual damage sustained by the party aggrieved." Yet this was not deemed by the Supreme Court of the United States as any reason why the statute and the constitutional provision should not be enforced. It will be observed that the Colorado statute quoted above says, "for a like service from the same place,"—just what is decided in effect by the majority opinion in the meaning of our statute. But the Supreme Court of the United States, construing it in connection with the provision of the Colorado Constitution exactly like our statute, enforced it as between individuals of different localities; showing clearly that the provision of the Colorado Constitution embraced acts of discrimination between individuals of different localities, and was intended, like our act, to protect the parties named therein against all acts of "undue or unjust discrimination within the state." And, although Erie and Marshall were different stations or localities, shippers there were treated, for the purpose of the Colorado Constitution and statute preventing unjust discrimination, as being in like condition and under similar circumstances with reference to the railway company in shipments of coal. The fact of shippers being at different stations or localities does not necessarily make their condition or circumstances unlike in relation to the railroad company, as we have shown. In the opinion of the court first announced it is said: "Was there any unjust or undue discrimination by appellants against appellee? Superior facilities for shipping were furnished at Van Buren. If this was a discrimination, it was not against any particular individual or association, nor against the shippers at any particular station, but against the shippers collectively at every station on the railroad except at Van Buren; that is to say, in favor of one locality against all others. They furnished the same shipping facilities to all persons, associations, and corporations at Van Buren which they refused to all parties at other stations. Hence there was no discrimination against individuals or associations, they being treated alike under the same circumstances." It appears from this, as well as the opinion just delivered, that the court holds that, where shippers are at different stations or localities, there can be no undue or unjust discrimination between them. In other words, where the locality of shippers is not the same, there is such a difference in circumstances as to justify the discrimination in failing to furnish facilities, however great or unreasonable the difference might be. We are not concerned, therefore, about the discussion of the facts of this particular case, as it is conceded that Van Buren and Altus are differ-

ent stations, which, upon the doctrine announced by the court, must work a reversal and dismissal of this cause. It might be said, however, with reference to the facts, that the station agent at Van Buren, when asked the following question, to wit, "It mattered not how much they needed them [the cars] down there [at Altus], you were going to keep enough for your people?" replied, "That was about the size of it." This would tend to show that the competition of another road at Van Buren was the real cause of the cars being kept there, and not distributed to other points along the road, where there was no competition. At any rate, this, in connection with all the other facts and circumstances, was sufficient to require the submission of the question of undue or unjust discrimination to the jury upon proper instructions. We do not join issue with much that is said in the able opinion just rendered by Judge Riddick. The opinion we have already delivered shows that. We cannot consent that this statute should not be enforced because another remedy, by way of damages for failing to furnish transportation facilities, is provided for the party aggrieved. The legislature, of course, was familiar with our constitutional provision preventing discrimination. Const. 1874, art. 17, § 3. Also with the statute passed in 1868 (Sand. & H. Dig. § 6193), requiring railroads to furnish sufficient accommodations for the transportation of passengers and property. This act was in obedience to the constitutional provision, and in harmony with the prior statute, and was intended as an additional or cumulative remedy. It is said in the last opinion that the "appellees have already, in another action, recovered a judgment against the appellant company for a large amount, to compensate them for all damages suffered by reason of the delay in shipment complained of here, and that judgment has been affirmed by this court. But the mere fact that the company has wrongfully failed to furnish cars to appellees does not necessarily entitle them to a penalty in addition to their damages." If our contention, that the statute under consideration was intended as a cumulative remedy, be correct, it is obvious that the above could only be considered as a mere "begging of the question." This question must be decided, and the truth is it was decided in the first instance, without regard to whether or not the appellees had recovered judgment by way of damages for failing to

furnish cars in another action; for, when the judges passed upon and decided the present cause, it was unknown to them that another case was pending here on appeal from a judgment for damages for failing to furnish cars. The object of the statute is not to enforce the same facilities, or equality in facilities, but to prohibit unjust or undue inequality. We think these qualifying words "undue or unjust" have either been overlooked, or have not been given the significance which their use in the statute requires. Many of the instances mentioned, as showing the impracticability of giving effect to the statute under the construction we contend for, would be recognized at once by any man of good common sense, whether judge or juror, as not an unjust or undue discrimination. These words "unjust or undue" allow for all differences in the situation and circumstances of shippers and railway companies, whether at the same or different stations. They furnish a wholesome restriction and safe limitation to the passion or caprice of jurors; and, within these bounds, it would not be difficult, much less impracticable, for trial judges, with proper directions, to hold jury verdicts. At any rate, the question of whether there has been an unjust or undue discrimination, like thousands of other mixed questions of fact and law, must be left to the jury, under proper instructions from the trial court. The fact of shippers being at different stations or localities is to be submitted to the jury along with every other fact in the determination of this question. But we insist that this fact being conceded or undisputed does not, of itself, justify the court in declaring, as a matter of law, that, in such a case, there can be no such thing as an undue or unjust discrimination. The statute is plain. "No unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state." No amount of subtle reasoning or lengthy argumentation can either obscure or make clearer the legislative intent to prohibit acts of undue or unjust discrimination between the parties named "within the state." Under the construction given it by the court, the act is shorn of the very force and power which the legislature doubtless most designed it should have.

Hughes, J., concurring.

CALIFORNIA SUPREME COURT.

Re Estate of Herman ROYER, Deceased.

(.....Cal.....)

1. The University of California, created by the act of 1868, and continued and declared to be a public trust by the

state Constitution of 1879, is an entity capable of taking by bequest, although the regents are, by law, made the governing body under a separate incorporation, and the organic act, providing in terms that grants and gifts may be made to the regents of the state,

NOTE.—As to nature of incorporated institutions belonging to the state, see *note to State, Little v. Regents of University (Kan.)* 29 L. R. A. 378; also *Lane v. Minnesota State Agri. Soc. (Minn.)* 29 L. R. A. 708; *Lund v. Chipewa County (Wis.)* 34 L. R. A. 131; *Sterling* 44 L. R. A.

v. Regents of the University (Mich.) 34 L. R. A. 150; *Oklahoma Agri. & Mechanical College v. Willis (Okla.)* 40 L. R. A. 677; *Gross v. Kentucky Board of Managers of World's Columbian Exposition (Ky.)* 43 L. R. A. 703.

See also 45 L. R. A. 675.

does not in terms provide that they may be made to the university.

2. A bequest to the state university is subject to Civil Code, § 1813, limiting charitable gifts to one third of the distributable estate.

(March 3, 1899.)

APPEAL by the University of California from a decree of the Superior Court for the City and County of San Francisco distributing the residue of the estate of Herman Royer, deceased, to his heirs and next of kin notwithstanding a clause in his will bequeathing such residue to the University of the State of California. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. John B. Mheon, for appellant, University of California:

The University of California is a quasi corporation.

Const. art. 9, § 9.

Two entities are provided for by the organic act, to wit: "The University of California," with its president (Kellogg) and its treasurer (Sloss), and its design to provide a complete education for citizens of the state, and the other entity, the Board of Regents, etc., a corporation under the laws of the state, having its president (the governor) and its secretary (E. W. Davis), and its design is to manage and control the property and administer the business of the university.

Thus we have the University of California created by statute, organized under a president, treasurer, and land agent, receiving appropriations from the state, and donations from private persons and corporations in that name, and performing its functions for more than twenty-five years. This certainly constitutes a *de facto* quasi corporation or governmental agency.

People v. Lakue, 67 Cal. 526; *Dean v. Davis*, 51 Cal. 406; *People v. Montecito Water Co.* 97 Cal. 276; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 316, 14 L. R. A. 755.

The University of California is not a public chartered corporation like a city or city and county (Civil Code, § 284). It is in principle more like a county, and is therefore within the definition of a quasi corporation.

People v. Sacramento County Supers. 45 Cal. 692; *Barnett v. Contra Costa County*, 67 Cal. 77; *Dill. Mun. Corp.* § 10; *Potter, Corp.* § 420; *Boone, Corp.* §§ 8, 314.

A state university is a quasi corporation and body politic.

University of Alabama v. Winston, 5 Stew. & P. (Ala.) 17; *Tulane Education Fund v. New Orleans Bd. of Assessors*, 38 La. Ann. 292; *Regents of the University v. Detroit Bd. of Education*, 4 Mich. 213; *Regents of the University v. McConnell*, 5 Neb. 426; *State, Robinson, v. Carr*, 111 Ind. 337; *State Bd. of Edu. v. Bakewell*, 122 Ill. 344; *University of North Carolina v. Maultsby*, 43 N. C. (8 Irid. Eq.) 257; *Dunn v. University of Oregon*, 9 Or. 357; *State, Atty. Gen., v. Knowles*, 16 Fla. 577; *Liggett v. Ladd*, 23 Or. 26; *State*, 44 L. R. A.

Little, v. Regents of University, 29 L. R. A. 378, 55 Kan. 389.

The property of the university is exempt from taxation on the ground that it belongs to the state.

Aplin v. Regents of the University, 10 L. R. A. 376, 83 Mich. 467; *Hollister v. Sherman*, 63 Cal. 38; *People, Johnson, v. San Francisco City & County Supers.* 77 Cal. 136.

The term "person" applies to natural persons and also to artificial persons,—bodies politic deriving their existence and powers for legislation,—but cannot be so extended as to include within its meaning the Federal government, and the term "corporation" in the statutes applies only to such corporations as are enacted under the laws of the state.

United States v. Fox, 94 U. S. 321, 24 L. ed. 183; *Dickson v. United States*, 125 Mass. 315, 28 Am. Rep. 230; 1 Kent, Com. p. 460.

Prima facie the statute will be interpreted not to bind the sovereign or the sovereign state.

Bishop, Written Laws, § 142; *Sedgwick Stat. & Const. L.* p. 337; *United States v. Hoar*, 2 Mason, 311; *Mayrhofer v. San Diego Bd. of Edu.* 89 Cal. 110.

If this court shall believe that the testator did intend to endow a professorship of political economy, that intention should control, notwithstanding the fact that the legatee is called the University of California instead of the Regents of the University of California or the State of California for the University of California.

Re Gibson, 75 Cal. 329.

This court will distribute the estate as bequeathed, provided the bequests are lawful. *Bispham, Eq.* § 126; *Blythe's Estate*, 1 Coffey, Prob. Dec. 459.

Mr. Joseph Leggett for respondents.

Mr. W. F. Williamson for executors.

Chipman, C., filed the following opinion:

The controversy arises upon conflicting petitions for distribution filed by the heirs at law of deceased and by the Regents of the University of California, and involves the right to the residue of the estate of deceased under the provisions of his will. After making certain specific bequests, the testator, in the sixth clause of his will, declared as follows: "Sixth. All the rest and residue of my property and estate I do hereby give, devise, and bequeath unto the University of the State of California, for the sole purpose of founding a professorship of political economy, and for no other purpose whatever. If the said gift and devise shall for any reason fail, the same shall revert to my next of kin." The court found that neither the University of the State of California, nor the University of California, is now, or ever has been, a corporation under the laws of this state, and is not a person, and that each is an entity distinct from the Regents of the University of California, which latter are a corporation duly organized under the laws of the state. The court also found that the residue of the estate is insufficient for the purpose of the founding a professorship of political economy, and that the gift has

failed, and has, by the express provisions of the will, reverted to the next of kin of the testator. The court denied the petition of the Regents of the University of California, and granted that of the heirs at law, and ordered distribution accordingly, from which this appeal was taken.

But little evidence was submitted at the hearing. In addition to the introduction of the will, it appeared that on October 12, 1897, appellant adopted a resolution "that the funds devised to the university by Herman Royer, deceased, together with such other funds as are now available for that purpose, or may become available hereafter, in aid of founding a professorship of political economy, be invested so as to produce an income, and that no part of the principal funds so invested shall ever be expended." It was admitted that the Regents of the University of California are now, and have been since 1868, a duly incorporated and existing corporation under an act of the legislature approved March 23, 1868, and that a chair of political economy of said university was established in 1878, and is now existing. It also appeared that the residue of the estate of deceased amounts to \$5,467.10. This was all the evidence. The findings of fact are obviously drawn, not only from this evidence, but also to some extent from the statutes, and are practically findings of mixed law and fact. They are attacked as against both the law and the evidence. It seems to be admitted that the "University of California" and the "University of the State of California" mean the same entity, whatever that entity may be. We shall therefore disregard any distinction between the two designations, and for brevity will refer to the University of California as the "university," and the Regents of the University of California as the "regents." The questions involved are of much importance, as they concern, not only the bequest in issue, but previous gifts and grants, as well as the legal status of the university. This must be our apology for entering somewhat fully into the consideration of the matter.

1. The Constitution of 1849 (art. 9, § 4) directed the legislature to take measures for the disposition of such lands as had then been, or might thereafter be, granted by the United States, or any person or persons, to this state, "for the use of a university," pursuant to which provision the act of March 23, 1868, was passed. Stat. 1867-68, p. 248. Section 1 of the act reads: "A state university is hereby created. . . . The said university shall be called the University of California. . . . The said university shall be under the charge and control of a board of directors, to be known and styled 'The Regents of the University of California.' The university shall have for its design, to provide instruction and complete education in all the departments of science, literature, art, industrial and professional pursuits and general education," and also various special courses of instruction named in the act. The act provides for the establishment of different colleges of which the university is to consist. Section 11 provides: "The general

government and superintendence of the university shall vest in a board of regents, to be denominated the 'Regents of the University of California;' who shall become incorporated under the general laws of the state of California by that corporate name and style. . . ."

Section 12 provides: "That said board of regents, when so incorporated, shall have the custody of the books, records, buildings and all other property of the university." This section also provides for vesting the title of certain property in the state, where donated for the purpose of the university, and also provides how the regents shall dispose of property donated or conveyed to them, and also for the affiliation of certain colleges with the university, in which case the regents are to have no right of property in or over the same, but "such college so affiliated may retain its own property," etc. Section 13 gives the regents, when incorporated, power "to enact laws for the government of the university, to elect a president of the university, and the requisite number of professors, instructors, officers, and employees, and to fix their salaries, also the term of office of each, and to determine the moral and educational qualification of applicants for admission to the various courses of instruction." Section 14 speaks of the income of the university, and when the regents may provide for free tuition. Section 15 makes the president of the university "the president of the several faculties and the executive head of the institution in all its departments, except as herein otherwise provided." This section also provides for the selection of a secretary and a treasurer of the university. Section 20 provides "for the endowment and support of the university and its buildings and improvements." Then follows a designation of the various funds or income arising out of the sales of lands granted to the state by Congress. Some of these funds are to be paid over to the regents; in other cases to the state treasury, "and paid over to the treasurer of the university, for the use and behoof of the said university and expended by said board," etc. The section also appropriates contributions to the endowment appropriated by the state "or from public or private bounty." The income of these funds is placed at the disposal of the regents "for the support of the university and of the several colleges and schools thereof," etc. The section also gives the regents authority to appoint persons "to solicit and collect private contributions for the endowment of the university," etc. Section 21 provides "for the current expenditures of the university, and payment is to be made by warrants of the president of the board drawn upon the treasurer of the university." Section 23 refers to the buildings of the university, and § 24 provides that "the collections by the state geological survey shall belong to the university," and directs that they be arranged in a building denominated the "Museum of the University." Section 25 directs the regents to construct "such buildings as shall be needed for the immediate use of the university," and to take steps for the improvement of its grounds,

etc. The general appropriation act of March 30, 1868 (Stat. 1867-68, p. 583), appropriated \$200,000 of the moneys derived from the sale of overflowed or tide lands, "which shall be paid into the university fund, and paid out therefrom to the regents of the university upon their order, to be by them expended for university purposes as provided by law." The various land grants of the government in aid of the university made necessary a "land agent of the university," and such officer is frequently mentioned in the acts of the legislature (Pol. Code, § 3534; Act March 13, 1875; Stat. 1873-74, p. 356); who is authorized to select state land, and "issue certificates of purchase and patents." When the act of 1868 was codified and brought into the Political Code (§§ 1385 *et seq.*) the university was treated as an institution of the state, having its location in Alameda county. The "endowment" is to the university. Id. § 1415. An academic senate of the university is created. Id. § 1461. By the act of March 19, 1878, certain funds were consolidated, to be known as the "Consolidated Perpetual Endowment Fund of the University of California," and all interest, etc., arising out of the same "shall be placed in the general fund of the university and subject to disbursement to meet the current annual expenses of the University of California." Throughout the entire legislation of the state the university is spoken of as having some sort of an existence, a part of which, rather than distinct from it, are the regents. The latter seem to be a corporation formed in aid of the objects and purposes of the university, but not to displace nor destroy nor to absorb its entity. Acts are found "for the endowment of the university" (Stat. 1869-70, p. 668); "for the support of the university" (Stat. 1871-72, p. 554); "concerning university lands" (Stat. 1873-74, p. 356). General appropriations run in the same way: "For the aid of the State University, \$80,000" (Id. p. 902); "to reimburse the University of California" (Stat. 1881, p. 50).

The Constitution of 1879 (art. 9, § 9) declares: "The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the organic act creating the same, passed March 23, 1868 (and the several acts amendatory thereof)," etc. It is the university organized by the act of 1868, and not the regents—one of its constituent parts—which the Constitution declares to be a public trust. In *Foltz v. Hoge*, 54 Cal. 28, and *People, Hastings, v. Keweenaw*, 69 Cal. 215, where the status of the Hastings College of Law as an affiliated college of the university was considered, this court seems to have treated the university as a state institution to which a college might be attached under the organic act of 1868. Looking to the origin and purposes of the university, and the constitution and legislation respecting it, we cannot doubt its existence as an entity capable of taking by bequest. It is a governmental agency created by the lawmaking power, and endowed with very important functions,

which it has been exercising for a long period of years. It may be unique, but it is nevertheless an instrumentality of the state, created by the legislature acting within its just powers. That the regents are by law made the governing body of the university, and are required to incorporate under the laws of the state, is by no means inconsistent with the continued existence of the university as a public corporation; and the fact that the organic act in terms provides that grants and gifts may be made to the regents and to the state, and does not provide in terms that grants and gifts may be made to the university, does not, in our opinion, indicate that it was intended that the university was to be incapable of taking by gift, grant, or bequest. The organic act leaves the property of the university with it, and only gives to the regents the custody and control of it. Mr. Justice Story, in the *Dartmouth College Case*, 4 Wheat. 518, 4 L. ed. 629, said: "Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties, and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. . . . For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation; so, an hospital created and endowed by the government for general charity." And he adds that the reasoning by which private and public corporations are distinguished applies in its full force to eleemosynary corporations such as colleges and hospitals. Mr. Morawetz describes the difference between private and public corporations as radical, the former being associations formed by voluntary agreement of their members, while of the latter he says they "are not voluntary associations at all, and there is no contractual relation between the corporators who compose them; they are merely government institutions, created by law, for the administration of the public affairs of the community." Morawetz, Priv. Corp. 2d ed. § 3. To corporations proper, authors and courts have added a species called "quasi corporations," or "corporations *sub modo*"; i. e., associations and government institutions possessing only a portion of the attributes which distinguish ordinary public or private corporations. Id. § 6, 2 Kent, Com. p. 274. These quasi corporations may be either public or private, and are to be distinguished upon the same principle as ordinary corporations. It would seem clear enough that the university comes plainly within the commonly accepted definition of a "public corporation." It was founded by the state. Its original and primary endowment was by the United States, by grant to the state for this special purpose. All its property is property of the state. It was created by the state, and is subject to the laws of the state, as a state institution, within the limits of the new Constitution, which

has declared it to be a public trust, and that its organization and government shall be perpetually continued in the form and character prescribed by the organic act. This latter act is the charter of the university. In many respects it is modeled after the Dartmouth College charter. But in the Dartmouth College charter all doubt was removed as to what constituted the corporate body, by the terms of the charter itself, in which the trustees were made the body corporate "by the name of the Trustees of Dartmouth College," and the letters patent were to the trustees. 4 Wheat., *supra*. In the present case the law created the university, and, while it provided for a governing body called "regents," it did not create or designate them as the body corporate, as the charter created the trustees of Dartmouth College. The university was created first, and the trustees became incorporated afterwards, as was directed in the organic act. But the act nowhere provides, in terms or by implication, that when incorporated the regents should become, and thereafter be, the university.

Respondents' counsel seems to think it an absurdity to suppose that it was intended by the legislature to give any sort of corporate existence to an institution officered only by a president, treasurer, secretary, and land agent. It is altogether too narrow a view of the university to say that it is composed only of these officers. The organic act declares that it shall consist of various colleges of arts, letters, and such other professional and other colleges as may be added thereto or connected therewith. Included in these are colleges of agriculture, mechanic arts, mines, civil engineering, medicine, and law. The property previously belonging to the College of California, now the site of the university, was conveyed to the state "for the benefit of the State University," and said college was to go out of existence "as soon as the state shall organize the university." The regents are in fact a part of the university, with specifically defined powers in their custody and control of the property and the management of university affairs. The act designates them "The Regents of the University of California." It may seem anomalous that the law should require the regents to incorporate, or that we should have apparently a corporation within a corporation; but the legislature created the university upon that plan, and, however novel it may be, the power existed in the legislature, not only to create the university, but to prescribe the mode and manner of the exercise of its functions. I can conceive of no imperative necessity for the requirement that the regents should incorporate, but that it was so required did not change their relation to the university. It only endowed the regents with certain corporate powers, and prescribed the mode and manner by which they were to exercise the control given them over the affairs of the university. They have no duties or powers beyond the purpose of their creation, which was to take the custody and control of the university property, and to perform certain prescribed duties in the 44 L. R. A.

management of the university. The law intrusts "the immediate government and discipline of the several colleges" to their respective faculties, "to consist of the president and the resident professors of the same." These faculties are part of the university, and not of the regents. All endowments are to the university, and all funds, whether coming directly to the regents, to the state, or to the university, are for the benefit of the university. Indeed, the central idea of the law was to create and organize a state university, upon broad lines of expanding usefulness. How this university, when created, was to be managed and controlled—the machinery to be provided in its organization for the purpose of practically carrying out the design—was for the legislature to determine. I cannot regard the regents as a legal corporate entity, except as a part of, and ancillary to, the parent and principal institution,—the public corporation created by law as such, and entitled "The University of California." It cannot be doubted that a legislative appropriation to the university would be a legal appropriation available and enforceable; and, if it is capable of taking by appropriation in that name, it is capable of taking by grant or bequest. A recent and important appropriation to the university is found in the act of February 27, 1897 (Stat. 1897, p. 44). It provides that, "in addition to all other sources and means of support . . . of the University of California, there is hereby levied, annually, . . . an 'ad valorem' tax of one cent on each \$100 of value of the taxable property of the state . . . for the use and support of the University of California." Section 1. This money must be paid into the state treasury, and "converted into the State University fund" (§ 3), and "must be applied only for the uses and purposes of the University of California" (§ 5). This money may be drawn out upon the order of the board of regents, but, when paid out by the state treasurer, it must be made "payable to the order of the treasurer of the University of California, out of said 'State University fund.'" Section 4. This is clearly an appropriation of money to and for the uses of the university, and it goes from the state into the hands of the treasurer of the university, and to our minds is an unmistakable legislative recognition of the public corporation created by the act of 1868, called "The University of California."

I have examined the reported cases decided by several states and territories of the Union where the congressional grant has been taken advantage of, and institutions similar to the University of California have been created. These institutions differ in some respects from each other in the machinery of their organization, and in none of them do I find an exact parallel with the university of this state. But everywhere the courts have held them to be public corporations. *University of Alabama v. Winston*, 5 Stew. & P. (Ala.) 17; *University of North Carolina v. Maultsby*, 55 N. C. (2 Jones, Eq.) 241; *State, Atty. Gen., v. Knowles*, 16 Fla. 577; *State, Little, v. Regents of University*,

55 Kan. 389, 29 L. R. A. 378; *Oklahoma Agri. & Mechanical College v. Willis*, 6 Okla. 593, 40 L. R. A. 677; *Dunn v. University of Oregon*, 9 Or. 357. The Oklahoma court said: "It seemingly needs no argument to show that the public educational institutions of a state are as much a part of its sovereignty as are its counties." In speaking of the university of that state, the Oregon court said: "It is true, the legislature has not declared it to be a corporation in express terms, but this was not essential;" and so the Kansas court spoke of the university as a public corporation created to carry on special work for the benefit of the state or the public interest.

2. Respondents contend (1) that the university not being expressly authorized by § 1275, Civil Code, it cannot take by will; and, (2) even if it could take, the bequest, being in its nature charitable, must not exceed one third of the distributable estate, under § 1313, Id. The university, as we have seen, is a public corporation "formed for scientific, literary, or solely educational purposes," and, if the statute includes such a corporation at all, it is by its terms capable of taking by will. *Bulmer's Estate*, 59 Cal. 131. Appellant contends that § 1313, Id., does not apply, because it is a general rule in the interpretation of statutes limiting rights and interests not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication; citing 1 Kent, Com. p. 460; *United States v. Hoar*, 2 Mason, 311; *Mayrhofer v. San Diego Bd. of Edu.* 89 Cal. 110; Bishop, Written Laws, §§ 103, 142; Sedgw. Stat. & Const. L. p. 395. There is nothing in the record from which we can determine whether the residue of the estate "exceeds one third of the estate of the testator." There is no

finding on this question of fact. As it will arise hereafter, however, the law governing the point should be stated. We do not think the principle upon which appellant relies should govern in this case. The university, while a governmental institution, and an instrumentality of the state, is not clothed with the sovereignty of the state, and is not the sovereign. As we understand the rule, it is only the sovereign that is exempt from the operation of statutes affecting its interest or rights. We think the statute applies to the university as a public corporation.

3. Respondents contend that the bequest has failed because the fund is inadequate to carry out the testator's original intent, and that the court has so found the fact upon sufficient evidence. The only evidence claimed by respondents to support this finding is the resolution of the regents. We cannot see that this resolution, which directs the investment of the fund, bequeathed by deceased, indicates its insufficiency. It was admitted that there was a chair of political economy of the university established in 1878, and now existing. Nor can we say that the residue (\$5,467.10) is necessarily insufficient for the purpose intended by the testator. Section 1317, Civil Code, provides that, where the intention of the testator "cannot have effect to its full extent, it must have effect as far as possible." Conceding that the probate court could nullify the bequest on the ground of inadequacy alone, there is no evidence to justify a finding that the gift has failed for this reason. The decree should be reversed.

We concur: **Haynes, C.; Gray, C.**

Per Curiam:

For the reasons given in the foregoing opinion, *the decree is reversed.*

GEORGIA SUPREME COURT.

Charity HEARD et al., Pliffs. in Err.,
v.

W. R. PHILLIPS, Jr., et al.

(101 Ga. 691.)

*1. In computing the number of days preceding the term of court in which a petition must be filed to make it returnable to that term, the Sundays intervening between the date of filing and the commencement of the term are to be counted; and this is true even if the twentieth or last day before the commencement of the term falls on Sunday.

*Headnotes by **LITTLE, J.**

NOTE.—The above case holding that possession of a vendee is adverse within the meaning of a statute restricting the sale by an administrator of property held adversely, although it is not adverse for the purpose of prescription, presents a distinction that seems to be novel.

For the character of such possession, see also cases in note to *Erck v. Church* (Tenn.) 4 L. R. A. 645.
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2. Where a transferee of a bond for titles has taken a deed from the obligor of the bond, and brings a suit to recover the possession of the premises so conveyed to him from one who acquired possession under the original obligee, he being dead at the time of the trial, the defendant does not fall within any of the classes of persons excluded as witnesses by the terms of § 1 of § 5260 of the Civil Code.

3. The possession of one who has been admitted under a bond for titles to land is not adverse to the obligor of the bond, or the representatives upon his estate, in the sense that such possession may be the foundation of a prescription; but where, in pursuance of such a bond, the obligee has been admitted into possession, and the obligor dies, the possession so obtained is adverse in the sense that a sale of such property by the administrator upon the latter's estate pending such possession is void, and one who takes a conveyance at such sale cannot in his own name, by force of such conveyance, maintain an action against the person so holding possession.

4. So far as the assignments of error upon rulings made in the court below are properly presented for consideration, there was no error of law committed, except upon the questions dealt with in the second and third headnotes.

(July 9, 1897.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of plaintiffs in an action to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. Robert L. Rodgers, for plaintiffs in error:

Exchange of lands and possession taken give perfect equity.

Temples v. Temples, 70 Ga. 480.

Emma Jones took this land in possession by an exchange; her equity is perfect, and a due administration on this property as the property of Emma Jones, and a sale of it by the administrator after due and legal notice, and no claim having been interposed by Phillips, would operate in such case as a legal and complete estoppel against Phillips.

Code, § 3753 (2906); *Hill v. Williams*, 33 Ga. 39; *Lynch v. Lively*, 32 Ga. 575; *Tompkins v. Philips*, 12 Ga. 52; *Means v. Sanders*, 14 Ga. 113; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *Goodson v. Beacham*, 24 Ga. 150; *Roe v. Doe*, 31 Ga. 544.

When Wash Holland, as administrator of Emma Jones Woodley, sold the land, it was bought in by Allen Holland, and Phillips did not interpose any claim. He had notice from the several citations as prescribed by law, in Code, §§ 2559, 2560, 2561.

Emma Jones Woodley held the land adversely to Swift & Lamar, and against Burkhart as administrator of Swift, and was holding adversely to Phillips at time of her death, and it was necessary for Burkhart to have recovered the possession before he could make his deed as administrator of C. T. Swift, to Mrs. Lena B. Swift, the property being then held adversely to the estate by a third person.

Code, § 2564.

Messrs. Arnold & Broyles, for defendants in error:

Phillips & Co. were not parties to administration of Wash Holland on Emma Jones Woodley, and were not bound nor estopped by anything that might have been done by Wash Holland. Emma Jones Woodley never had any title, and her administrator could give none.

The bond for title, after having been assigned to Phillips, conveyed whatever interest the obligees had, and was properly admitted as against the obligees or those claiming under them.

Little, J., delivered the opinion of the court:

1. The present suit was filed on August 14, 1894, and made returnable to the September term of Fulton superior court, which by law met on the first Monday in September, which Monday was the 3d day of that month. The cause coming on for a hearing, defendants' counsel moved to dismiss the 44 L. R. A.

same, on the ground that the suit had not been filed for the length of time required by law—that is, twenty days—before the sitting of the court for the September term. This motion was overruled, and is made a ground of exception in the motion for a new trial. The contention is that the Sunday preceding the sitting of the court on Monday cannot legally be counted in computing the number of days intervening between the filing of the petition and the commencement of the term of the court. This court has heretofore made a ruling directly on this point, which is adverse to the contention of the defendants' counsel. See the case of *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, 38 L. R. A. 749, wherein it was ruled that, "under an act providing that all cases brought in a designated city court should be 'returnable to and triable at the term next ensuing after twenty days have elapsed from the filing,' a case in that court, the declaration in which was filed on the 12th day of June, 1894, was ripe for trial at the ensuing July term, which began on the first Monday of that month. This is true although the last of the twenty days prescribed by the statute in this instance fell upon the Sabbath day." The effect of this ruling is that the Sundays intervening between the date of filing and the commencement of the term are to be counted.

2. Phillips brought an equitable petition involving a complaint in the nature of an action of ejectment against the defendants to recover possession of a house and lot in the city of Atlanta, and prayed, also, therein for other relief. Both plaintiff and defendants claimed title under C. T. Swift and H. J. Lamar, Jr. Phillips claimed under a bond for titles, executed by the last-named parties to one John Wright, conditioned to make title to him upon the payment of an aggregate sum in monthly instalments of given amounts. Upon this bond appears a transfer and assignment of the same by Wright to James M. Jones, who in turn transferred and assigned the same and all his rights thereunder to the plaintiff. He also relied for recovery on a deed from Burkhart, as administrator of C. T. Swift, to Mrs. Lena B. Swift, under an order from the court of ordinary, conveying to her a half undivided interest in the land in dispute; and a deed from Mrs. Lena B. Swift and H. J. Lamar, Jr., conveying the land in question to himself. The defendants founded their claim upon the contention that during the lifetime of James Jones his wife, Emma, a daughter of Allen Holland, was the owner of another lot, and with the same, or its proceeds, traded with John Wright for the lot in controversy, and the bond for titles ought to have been transferred by Wright to her, as her money paid for it; that, after the death of James Jones, his wife, Emma, remained in possession of the lot in controversy until her death, she having in the meantime married defendant Woodley; and that after her death the land was administered upon as her estate, and regularly sold at administrator's sale to Allen Holland, under whom Charity Heard was in possession when the

suit was brought. It was further contended that the transfer of the bond for title by James Jones to plaintiff was made only as security for a loan of \$18, or some such sum of money. It appears that John Wright, the original obligee in, and James Jones, the intermediate transferee of, the bond for titles introduced in evidence by the plaintiff, were both dead at the time of the trial. During the progress of the trial Charity Heard and Allen Holland, defendants, were introduced as witnesses, and, among other things undertook to testify, respectively, as to certain transactions occurring between them and James Jones and John Wright during their lifetime, whereupon plaintiff's counsel objected to their testifying to anything that transpired between them and the deceased parties, for the reason, as urged, that plaintiff was claiming under said deceased parties, and Charity Heard and Allen Holland were parties to the suit, and therefore incompetent to testify concerning such transactions, under the provisions of the evidence act of 1889, as amended by subsequent acts; the provisions of all of which acts will be found codified in § 5269 of the Civil Code. The court below sustained the objection as made, and, we presume, rested his judgment upon the provisions of paragraph 1 of said section, the full text of which is as follows: "Where any suit is instituted or defended by a person insane at time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person." It will be noted that the plaintiff presented the bond for titles which had been transferred to him to Mrs. Lena B. Swift and H. J. Lamar, Jr., and upon payment by plaintiff of \$225 as the balance due upon the purchase price to Swift and Lamar they executed to plaintiff a deed conveying the land in dispute, and it was this deed which formed the foundation of the present action. Phillips was claiming under and suing upon this deed. True enough, the bond for titles constituted a link in the chain of title exhibited to the court, and upon which Phillips's claim rested. It served, however, merely to show the channel through which the plaintiff derived the title upon which his claim was finally based. His suit was not founded upon the transfer or assignment of the bond for titles, nor was he suing as an assignee or transferee thereof, within the meaning of the statute. Although the bond and transfers were needful in showing his chain of title, and were, with respect to the gravamen of the action, collaterally involved, yet the suit was directly upon the deed from Swift and Lamar to the plaintiff. We think the provisions of the statute apply only in cases where the action is instituted or defended directly by an indorsee, assignee, or transferee; that is to say, where the indorsement, assignment, or transfer is directly sued upon or defended. We conclude, therefore, that the court erred in sustaining the objection to the compe-

tency of the witnesses heretofore referred to.

3. John Wright made a contract of purchase of the property in dispute from C. T. Swift and H. J. Lamar, Jr., taking their bond for titles, conditioned to make a conveyance of the property to him upon payment of the purchase price. Under this contract of purchase and bond for titles he was admitted by Swift and Lamar into possession of the premises. Wright afterwards transferred and assigned the bond to Jones, who in turn transferred and assigned the same to the plaintiff. Pending the outstanding of this bond for titles, and before its conditions had been complied with and title made, C. T. Swift, one of the joint obligors, died. Administration was regularly taken on his estate by one Burkhart, and, it appearing that his intestate and H. J. Lamar, Jr., were tenants in common of the property in controversy, Burkhart, as administrator, under an order of the court of ordinary, conveyed a half undivided interest in the land in dispute to Mrs. Lena B. Swift, who then, as has been shown, joined Lamar in a deed to the plaintiff in pursuance of the terms and conditions of the bond for titles previously executed by C. T. Swift and H. J. Lamar, Jr., and held by plaintiff in the manner heretofore pointed out. It does not appear that the administrator made any effort whatever to recover possession of this property from the obligee in the outstanding bond before making administrator's deed to Mrs. Lena B. Swift. Our Civil Code (§ 3457) provides that "an administrator cannot sell property held adversely to the estate by a third person; he must first recover possession." It has several times been ruled by this court that the possession of one holding under a bond for titles to land is not adverse to the obligor of the bond, or the representatives upon his estate, in the sense that such possession may be the foundation of a prescription as against such obligor or his estate. *Hines v. Rutherford*, 87 Ga. 606; *Allen v. Napier*, 75 Ga. 275; *Hawkins v. Dearing*, 93 Ga. 108. Indeed, a vendee under a bond or contract for conveyance, though placed in possession by the vendor, does not hold adversely to the latter. By the very fact of taking under a bond or contract for a deed to be thereafter executed by the vendor, a purchaser recognizes the title of the vendor, and acknowledges himself as holding in subordination, and not in antagonism, to it. 1 Warvelle, Vendors, 201. It must be understood, however, that the obligor or his personal representative is not at liberty to treat the obligee as holding in subordination to the title of the obligor for all purposes. The doctrine is well settled, and has been announced in strong terms by the Federal courts, that, while the vendor without deed is a trustee of the vendee for the conveyance of the title, and the vendee in turn a trustee for the payment of the purchase money, yet that the vendee is in no sense a trustee of the vendor as to the possession of the property sold; that the vendee claims and holds it in his own right, for his own benefit, subject to no right of the vendor save the terms which

the contract imposes; and that his possession is therefore adverse as to the property, but friendly as to the performance of the conditions of the purchase. *Id.* 202; *Hobart v. Drogan*, 10 Pet. 108, 9 L. ed. 363. We are clearly of the opinion, therefore, that while the obligee in the bond from Swift and Lamar had, as to the latter, no such adverse possession of the premises as would enable him to acquire a prescriptive title thereunder, yet such possession was, within the meaning of our statute, adverse in the sense that a sale of any portion of the property by the administrator upon the estate of one of the obligors, pending such possession, and without first having recovered the possession as required by the statute, was void. It follows, therefore, so far as this record shows, that the legal title to an undivided half interest in the premises in dispute still remains in the estate of C. T. Swift, the administrator's deed to Mrs. Lena B. Swift being void, and consequently ineffectual to pass the title out of said estate. It being incumbent upon the plaintiff to recover upon the strength of his own title, and he having failed to exhibit title covering the undivided interest in the property belonging to the estate of C. T. Swift, the court erred in directing a verdict for the plaintiff covering the entire premises.

4. In addition to the questions above considered, the motion for new trial contains several assignments of error upon rulings made in the court below; but, in so far as these assignments of error are properly presented for consideration, there was no error of law committed except as herein pointed out.

Judgment reversed.

EXCHANGE BANK OF MACON, *Piff. in Err.*,
v.

Edward LOH, Admr., etc., of John D. Hudgins, Deceased, *et al.*

(104 Ga. 446.)

*1. A creditor has, for the purpose of indemnifying himself against loss, but for no other, an insurable interest in the life of his debtor.

2. This interest cannot exceed in amount that of the indebtedness to be secured. (a) Such indebtedness may, however, include the cost of taking out and keeping up the insurance, if made a charge against the debtor or his estate, or upon the proceeds of the policy when collected.

3. Courts should not concern them-

*Headnotes by LUMPKIN, P. J.

NOTE.—As to insurable interest in debtor's life, see also *Rittler v. Smith* (Md.) 2 L. R. A. 844, and note; *Ulrich v. Reinoehl* (Pa.) 13 L. R. A. 433, and note; *Hays v. Lapeyre* (La.) 35 L. R. A. 647, also *Fisher v. Donovan* (Neb.) post, 383.

As to right to take life insurance for benefit of a stranger, see *Heinlein v. Imperial L. Ins. Co.* (Mich.) 25 L. R. A. 627, and note. 44 L. R. A.

selves with the disposition of the proceeds of "wagering" policies.

4. The evidence in the present case warranted a finding that the policy in question was not of this character, but that it was in good faith taken out by the insured himself, and by him assigned to his creditor as collateral security merely; and the judgment rendered was not contrary to law.

(July 18, 1898.)

ERROR to the Superior Court for Bibb County to review a judgment refusing to adopt the suggestion of the Exchange Bank of Macon as to the method of marshaling securities held by it for a debt of Hudgins in a proceeding by Hudgins, administrator against creditors of the estate to marshal the assets. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bacon, Miller, & Branson, for plaintiff in error:

Life insurance is not a contract of indemnity, even when taken out by a creditor upon his debtor's life.

Rawls v. American Mut. L. Ins. Co. 27 N. Y. 282, 84 Am. Dec. 280; *Ferguson v. Massachusetts Mut. L. Ins. Co.* 32 Hun, 306; *Olmsted v. Keyes*, 85 N. Y. 593; *Salt v. Northampton* [1892] A. C. 1; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192.

The creditor has an insurable interest in the debtor's life as soon as the relation arises, and can take out insurance on such life to secure his debt, provided the amount of insurance bears a reasonable relation to the amount of the debt.

Olmsted v. Keyes, 85 N. Y. 593; *Hearing's Succession*, 26 La. Ann. 326; *Grant v. Kline*, 115 Pa. 618. See also *Dalby v. India & L. Life Assur. Co.* 15 C. B. 365; *Morrell v. Trenton Mut. L. & F. Ins. Co.* 10 Cush. 282, 57 Am. Dec. 92.

The relation of debtor and creditor need only exist at the time the insurance is taken out, and the contract is not affected by the subsequent payment of the debt by the debtor prior to his death.

Rawls v. American Mut. L. Ins. Co. 27 N. Y. 282, 84 Am. Dec. 280; *Wright v. Mutual Ben. Life Asso. of America*, 118 N. Y. 237, 6 L. R. A. 731; *Mowry v. Home L. Ins. Co.* 9 R. I. 346.

Where the creditor himself insures the life of his debtor in a reasonable amount for the purpose of securing his debt, and the debtor is not liable either to the creditor or the company for the premiums, the creditor is entitled to the entire fund upon the death of the debtor.

Anick v. Butler, 111 Ind. 578, 60 Am. Rep. 722; *Rittler v. Smith*, 70 Md. 261, 2 L. R. A. 844; *Corson's Appeal*, 113 Pa. 438, 57 Am. Rep. 479; *Ulrich v. Reinoehl*, 143 Pa. 238, 13 L. R. A. 433; *Grant v. Kline*, 115 Pa. 618; *Morland v. Isaacs*, 20 Beav. 389; *Freem v. Brade*, 2 DeG. & J. 582; *Levy v. Taylor*, 66 Tex. 654; *Lewis v. King*, 44 L. J. Ch. N. S. 259; *Bruce v. Garden*, L. R. 5 Ch. 32; *Central Nat. Bank v. Hume*, 128 U. S. 204, 32 L. ed. 375.

See also 44 L. R. A. 383; 45 L. R. A. 243; 46 L. R. A. 506.

Messrs. Hardeman, Davis, & Turner, for defendants in error:

Originally at common law the contract of life insurance might be supported without any insurable interest in the life of the insured.

1 May, Ins. 3d ed. §§ 116, 374.

The courts of the United States refused to adopt this principle of the common law. Insurance upon the life of another by one who has no interest in the life of the assured is prohibited, and such policies are void.

Code, §§ 2090-2114; 1 May, Ins. 3d ed. §§ 74, 75b, 117.

Such a policy is void because it is contrary to public policy.

1 May, Ins. 3d ed. §§ 74, 75.

Authorities are conflicting as to whether a person without interest in the life of the assured can legally hold by assignment a policy legally issued. The better authority, however, seems to be that for the same reason why one cannot take out a policy upon the life of one in whom he had no interest he cannot legally hold said policy by assignment.

Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; *Equitable L. Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217.

A creditor has an interest in the life of his debtor, but his interest extends only to the amount of his debt; hence as between the creditor and his debtor he is entitled to insurance only for indemnity.

Knox v. Turner, 21 L. T. N. S. 701, L. R. 9 Eq. 155; 1 May, Ins. 3d ed. §§ 2, 7, 8; *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244.

When the insurance contracted for is legal at its inception, it ought not to become void by the cessation of the assured party's interest in the life of the insured, for the reason that, the company having received its premiums with full notice of the facts it ought to be compelled to comply with its contract.

Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; *Equitable L. Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217.

But when the insured's interest in the life has ceased, as, for instance, a creditor whose debt has been paid, he cannot recover for himself upon the policy, for that would be allowing him to do by indirection what public policy forbids him to do directly, to wit, carrying insurance upon the life of a person in whom he has no interest.

1 May, Ins. 3d ed. §§ 100-100a; *Crotty v. Union Mut. L. Ins. Co.* 144 U. S. 621, 36 L. ed. 566.

When the interest of the insured in the life of the assured ceases, what should become of the policy? It being legal and valid in its inception the law will, presuming that there was no intention to defraud the insurance company, cast the policy upon the assignee as trustee for the estate of the assured, and will require said trustee, after reimbursing himself for all expenses, to pay the balance to the estate of the insured, on the principle that it is merely carrying out 44 L. R. A.

what was the real intention of the parties at the time of making the contract.

2 May, Ins. 3d ed. § 459a; *Cheeves v. Anders*, 87 Tex. 287; *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Page v. Burnstine*, 102 U. S. 664, 26 L. ed. 268; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Equitable L. Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217.

This rule is true justice.

Seigrist v. Schmoltz, 113 Pa. 326.

We have found no decision that would allow the creditor to do as the Exchange Bank insists it has the right to do,—to hold the amount collected upon the policy and to make the estate pay the debt in addition.

Lea v. Hinton, 5 DeG. M. & G. 823; *Ex parte Andrews*, 1 Madd. 573.

If a creditor has that right he would have a double temptation to the commission of a crime,—to collect his debt twice, and surely this would be against the policy of the law.

1 May, Ins. 3d ed. § 100a.

Messrs. Ryals & Stone, Hill, Harris, & Birch, Steed & Wimberly, A. W. Lane, Guerry & Hall, Dessau, Bartlett, & Ellis, Dasher, Park, & Gerdine, Morcock & Warren, and L. D. Moore also for defendants in error.

Lumpkin, P. J., delivered the opinion of the court:

It is provided in § 2114 of our Civil Code that a policy of life insurance may lawfully be taken out only upon the life "of the assured, or of another in whose continuance the assured has an interest." It is well settled that a creditor has an insurable interest in the life of his debtor, but the nature and extent of this interest have become a seriously complicated question. Much of the confusion now surrounding this subject is, we think, attributable to two erroneous views which have been entertained and announced by quite a number of the most respectable courts and judges in this country. The first is that a contract effecting insurance upon the life of a debtor for the benefit of a creditor is not a contract of indemnity; and the second is that the creditor's insurable interest in the debtor's life is not confined strictly to the amount of the indebtedness to be secured. Before proceeding further, it may be remarked that the form in which the transaction is clothed is utterly immaterial. It makes not a particle of difference whether the policy be payable to the insured, or his estate, with an assignment to the creditor, or payable directly to the creditor as the nominated beneficiary. The real thing to be ascertained in any given instance is, what was the actual object of the parties, for by this test alone is the legality of what they did to be determined.

1. Our first proposition is that effecting insurance for the purpose of securing an indebtedness is a contract of indemnity, and nothing else. We have the utmost confidence in the correctness of this assertion. Indemnity is the only logical end to be attained by a transaction of this kind. What possible right has a creditor to be the beneficiary of such insurance except to protect

himself against loss? And what is such protection, if not indemnity? Notwithstanding the fact that eminent jurists have held otherwise than as above laid down we cannot help thinking that this is a very plain proposition, and one as to which there ought to be no serious difference of opinion. We will cite a few of the great array of authorities which we could produce in support of our position, making, as we proceed, such comments as may seem appropriate.

In *Godsall v. Boldero*, 9 East, 72, we find the following: "A creditor may insure the life of his debtor to the extent of his debt, but such a contract is substantially a contract of indemnity against the loss of the debt." Lord Ellenborough said: "This assurance . . . is, in its nature, a contract of indemnity, as distinguished from a contract by way of gaming or wagering"; and, in this connection, he quoted a pertinent extract from Lord Mansfield's opinion in *Hamilton v. Mendes*, 2 Burr. 1210. It is true that in the latter case Lord Mansfield was dealing with a case of marine insurance, and it is also true that the *Godsall Case* was subsequently overruled; but it is apparent that Lord Ellenborough thought the doctrine of the marine insurance case was applicable to the life insurance case which he had under consideration; and in this view we concur. Whenever it is admitted that a contract of life insurance made for the benefit of a creditor is not one having indemnity for its object, we necessarily stamp it as a purely wagering contract. There is much reason for the position that even ordinary contracts of life insurance, whereby a man insures his own life for the benefit of those dependent upon him, are contracts for indemnity merely; but we do not care to enter upon a discussion of this question, or assail the great current of authority tending to establish the contrary, this being a matter not involved in the case now before us. Accordingly, we will adhere strictly to our text, which is that life insurance effected to secure a debt is, and can be, for nothing else but indemnity against loss. A creditor secured by a policy of marine or fire insurance can collect thereon, for his own benefit, so much only as will save him from actual loss; the precise amount of which is easy of ascertainment. The interest of a creditor holding as security a life policy can be as readily computed in dollars and cents, being properly measured by the amount of the debt, which, as we shall, before concluding, endeavor to show, constitutes the sole basis of his insurable interest. How, then, can it be said that it would be against public policy to allow a creditor to speculate upon the mere chance of property being destroyed by the dangers of the sea or by fire, and not equally repugnant to public policy for him to speculate upon the life of a fellow creature? And if the creditor protected by the life policy can lawfully stipulate for anything more than indemnity, what prevents the transaction from being a speculation, pure and simple? We are at a loss to perceive any rational distinction between life and marine or fire insurance in so far as the 44 L. R. A.

supposed right of a creditor to effect insurance beyond the extent of his insurable interest is concerned. Surely, in view of § 2117 of our Civil Code, which declares that the principles governing "fire insurance, wherever applicable, are equally the law of life insurance," this court would not be justified in giving recognition to any such intangible and specious distinction.

In Porter, Ins. 2d ed. p. 13, it is said that a creditor who insures his debtor's life "obtains a contract of indemnity against the loss of his debt by the death of the debtor before it has been paid," and that "in such a case the debt is not a mere excuse for the policy, but the securing of the debt, or indemnification against its possible loss, is the reason for the insurance being effected." This author says that Lords Mansfield and Ellenborough "both undoubtedly considered that insurance *sur autre vie* was a contract of indemnity," and that the case in 9 East was decided upon this view. He then refers to the fact that this case was overruled in *Dalby v. India & L. Life Assur. Co.* 24 L. J. C. P. N. S. 2, 15 C. B. 365, and *Law v. London Indisputable Life Policy Co.* 24 L. J. Ch. N. S. 196, 1 Kay & J. 223, and asserts that the decision in the first of these two latter cases was based upon a misinterpretation of the English "gambling act," and divers misconceptions of the real nature of a contract of life insurance effected for securing a creditor. See Porter, Ins. 2d ed. pp. 14, 15. On page 17 he states that a policy of insurance taken out by a man on his own life has been settled not to be a contract of indemnity, "but to be a contract by the insurer to pay a certain sum on the happening of a given event,—usually the death of the assured, or his attaining a certain age,—and the sum will not vary with reference to the greatness or smallness of the loss to the family of the assured." This alleged distinction between ordinary life insurance which a man takes out for the benefit of his family and that taken out for, or assigned to, a creditor for his protection, was recognized as correct by the Supreme Court of the United States in *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, but it was therein distinctly laid down that the latter was a contract of indemnity. Mr. Chief Justice Fuller said (page 205, 128 U. S. 32 L. ed. 375); "Marine and fire insurance is considered as strictly an indemnity; but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, nevertheless the contract is also a contract of indemnity. If the creditor insures the life of his debtor, he is thereby indemnified against the loss of his debt by the death of the debtor before payment." This high court had previously, in at least one case, recognized the correctness of the doctrine that life insurance for a creditor's benefit was a contract for his indemnity. "In cases where the insurance is effected merely by way of indemnity,—as

where a creditor insures the life of his debtor for the purpose of securing his debt,—the amount of insurable interest is the amount of the debt.” Mr. Justice Bradley, in *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 461, 462, 24 L. ed. 254. An assignment of a life insurance policy for the purpose of securing a creditor is “for his indemnity.” 13 Am. & Eng. Enc. Law, p. 648. “A creditor’s claim upon the proceeds of insurance intended to secure the debt should go no further than indemnity, and all beyond the debt, premiums, and expenses should go to the debtor and his representative, or remain with the company, according as the insurance is upon life or on property.” 2 May, Ins. 3d ed. § 459a.

In view of the foregoing authorities and of the sound sense and reason of the rule they lay down on this subject, it is difficult to understand how there can be any doubt that an insurance policy upon a debtor’s life, held by a creditor as security for a debt, is simply and merely, so far as the latter is concerned, a contract for indemnifying him against loss. To our minds, no other view of this matter can be accepted as sound. We could, as already intimated, produce many citations to the same effect as those appearing above, but we do not think this is necessary, for we are satisfied that, if our first proposition really required demonstration, it stands proved.

2. A single step carries us easily and naturally to the next proposition we are to consider, which is that the insurable interest which a creditor has in the life of his debtor cannot exceed in amount that of the indebtedness to be secured. Before proceeding with this discussion, we will briefly explain the meaning of the word “indebtedness,” as here used. We wish to be understood as employing it in a liberal sense, and, accordingly, as holding that it may embrace, not only a debt or debts actually existing when the insurance is taken out by the debtor, or is thereafter assigned to the creditor, but also additional indebtedness to arise upon the making of further loans or advances by the creditor to the debtor; such, for instance, as cash for premiums to be paid in obtaining the policy, or in keeping it alive. Manifestly, if expenses thus incurred by the creditor are made a charge against the debtor or his estate, the creditor may, by agreement, hold the policy as security therefor, and look to its proceeds for his reimbursement. The same is also true if such expenses, though not made a debt generally against the debtor or his estate, are made a charge upon the money to be realized from the policy; for this, in effect, is making the cost of the insurance ultimately payable out of a fund which in law primarily belongs to the debtor’s estate subject to the creditor’s right to so much thereof as he is entitled to receive upon his secured claim or claims against the deceased. A creditor cannot, however, rightfully appropriate the proceeds of a policy held by him as a collateral security to the repayment to himself of sums voluntarily paid by him for premiums for which the debtor was in no way liable, and 44 L. R. A.

which could not lawfully be made a demand against his estate or its assets. If a creditor desired protection by way of insurance upon his debtor’s life, and chose to pay for it himself, this would be proper enough; but the insurance would be available to the creditor to no greater extent than the amount of his insurable interest at the time the insurance was effected, viz., the amount of the then existing indebtedness.

We will now undertake to show that, whenever it is attempted to give to a creditor or any greater insurable interest in a debtor’s life, the transaction becomes a wagering contract. If one cannot, for his own benefit, insure a life in which he has no interest at all, why does not insurance for a creditor’s benefit, when effected for anything beyond indemnity,—the right to which gives the creditor his insurable interest,—stand upon the same footing? Whenever a creditor undertakes to stipulate for more than the amount of his just demands, what distinguishes the transaction from a wagering contract, pure and simple, having for its object speculative gain? If he can lawfully take one dollar more than the amount of his debt, why can he not take any number of dollars within the limits of the policy? Where, and upon what principle, is the line to be drawn? An examination of scores of cases bearing upon every conceivable phase of these questions has satisfied us that it has become a difficult, if not an impossible, task to make the daylight of truth shine so clearly upon the complicated and conflicting mass of decisions as to bring into clear view the correct rule relating to this class of insurance. A hurried examination of the cases cited in this opinion would disclose that the courts of this country have indulged in quite a variety of holdings thereon. An exhaustive list of all the cases touching upon the subject, with even a brief comment upon each, would unduly expand this opinion, if, indeed, it did not make it fill a volume of our reports. The language quoted *supra* from the opinion of Mr. Justice Bradley in the case cited from 94 U. S. shows that he thought the amount of the creditor’s insurable interest was to be measured by the amount of the debt. In *Roller v. Moore*, 86 Va. 517, 518, 6 L. R. A. 136, Lacy, J., said: “To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy.” The supreme court of Tennessee, in *Rison v. Wilkerson*, 3 Sneed, 565, held that a creditor to whom had been assigned a policy issued to his debtor could retain of its proceeds no more than the amount of the original debt and certain premiums paid by the creditor to keep the policy alive. *Coon v. Swan*, 30 Vt. 6, is a case supporting the doctrine that a creditor cannot lawfully keep any more of the proceeds of a policy insuring a debtor’s life, and collected by the former, than the amount actually due by the debtor, although the policy was payable to the creditor, and the contract between the parties undoubtedly contemplated that the creditor might make a profit by the transaction. In *Cheeves*

v. *Anders*, 87 Tex. 287, it was held that "the limit of interest of a creditor in a policy upon the life of his debtor is the amount of such debt and interest, plus amount expended to preserve the policy, with interest thereon." The following are extracts from 13 Am. & Eng. Enc. Law: "Where the assignment is for the purpose of securing a creditor, although he is entitled to recover the face of the policy, he cannot hold what is not necessary for his indemnity. The legal representatives of the debtor will be entitled to the balance." Page 648. "Where insurance is effected on the life of a debtor in favor of a creditor, whether by the debtor himself or the creditor, and whether the premiums are paid by the debtor or the creditor, the latter, on the death of the former, is entitled to the amount of his debt and premiums, and the representatives of the debtor to the balance of the proceeds of the policy." Page 653. Bacon, in his work on Benefit Societies and Life Insurance, vol. 1, 2d ed. § 250a, says: "A creditor has an insurable interest in the life of his debtor, and can insure the life of the debtor without his consent, but such interest is limited to the amount of the debt." And see, in this connection, 2 May, Ins. 3d ed. § 459a, cited *supra*.

Giving to the word "indebtedness" the comprehensiveness above indicated, the following cases all to some extent sustain the rule for which we are contending,—that the creditor's insurable interest in the debtor's life cannot exceed the amount of the secured indebtedness: *American Life & Health Ins. Co. v. Robertshaw*, 26 Pa. 189; *Downey v. Hoffer*, 110 Pa. 109; *Ruth v. Katterman*, 112 Pa. 261; *Seigrist v. Schmoltz*, 113 Pa. 326; *Schonfield v. Turner*, 75 Tex. 324, 7 L. R. A. 189; *Equitable L. Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217; *Cawthon v. Perry*, 76 Tex. 383; *Lewy v. Gilliard*, 76 Tex. 400; *Goldbaum v. Blum*, 79 Tex. 638; *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Metropolitan L. Ins. Co. v. O'Brien*, 92 Mich. 584; *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Page v. Burnstine*, 102 U. S. 664, 26 L. ed. 268; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924. We do not, however, wish to be understood as asserting that these cases are closely in point, or as concurring in all of the rulings therein made,—certainly not in those whereby the courts undertook the distribution of funds arising from the collection of wagering policies. It is not essential to our present purpose to analyze these cases, discuss the various questions dealt with therein, or point out specifically the conclusions to which we do not assent. Without undertaking to do this, we simply cite them as containing decisions and *dicta* which, to a greater or less extent, recognize the correctness of our present contention. In the highest courts of at least two states—Maryland and Pennsylvania—efforts have been made to establish the proposition that a creditor may lawfully have insurance upon the life of his debtor in an amount greater than that of the debt secured, provided there is not a "gross disproportion" between these two amounts. The 44 L. R. A.

case of *Rittler v. Smith*, 70 Md. 261, 2 L. R. A. 844, was a suit by the administratrix of the insured to recover of a creditor the excess remaining in his hands after satisfying all his demands against the insured. It appears that the creditor, of his own motion, insured the life of his debtor, and paid all premiums. The debt was \$1,000. The policies, on their face, amounted to \$6,500, but, owing to certain stipulations therein, only \$2,124.82 was collected. The surplus amounted to \$474.53. The policies were issued in the name of the creditor, and, so far as appears, there was no understanding, express or implied, between him and his debtor, that the latter was, in any event, to have any interest in the policies or their proceeds. The court held that the creditor was entitled to the surplus. The decision was based on the ground that the creditor had a right to procure a policy on the life of his debtor, provided there was not "such a gross disproportion between the debt and the amount of the policy as to stamp the transaction with want of good faith, and as a mere speculation or wager," and that, accordingly, the entire proceeds of the policy belonged to the creditor. Such a "rule" would seem entirely too loose, and itself too "speculative," to admit of anything like a reasonable and practical application, even if it is to be considered as resting upon sound doctrine, rather than as repugnant to the spirit, if not directly opposed to the letter, of the law in regard to wagering contracts. The supreme court of Pennsylvania, in the case of *Cooper v. Shaeffer*, 11 Atl. 548 [9 Cent. Rep. 601, 20 W. N. C. 123,] held that, "where the disproportion between the amount of a policy taken out by a creditor on the life of his debtor and the debt thereby secured is very great,—as where the insurance is \$3,000 and the debt \$100,—it is the duty of the court to declare the transaction a wager, as matter of law." This case does not appear in the Pennsylvania state reports. In the opinion, Sterrett, J., characterizes as "a just and practical rule" a suggestion which Paxson, J., speaking for himself, had made in *Grant v. Kline*, 115 Pa. 618, to the effect that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of the life of the insured, according to the Carlisle Tables. In the subsequent case of *Ulrich v. Reinoehl*, 143 Pa. 238, 13 L. R. A. 433, a policy for \$3,000 was assigned to a creditor, absolutely, to secure a debt of \$110.02. The creditor at the trial offered evidence to show the expectancy of the deceased according to the Carlisle Tables, and expert testimony going to prove that, had deceased lived up to such expectancy, the total amount invested in the policy would have been \$4,336.31. In the opinion, which was delivered by the learned jurist last mentioned, he having in the meantime become chief justice, he undertakes to prove the correctness of the above-mentioned "rule"; it being thus stated: "A creditor may lawfully take out a policy of insurance

on the life of his debtor in an amount sufficient to cover the debt, with interest, and the cost of such insurance with interest thereon, during the period of the debtor's expectancy of life according to the Carlisle Tables; but, if such amount be exceeded, the policy may be a wagering transaction." The substance of the argument embodied in the opinion is that, if the principal and interest of the debt secured, the aggregate sum of the premiums which would have to be paid during the entire period of the expectancy of the insured, in case he lived out the same, and the interest on such premiums, would, all together, amount to a sum greater than the face of the policy, it would not be a wagering contract, but would be one if the chances were that the insured would not live out his expectancy, and there would be a consequent probability that the proceeds of the policy would exceed a sum representing the total cost of the policy and the amount of the debt. Among other things urged in support of the views above outlined, Chief Justice Paxson says: "It seems clear upon reason that the creditor may take out a policy in excess of his debt. But to what excess? The answer to this question obviously depends upon circumstances. An important element in the consideration of this question is the age of the assured. The difference between a policy on the life of a man twenty-five years of age and one of seventy-five is clear to the dullest understanding. The assured was only forty-two years of age, and his expectancy of life was twenty-six years. The chances were greatly in favor of his living out his expectancy. The Carlisle Tables were prepared with care by competent experts, and are the result of actual experience. I am therefore justified in saying that the chances were in favor of the assured living out his expectancy, in which case there would be the loss of interest on the debt for twenty-six years, added to the dues and assessments, with interest thereon for the same period. The evidence shows that, in such event, the defendants would have been losers by a considerable sum. In fact I infer from the tables furnished that after about seventeen years the defendants would have carried this policy at a loss. The defendants assumed this risk when they took out the policy. They also had the chance of the assured not living out his expectancy. This is a risk which an insurance company assumes upon every policy which it issues. In a particular instance the assured may live many years beyond his expectancy which is a large gain to the company. But this gain is equalized by the loss in instances where the assured dies before the expiration of his expectancy, so that, in the vast volume of business of such corporations, the average result is reasonably uniform. But the holder of a single policy can have no average result. He takes the risks with the chances fairly balanced." With the utmost respect we think this is fallacious reasoning. As stated by the distinguished chief justice, "All life insurance is, in one sense, speculative," and this remark applies to every policy. It is radically erroneous to say that

one average man has a greater or a less chance to live out his expectancy than another. The man of forty-two is no more apt to live out his expectancy of twenty-six years than the man of seventy-five is to live out his expectancy of seven years. Life insurance premiums are fixed relatively to the different ages and expectancies of the persons insured, and every company whose business is conducted on sound principles proceeds upon the theory that it must be the gainer in every risk where the insured lives out his expectancy and all the premiums are paid. Some live longer and others shorter periods, but the company looks to the average, and on the average basis it must take in more than it pays out, or else ultimately fail. Clearly, therefore, in every instance of life insurance there is a chance for the insured, or the person paying the premiums, to pay in more than the policy will bring back; and, as a consequence, there can, under the doctrine announced in Pennsylvania, be no such thing as a wagering policy. The test that the amount of a policy taken out to secure a debt must not be out of proportion to the amount of the debt with added premiums and interest thereon will not stand scrutiny for everyone carrying the burden of keeping up a life policy may, whether a debt be thereby secured or not, suffer loss by paying out more than is finally received on the policy. In the case of a man who insured his life for the benefit of his wife, and paid out in premiums more than the insurance company paid to her after his death, the loss would be the difference between the sum of the premiums, with interest, and the proceeds of the policy. If a creditor who held as collateral security a policy of life insurance, and paid the premiums under a contract with the debtor to be reimbursed therefor out of the fund to be realized by the payment of the policy, paid to the company more than it returned when the debtor died, which would inevitably be the case in the event the latter lived out his expectancy, and all premiums up to that time were duly met, this creditor, if the collateral was the only source to which he could look for satisfaction, would lose the difference between the amount received on the policy and the amount resulting from adding the sums representing the premiums, the interest thereon, and the debt; and this would be true whether the debt was great or small. If, for instance, one man loaned to another \$10, and insured the latter's life in the sum of \$50,000 to secure the debt, the creditor undertaking to pay the premiums, and the debtor (whether young or old) lived out his expectancy, and died, leaving no assets but the insurance money, the creditor would certainly lose the difference between the face of the policy and the sum of the premiums and the interest thereon, and would lose also the \$10 and the interest on that sum. If the debt thus created was \$25,000, the creditor's loss would, in that case, be greater by \$24,990 and interest than in the other. There would be no difference in principle between the two cases. It is therefore to be regretted that the Pennsylvania court, while declaring that there should be

"a fixed rule" for determining when a creditor was and when he was not obtaining an "excess of insurance," did not succeed in evolving a more satisfactory one. The truth is, there can be no sound rule on the subject which does not recognize the truth of the proposition that whenever a creditor stipulates for receiving more than indemnity upon a policy insuring his debtor's life he is engaged in a speculative venture, the gain from which, if successful, would be represented by the excess of a sum derived from the policy over the amount of the "indebtedness" thereby secured.

Enough has been said to make it clear that, with our views of the question under discussion, we cannot follow as sound the decision rendered by the supreme court of Indiana in *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 722, which was strongly relied on by the able counsel for the plaintiff in error. In that case the facts were as follows: "Frazee was indebted to Amick in the sum of about \$600." It was agreed between them that the creditor should take out a policy for \$2,000 in an assessment benefit association upon the life of the debtor, paying all expenses and premiums. This was done, the policy as issued naming the creditor, his heirs and assigns, as beneficiaries. "At the time the policy was issued it was orally agreed that if Frazee should at any time thereafter pay his indebtedness, and reimburse Amick for the cost of obtaining the policy and carrying the insurance, the latter would turn over the policy to the former." It did not appear, however, that there was any express understanding between them as to the disposition of the surplus (if any) after the death of the insured, in the event he had not paid off such demands. The creditor having collected the entire sum due upon the policy upon the death of his debtor, the latter's administrator brought an action to recover the surplus, which amounted to \$1,259.58." The court took the position that no intention to enter into a wagering contract was shown; that the policy belonged absolutely to the creditor, the stipulation as to paying off the debt not having been complied with by the debtor prior to his death; and therefore no part of the proceeds thereof could be claimed by the administrator upon the theory that the creditor held the same as trustee. It would seem that without any great strain the court might have construed the contract to be for indemnity merely, for it was not necessary that there should be any express stipulation as to the distribution of the proceeds. On the contrary, nothing as to this having been specifically agreed to, the law would raise a constructive trust, rather than treat the contract as a wager. That, as construed by the court, it was a wager, pure and simple, seems evident. By the early death of the debtor the creditor won a clean stake of over \$1,250; whereas, had the debtor continued to live insolvent to a ripe old age, the creditor would doubtless have lost a part or the whole of his entire debt, because forced to abandon his policy, or pay in assessments and premiums an amount equal to the whole face of the policy, 44 L. R. A.

which was only \$2,000, and consequently could not, according to the rule as to "gross disproportion," be considered as evidencing an attempt and intent to gamble. For a just criticism on the decision, see, again, 2 May. Ins. p. 1055, § 459a.

3. As already intimated, there are numerous cases in which the courts have dealt with life insurance policies as valid which ought, in our judgment, to have been treated as mere nullities. Some of these cases were actions against insurance companies upon what we regard as wagering policies, and others of them involved controversies over the proceeds of such policies which the insurance companies had voluntarily paid. No argument is required to show that, in cases of either character, the courts ought not to afford any relief whatever but should, in every instance, leave the parties exactly as they were before the litigation began. No court can properly concern itself with the enforcement of a contract which is contrary to public policy, and for that reason void, nor with the adjustment of alleged rights or equities growing out of such a contract. This doctrine is so thoroughly established and so universally recognized that it will not, we apprehend, be questioned; but it has evidently been too often overlooked by the courts in their efforts to do what they conceived to be "justice." Our Civil Code (§ 3688) declares that "a contract which is against the policy of the law cannot be enforced," and that "wagering contracts" are of this character. Whenever, therefore, it appears that a particular contract of life insurance falls within the prohibited class, no court of this state should have anything to do either with its enforcement or the distribution of its proceeds.

4. We will now apply the foregoing to the facts of the present case, a fair and accurate statement of which we find in the brief of counsel for the plaintiff in error, as follows: "John D. Hudgins was a merchant, residing in Macon, who had been carrying on there for many years a wholesale and retail liquor business. The Exchange Bank, plaintiff in error, had advanced him, at various times, large sums of money. In December, 1892, this indebtedness amounted to something over \$10,000, for which the bank held Hudgins's notes. To secure the payment of this indebtedness, Hudgins had given to the bank certain mortgages on both his real and personal property, including his stock of liquors. To further secure the bank, he had also taken out a policy of insurance on his life for \$1,000 in the Manhattan Life Insurance Company, and a policy for \$5,000 in the New York Life Insurance Company, both of which policies were duly assigned by him to the bank; and upon both of these policies Hudgins himself paid the premiums. These policies were recognized by both parties as being the property of Hudgins, transferred by him to the bank as collateral security for his indebtedness. In the latter part of 1892 Hudgins applied to one Winship, who was the general agent in Georgia for the Equitable Life Insurance Company of New York, for a policy of \$5,000. His ap-

plication was duly forwarded to the home office, and upon the request or instruction of Winship, and without the request, or even the knowledge, of Hudgins, the company sent out to Winship two policies of \$5,000 each on Hudgins's life. Upon the reception of the policies Winship endeavored to persuade Hudgins to take them both. Hudgins, however, would only accept the one for \$5,000 for which he had applied, and declined to take or accept the second or additional policy for \$5,000, and refused to pay the premiums due thereon, saying that the rate was so high he was not able to carry it. Upon this, Winship, knowing that Hudgins was indebted to the Exchange Bank, carried the second policy to J. W. Cabaniss, the cashier of the bank, stated to him the facts, and requested him to take the policy for the bank as a creditor of Hudgins, and pay the premiums thereon. This Cabaniss finally consented to do, provided Hudgins would execute the necessary assignment. This was done by Hudgins, Winship delivering the policy to the bank, and receiving from the bank the premium due thereon. Cabaniss had no conference or consultation with Hudgins about the transaction, either personally, by letter, or by messenger; and it was distinctly understood between Cabaniss, representing the bank, and Winship, representing the Equitable Life Insurance Company, that the policy was taken out by the bank for its own protection as a creditor of Hudgins, and that in no event was Hudgins to be liable for that premium, or any future premiums, either to the bank or to the insurance company. The demands for the subsequent premiums were made by the insurance company directly on the bank, and not against Hudgins, and they were paid by the bank, and were not charged against Hudgins upon the books of the bank, nor has any claim or demand ever been made by the bank for the payment of such premiums, either against Hudgins in his lifetime or against his estate. On the 12th day of March, 1894, Hudgins died intestate, and Edward Loh was appointed his administrator. Upon examination by the administrator, Hudgins's estate was found to be hopelessly insolvent, and on August 3, 1895, the administrator filed his equitable petition in Bibb superior court against the Exchange Bank and the various other creditors of Hudgins to marshal the assets of the estate, and to obtain the direction of the court as to the administration of the same. To this petition the Exchange Bank duly filed its answer, setting up the facts recited above. The case came on for trial on March 22, 1897, and by consent of all parties was heard by the presiding judge without the intervention of a jury. Upon the trial it appeared from the evidence that the debt of the Exchange Bank at that time amounted, principal and interest, to \$12,228.94. It was also shown that the proceeds of the policies collected by the bank from the New York Life and the Manhattan Companies, with interest thereon to the date of the trial from the date of collection, amounted to \$7,032.02, which left a 44 L. R. A.

balance due to the bank upon its claim of \$5,196.92. Upon this balance of \$5,196.92 the bank proposed to credit the net proceeds of the fund arising from the sale of the real and personal property, upon which it was admitted by all parties that the bank held the highest and best lien, and which fund amounted to \$4,537.78. This would have left a balance still due to the bank from the Hudgins estate of \$658.74, upon which final balance the bank proposed to credit a sufficiency of the net proceeds derived from the Equitable insurance policy to pay the same, and that it should retain as its own property the entire balance of the fund derived from such policy in the Equitable Company. The court refused, however, to allow the Exchange Bank to apply upon its claim any portion of the fund derived from the sale of the mortgaged properties until the bank had first applied as a credit upon its claim the entire proceeds of the fund derived from the Equitable policy; the court finding in its decree that, after making such credit of the Equitable fund, the estate would still be indebted to the Exchange Bank \$280.46, which the court decreed to be the highest and best lien to that extent, and no more, upon the fund of \$4,537.78, derived from the sale of the mortgaged properties. To be entirely clear, the exact ruling of the court on this point is given in the following language, quoted verbatim from the decree: "The court holding, finding, and decreeing that the proceeds of such Equitable insurance policy, after first reimbursing the bank for the premiums paid by it, with interest thereon, is the property of said intestate, Hudgins, and not the property of said Exchange Bank, and must, therefore, be credited upon the bank claim as above directed." It is only necessary to add that the insurance policy in question was payable to the estate of Hudgins, and that Cabaniss, the cashier, testified as follows: "What induced me to take out this third policy was the fact that the bank was practically carrying Mr. Hudgins's business, and had been for two or three years, probably longer, and his business had been getting worse, and I wanted all the protection that I could get in the carrying of his business, and I took this as additional protection." In answer to the question, "To what extent were you influenced in the taking out of that policy as an investment?" he said: "I regarded it as a good investment. He was quite an old man, and, in the ordinary course of life, would probably not live very long; and I thought, even as an investment, it would do to take."

From the foregoing it appears that there can be no dispute as to the following facts: (1) Hudgins was largely indebted to the bank, and, prior to the issuing of this policy, had assigned to it, as collateral security for his indebtedness, two other policies. (2) After this policy had been issued, he refused to accept it, when first tendered to him by the agent of the company. (3) Subsequently, he did accept it, for he could not have assigned it to the bank without so doing. (4) He made an absolute assignment of the policy to the bank. (5) The bank paid the first

premium, and took the policy for its protection as a creditor of Hudgins, the cashier also having in mind at the time that the policy was a good investment. (6) The bank paid all the premiums which accrued upon the policy before the death of Hudgins. They were not charged to him upon its books, nor was any demand ever made upon him or his estate for the payment of these premiums. If the assignment of the policy was made and accepted simply to place the bank in the same attitude as it would have occupied had it upon its own responsibility, at its own expense, and for its own benefit, applied for and obtained a policy upon the life of Hudgins, payable to itself, and in which neither he nor his estate was to have any interest or concern, it was a wagering contract. But if Hudgins assigned the policy to the bank, and it accepted the same as a collateral security for his existing indebtedness, and for the further purpose of securing the repayment to the bank out of the proceeds of the policy of all sums advanced for premiums, the transaction was a lawful and proper one. The form in which the transaction was clothed is, as above stated, immaterial, the question at last being, what was the real intent and purpose of the parties? This case belongs to one or the other of the two classes just indicated. If to the former, the judgment under review was wrong for two reasons: (1) The estate of Hudgins had no interest in the proceeds of the disputed policy, because there was no privity of contract between him and the insurance company, or between him and the bank; and (2) the court should not have undertaken to dispose of or distribute the proceeds of a wagering or gaming contract. If, on the other hand, this case falls within the latter class, the judgment excepted to should be sustained.

In view of the facts as stated, did the evidence warrant the judge in finding that the transaction was lawful and valid? Or, to put the question in different form, did the evidence demand a finding that it was a wagering contract? The policy, being payable to the estate of Hudgins, purported to evidence a contract of insurance between himself and the insurance company; and the assignment of the policy to his creditor, the bank, could certainly have been made for a legitimate purpose. The writings, therefore, on their face, are perfectly consistent with the idea that the transaction which the parties had in mind was a lawful one, and the presumption of law would be that such was the fact. Does the parol evidence sustain or overcome this presumption? So far as relates to Hudgins, it is easy to conclude that he simply intended to supplement the security of like kind which he had already given to the bank, and that, being unable himself to pay the premiums, he was willing for the bank to do so, and get its reimbursement out of the proceeds of the policy. There is nothing in the testimony which expressly negatives such a purpose on the part of Hudgins, and there are many circumstances from which its existence may be inferred.

The next inquiry is, What was the bank's

purpose in taking the assigned policy? Mr. Cabaniss explicitly testified that he was seeking to obtain "additional protection,"—that is, security; and, though he did regard the policy somewhat in the light of an investment, his testimony did not require a finding that he deliberately sought to have the contract so disguised that it would not, upon its face, show what was the real truth of the matter, or that his purpose was to evade the law against gaming by any concealment or artifice. On the contrary, it would seem that he accepted the assignment of the policy for no improper purpose, but may have been mistaken as to what legal rights would thereby be secured to the bank. Neither any private understanding between the insurance agent and the cashier nor the latter's opinion (if he entertained it) that the proceeds of the policy would belong exclusively to the bank, could affect Hudgins or his estate. A secret purpose entertained by one party to a contract but not disclosed to the other, does not bind the latter, for, obviously, as to this particular matter there was no "meeting of minds." *Harris v. Amoskeag Lumber Co.* 97 Ga. 465 (opinion, point 2), 469, 470, and authorities cited. It was certainly not shown that Hudgins made any agreement with the bank that he would claim no interest in the policy. Nor can it be said that by mere silence he assented that the assignment should vest an absolute and unconditional ownership of the policy in the bank, for it nowhere appears that any such idea on the part of the bank's representative was communicated to Hudgins, or that he had any direct dealings with the bank in regard to this particular insurance. If this purpose was that which, as we have attempted to show, could, under the evidence, be attributed to him, viz., to give additional collateral security to the bank, it is very reasonable to conclude that he might have understood that the cashier's purpose in procuring him to accept the last policy and assign the same to the bank was simply to increase its security by taking and holding this policy in the same way it did the others, the bank being willing to advance the premiums, and look for reimbursement solely to the proceeds of the policy, since he was unable himself to carry it. At any rate, the trial judge was warranted in reaching the conclusion that these parties did not enter into a scheme to furnish a cloak to a purely colorable transaction; and it follows that the rights of the parties are to be measured according to the terms of the contract as written, which evidences what purports to be a bona fide and entirely lawful transaction. Thus treated, the policy is without taint of illegality, and it was proper to limit the assignment to the object really intended to be thereby accomplished.

In this immediate connection the case of *Morland v. Isaac*, 20 Beav. 389, is quite pertinent. In that case it appeared that Isaac, a tradesman, insured the life of his debtor, Walker, the policy being payable to the former. He charged the premiums to Walker, but the latter never paid them, nor does it appear that he ever expressly agreed to

do so. Upon his death the court held "that his representatives were entitled to the produce of the policy after payment of the debt and premiums." Isaac himself "denied that any express agreement had ever been made between him and Walker either as to the amount to be insured (which was to be entirely at defendant's [Isaac's] discretion), or the ownership of the policy, or payment of the premiums; but it was clearly understood by the defendant [Isaac], and, he believed, also by Walker, that the policy was the defendant's [Isaac's], and, with respect to the payment of the premiums, that it should, in the first instance, be made by the defendant's [Isaac's] own absolute property." His "understanding and intention was, as he alleged, that if Walker should, in his lifetime, pay off the debt and premiums and expenses of insurance, he should be at liberty to do so, and in that case the defendant [Isaac] would either have dropped the insurance or transferred the policy to Walker." Isaac also stated that an entry of a charge in his account against Walker "for insurance was a mistake." The master of the rolls, taking into consideration the foregoing, and also the facts that Walker knew the insurance was to be effected, that he had attended the insurance office for this purpose, and that when Isaac's account with the item for insurance charged therein was delivered to him he did not complain, was of the opinion that, though Walker had never, in express terms, agreed to pay or become liable for the premiums, nor admitted liability therefor, the circumstances warranted the inference that he was so liable. Observed the master: "This matter depends on the contract between the parties. This, however, may either be expressed in writing or by parol, or it may be inferred from the acts and dealings between the parties, from which a contract between them may appear." It was accordingly held that the policy was simply a security for the debt and the premiums, and that the creditor was entitled to payment of these, and no more. It will be seen that this case in many respects resembles the one at bar, and is direct authority for the correctness of Judge Felton's judgment, if, as we think is true, he was warranted in finding, as matter of fact, that Hudgins, in assigning to the bank the policy in controversy, really intended merely to secure his existing indebtedness, and the premiums to be paid on the policy, expecting his estate to get the benefit of the surplus, if any. If this was what he intended, and the bank took the policy for the purpose of securing these claims, the mere opinion of its cashier (like that of Isaac in the case *supra*), that it would absolutely own the policy and its proceeds, would not alter the legal status of the matter.

As somewhat applicable to this branch of the discussion, we again refer to *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316, and *Roller v. Moore*, 86 Va. 512, 6 L. R. A. 136, cited *supra*. The following is extracted from the synopsis of the points decided in the latter case: "Assured made assignee an assignment absolute on its face of a pol-

icy of insurance on his life. The evidence, however, showed that in former transactions about the same matter the policy was held by assignee as security for advancements made by him for premiums and assessments on the policy. Held, the assignment was not a new contract between the parties and an absolute assignment, but it bore the impress of the original transactions, and stood merely as a security for the advances made by assignee." In our case, the previous dealings between Hudgins and the bank, in the course of which he had assigned to it policies of insurance as collateral security for his indebtedness to it, greatly strengthens the conclusion that he intended no more at the time of the last transaction, but that, being unable to pay the premium upon the policy then assigned, he expected the bank to advance the necessary amount, and look for reimbursement to the proceeds of this policy when collected. As all inferences in favor of the legality of a transaction are to be indulged, and as the conclusions of the judge below are sufficiently supported by evidence, the judgment rendered by him should be allowed to stand, especially as it is in direct accord with the justice and the equity of the case. Judgment affirmed.

All concur, Little, J., specially.

NOTE.—In addition to the authorities cited in the foregoing opinion, see the following, which are more or less in point on several questions discussed: *Gilman v. Curtis*, 66 Cal. 116; *Curtiss v. Etina L. Ins. Co.* 90 Cal. 245; *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 116, 13 Am. Rep. 318; *Hight v. Taylor*, 97 Ind. 392; *Walker v. Larkin*, 127 Ind. 100; *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Tateum v. Ross*, 150 Mass. 440; *Ferguson v. Massachusetts Mut. L. Ins. Co.* 32 Hun, 306; *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 282, 84 Am. Dec. 280; *Matheus v. Sheehan*, 69 N. Y. 585; *Olmsted v. Keyes*, 85 N. Y. 593; *Wright v. Mutual Ben. Life Assn. of America*, 118 N. Y. 237, 6 L. R. A. 731; *Gilbert v. Moose*, 104 Pa. 74, 49 Am. Rep. 570; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Rivers v. Gregg*, 5 Rich. Eq. 274; *Price v. Supreme Lodge K. of H.* 68 Tex. 861; *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 633; *Crotty v. Union Mut. L. Ins. Co.* 144 U. S. 621, 36 L. ed. 566; 35 Am. L. Reg. 65-87, 161-183, and cases cited.

Little, J. (concurring specially):

I agree to the judgment of the court as being sound, and properly interpreting the rights of the parties, but I arrive at this conclusion for reasons different from those stated in the very able opinion rendered by Presiding Justice Lumpkin. It is not my purpose to enter into a discussion of the case. It has, from time to time, been considered by each of us with a great deal of care, and the authorities, which are numerous and conflicting, have been carefully examined. It will be seen by reference to the opinion of the majority of the court, that there are two propositions of law which form the basis for the conclusions reached. The first is that a contract effecting assurance

upon the life of a debtor for the benefit of a creditor is a contract of indemnity. The second is that the creditor's insurable interest in the debtor's life is confined to the amount of the indebtedness to be secured. I think that neither of these is a correct conclusion of law. Neither of these questions, in my judgment, properly arises under the circumstances of the case; but, meeting the proposition so broadly laid down that insurance (life) for the purpose of securing an indebtedness is a contract of indemnity, and nothing else, I have this to say: By our Civil Code (§ 2080) a contract of fire insurance is clearly made a contract of indemnity. And by § 2120 of our Civil Code a contract of marine insurance is, in terms, classed as a contract of indemnity. The definition of the contract of life insurance which is made by the Civil Code (§ 2114) is that it is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. If such contracts derive any of the incidents which attach to contracts of indemnity, they must arise under principles of law which are not enunciated in our Code. It is true that § 2117 of the Civil Code declares that the principles stated in the Code in relation to fire insurance apply equally to the law of life insurance. Manifestly, however, reference is had to those legal principles which pertain generally to fire insurance, which can be made applicable to a contract of life insurance, and this provision in no way affects the definition or meaning of these two contracts. It is provided in the Code (§ 2114), in reference to contracts of life insurance, that the assured must have an interest in the continuation of the life insured, and both by text writers and adjudicated cases creditors have an insurable interest in the life of a debtor. Mr. Joyce, in his work on Insurance (vol. 1, § 26), says that "although the question of indemnity as related to life insurance has been prolific of much discussion by both text writers and the courts, yet the weight of authority is that life insurance is not a contract of indemnity." And this author then proceeds to discuss the question, referring to a large number of adjudicated cases to support the text. As a matter of law, numerous courts have held them to be contracts of this character, while a great many other courts of final resort have held the contrary of the proposition; and it seems to me that the latter are more in accordance with principle. A life is not, and cannot of itself be, a subject of valuation. Mr. Bunyon, in his work on Life Insurance (p. 7), says that such insurances are independent of the value of the subject-matter; and in the case of *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251, it is declared that "in life insurance the loss can seldom be measured by pecuniary values." The doctrine of indemnity contemplates that the insured shall be indemnified, but shall never be more than fully indemnified, for a loss. For instance, the contract of fire insurance only indemnifies the assured against any loss which he may

sustain within an amount named by the policy. This affects property. The value of the property destroyed can be ascertained, and the contract is a pure and simple indemnification for the value of the property destroyed. The same applies to a contract of marine insurance; property is there also the subject-matter of the contract; and hence our Code treats these two contracts as contracts of indemnity. But a life is not property. It cannot be valued so as to afford indemnity. The following authorities collected by Mr. Joyce rule that a contract of life insurance is not a contract of indemnity. [*Dalby v. India & L. Life-Assur. Co.*] 15 C. B. 365; *Nye v. Grand Lodge, A. O. of U. W.* 9 Ind. App. 139; [*Law v. London Indisputable Life Policy Co.*] 1 Kay & J. 228; [*Whiting v. Independent Mut. Ins. Co.*] 15 Md. 297; [*Trenton Mut. L. & F. Ins. Co. v. Johnson*], 24 N. J. L. 585; [*Rawls v. American Mut. L. Ins. Co.*] 27 N. Y. 282, 84 Am. Dec. 280; [*Ferguson v. Massachusetts Mut. L. Ins. Co.*] 32 Hun, 311, 102 N. Y. 647; [*Mowry v. Home L. Ins. Co.*] 9 R. I. 346; [*Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; [*Mutual L. Ins. Co. v. Allen*], 138 Mass. 27, 52 Am. Rep. 245; [*Emerick v. Coakley*], 35 Md. 188. For the doctrine that such contracts are not strictly contracts of indemnity, yet are in the nature of indemnity, where a creditor insures his debtor's life, the author refers to Bacon, Ben. Soc. § 163; *Miller v. Eagle Life & Health Ins. Co.* 2 E. D. Smith, 294. That they are not contracts of indemnity, such as fire and marine insurance contracts, he refers to *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501.

As to the second proposition, the majority of the court rules that, while a creditor, for the purpose of indemnifying himself against loss, has an insurable interest in the life of his debtor, this interest cannot exceed in amount that of the indebtedness to be insured against, although it may include the cost of taking out and keeping up the insurance. While I do not dissent from this ruling, the conclusion of the court, in my opinion, is put upon a wrong doctrine, which very many of the cases cited by Presiding Justice Lumpkin will prove. A creditor has an insurable interest in the life of his debtor, and the amount of the debt and the expense of taking out and keeping up the insurance must be the basis of the insurance; yet it is neither practicable nor essential to the validity of such a contract that the amount insured must exactly equal these sums. Indeed, it is impossible that it can be so. If one owes another \$1,000, and the latter takes out a policy of insurance on the life of his debtor, while he is entitled to fix the amount at \$1,000, and the interest thereon, and the cost of paying the premium and keeping up such insurance, yet, from the nature of things, it is impossible for the parties to agree on an exact amount which will represent these items. The insurer may have to pay premiums for a quarter of a century; he may not pay but one premium. The interest may run on the principal indebtedness for a year; it may run for twenty years. So

that it is practically impossible to settle in advance on an amount which represents the principal and interest of the indebtedness and the cost of the insurance which will be due at the time of the death of the assured. It must be remembered that a contract of insurance must specify a given amount, must be made anterior to death, and, being so, the amount necessarily has to be fixed at a time when the pecuniary interest of the creditor in the life of his debtor cannot be ascertained. At the same time, in order to render the contract valid, it must not be a wagering policy. Therefore a contract is valid, and not subject to be attacked as a wagering policy, if the creditor insures for such a sum as, under all the circumstances, considering the amount of the debt, the expectancy of the debtor, the cost per annum of the insurance, which in good faith and by the exercise of reasonable judgment is estimated to cover the debt and the outlay. If it should so happen that by reason of the early death of the debtor the creditor receives a sum which actually exceeds the amount of the debt and expenses, that sum belongs to him; and, if not disproportionate originally, taking the debt as a basis, it is not a wagering contract, and the insurer would be held to perform it. I make no attempt to collect authorities which support this proposition. They are very numerous, and are to be found in all books on insurance which treat the subject.

A distinction must be drawn between a contract of insurance on his own life, made by one who is indebted to another, and who transfers the policy to his creditor for the security of his debt, and a contract which is made directly by the creditor with the insurer to insure the life of his debtor. In the first instance the contracting parties are the person whose life is insured and the insurer. In that case the creditor has no rights except such as may be given to him by the assignment of the policy. The object of the transfer is to secure the payment of the debt due the creditor. The assignment accomplishes nothing else; and if, by any means, the debt be paid prior to the decease of the debtor, the assignment has no force or effect, and the original contract is in force, and the beneficiaries named in the contract will take the proceeds of the policy. But where a creditor contracts directly with the insurance company for a policy on the life of his debtor, neither the debtor nor his representatives will at any time thereafter have any interest in that contract, nor, under any circumstances, would either of them

be entitled to the proceeds of such contract, because the contractual relations exist between the creditor and the insurer independent of the debtor. In this case the Equitable Company issued a policy payable to the representatives of Hudgins, and the contract entered into, and upon which the money in question was collected, was that on the death of Hudgins the company agreed to pay to his representatives the amount named in the policy. The policy, under the usual rules, was assignable. Hudgins, according to the testimony, declined to enter into this contract; but the Exchange Bank, which was the creditor of Hudgins, agreed that it would pay the premiums if it could have the benefits. To this Hudgins agreed, and transferred the policy. As a creditor, while the bank had a right to make a direct contract with the company to insure the life of Hudgins, it did not do so, but it received the policy, which was payable to the representatives of Hudgins, by assignment. Under the law the bank was not entitled to receive out of the assigned policy more than the amount of its debt and the expenses of keeping up the insurance. This being the limited right of the creditor, when, after the death of Hudgins, the money was paid to it as the holder of the policy, what direction should be given to the remainder of the fund? The answer is had by reference to the original contract. That contract was an agreement to pay to the representative of Hudgins. It can make no difference who paid the premiums, except as to determine what amount the creditor should receive. That a creditor paid the premiums did not affect the contract. That contract required the company to pay the amount of the policy to the representative of Hudgins and by a legal assignment the company was directed to pay to the bank the amount of the policy. Under the law the only amount that the bank was entitled to retain when it so collected the sum agreed to be paid was its debt, interest, and the expense of maintaining the insurance, and by virtue of the terms of the contract the balance which remained after such payment must go to the representative of Hudgins's estate. As stated, I have not attempted to collect the numerous authorities which support the proposition here laid down, but have contented myself in giving the line of reasoning which brings me to the conclusion at which a majority of the court has arrived, and, differing as to the reasoning of the case, I concur in the judgment.

NEBRASKA SUPREME COURT.

Levi L. FISHER *et al.*, *Appts.*,

v.

Lillian DONOVAN.

(.....Neb.....)

*1. To create a trust fund out of which

*Headnotes by SULLIVAN, J.

NORM.—For creditors' insurable interest in life policies, see *Exchange Bank v. Loh* (Ga.) ante, 372, and footnote thereto.

44 L. R. A.

a trustee may make disbursements, the trustor must have some present or future right to, or interest in, the fund directed to be set apart.

2. A member of a fraternal beneficiary society has no such interest or property in the proceeds of a certificate therein that he can impress such proceeds with a trust in favor of his creditors.

3. A certificate in a fraternal benefi-

ary society is a mere expectancy, and the beneficiary has no vested right therein.

4. A member holding a certificate in a fraternal beneficiary society may, at his option, change the beneficiary therein, so long as he complies with the laws of such society and keeps within its limitations, and those of the statute under which it is organized.
5. Upon the death of a member holding a certificate in a fraternal beneficiary society, the money arising from such certificate vests absolutely in the beneficiary properly designated by the member.
6. Creditors have no right to, or interest in, a certificate in a fraternal beneficiary society, either before or after the death of the member, and they cannot participate in the fund derived therefrom.
7. The contrary not appearing, the statute of a sister state will be presumed to be similar to our own.
8. The rules and regulations of fraternal beneficiary societies for the creation and payment of their funds to the properly designated beneficiaries should receive such liberal construction as to carry out the benevolent purposes sought to be accomplished.
9. The promise of one party to pay the debt of another cannot be enforced unless such promise be in writing, signed by the party to be charged.

(January 5, 1899.)

APPEAL by plaintiffs from a decree of the District Court for Fillmore County in favor of defendants in an action brought to reach, for the benefit of creditors, certain moneys received as life insurance upon the life of Jere Donovan, deceased. *Affirmed*. The facts are stated in the opinion.

Mr. John D. Carson, for appellants:

A trust of personal property may be created by parol, and this being a trust of money the same rule will apply.

Allen v. Withrow, 110 U. S. 119, 28 L. ed. 90; *Gilman v. McArdle*, 99 N. Y. 451, 52 Am. Rep. 41; *Ellis v. Seacor*, 31 Mich. 185, 18 Am. Rep. 178; *Bostwick v. Mahaffy*, 48 Mich. 342; 4 Lawson, Rights, Rem. & Pr. p. 3412.

Any language or words which show that the property or money shall be held for a purpose, or on behalf of another, will constitute a parol trust of personal property.

4 Lawson, Rights, Rem. & Pr. pp. 3409, 3410; *Foot v. Foote*, 58 Barb. 258; *Chase v. Perley*, 148 Mass. 289.

A verbal trust partially performed will be enforced in a court of equity.

Robbins v. Robbins, 89 N. Y. 251; 4 Lawson, Rights, Rem. & Pr. p. 3377.

A trustee who accepts a fund impressed with a trust is estopped to assert that she has not formally accepted the same, in an action brought to enforce the trust.

McBride v. McIntyre, 91 Mich. 406.

The money received by the defendant Lillian Donovan, on the policies of insurance carried upon the life of her husband is impressed with a trust, and should be applied by her for the payment of the debts enumerated by the deceased to be paid out of that fund.

Cobb v. Knight, 74 Me. 255; 4 Lawson, 44 L. R. A.

Rights, Rem. & Pr. p. 3414; *Phipard v. Phipard*, 55 Hun, 433.

Money due on a beneficiary certificate made payable to another person for the purpose, and with the understanding, that it will be applied in the payment of debts and funeral expenses, is impressed with a trust, which equity will enforce.

Boasburg v. Cronan, 24 N. Y. S. R. 930; *Hirsh v. Auer*, 146 N. Y. 13.

Where one has procured a policy of insurance on his own life, for the benefit of another, and has paid the premiums thereon, he may dispose of his insurance by will or otherwise to the exclusion of the beneficiary named in the policy, and the fact that the change was made during the lifetime of the beneficiary does not affect the rule.

Clark v. Durand, 12 Wis. 224; *Breitung's Estate*, 78 Wis. 33.

If the assured allows the policy to remain in the possession of the holder under a promise, either expressed or implied, to pay the debts of the assured out of the avails of the policy when collected, his doing so is a valid consideration for the promise, and a creditor for whose benefit the agreement was made, although without his knowledge or consent at the time, can affirm and enforce it against the holder of the policy.

Hutchings v. Miner, 46 N. Y. 456, 7 Am. Rep. 369; *Kelley v. Mann*, 56 Iowa, 625. *Griswold v. American Cent. Ins. Co.* 1 Mo. App. 99.

A policy of insurance may be made or changed by parol.

Westchester F. Ins. Co. v. Earle, 33 Mich. 143.

A policy upon the life of a husband, for the benefit of the wife, may be assigned or pledged by her for the payment of her husband's debts.

Collins v. Dawley, 4 Colo. 138, 34 Am. Rep. 72.

There is a marked distinction between an ordinary policy of life insurance, and a certificate issued by a mutual benefit society. Under the latter there is no vested right, and the assured may during his lifetime either allow the policy to lapse without the knowledge or consent of the beneficiary, or change the name, or may impose upon it such conditions as he may see fit touching the disposition of the money, and that, too, by parol.

Holland v. Taylor, 111 Ind. 126; *Grand Lodge, A. O. U. W. v. Noll*, 90 Mich. 37, 15 L. R. A. 350.

The Modern Woodmen of America is a mutual benefit society incorporated under the laws of the state of Illinois, and nowhere under the statutes of Illinois are creditors prohibited from becoming beneficiaries under a policy of insurance issued by a mutual benefit society.

Bloomington Mut. Ben. Asso. v. Blue, 120 Ill. 121, 60 Am. Rep. 558.

Mr. Charles H. Sloan, for appellee:

If a trust could be created under circumstances similar to the ones surrounding this case, the terms of the trust and the evidence concerning the same should be absolutely clear and convincing, not doubtful,

uncertain, and contradictory; nor may it consist of loose declarations.

Roddy v. Roddy, 3 Neb. 96; *Allen v. Withrow*, 110 U. S. 119, 28 L. ed. 90; *Young v. Young*, 80 N. Y. 438, 36 Am. Rep. 634; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; 4 Lawson, Rights, Rem. & Pr. p. 3412.

The appellee upon being made beneficiary had a vested right therein in the nature of an executed gift which she could be divested of in but one of two ways: (1) Absolute and unequivocal waiver upon sufficient consideration; (2) by the deceased observing the rules of the A. O. U. W. and Modern Woodmen of America, which are mutual benefit societies.

Holland v. Taylor, 111 Ind. 126; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 582; *Thomas v. Thomas*, 131 N. Y. 205.

The gift could not be revoked by Donovan alone, and certainly not without the consent of the company.

Central Nat. Bank v. Hume, 128 U. S. 195, 32 L. ed. 370; *Brockhaus v. Kemna*, 7 Fed. Rep. 609; *Timayenis v. Union Mut. L. Ins. Co.* 21 Fed. Rep. 223; *Re King*, L. R. 14 Ch. Div. 179; *Re Richardson*, 47 L. T. N. S. 514; *Ex parte Dever*, L. R. 18 Q. B. Div. 664; *Glanz v. Gloeckler*, 104 Ill. 573, 44 Am. Rep. 94; *Pence v. Makepeace*, 65 Ind. 345; *Wilburn v. Wilburn*, 83 Ind. 55; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285; *Allis v. Ware*, 28 Minn. 166; *McClure v. Johnson*, 56 Iowa, 620; *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 806; *Robinson v. Duvall*, 79 Ky. 83, 42 Am. Rep. 208; *Vollman's Appeal*, 92 Pa. 50; *Gosling v. Caldwell*, 1 Lea, 454, 27 Am. Rep. 774; *Connecticut Mut. L. Ins. Co. v. Ryan*, 8 Mo. App. 535; *Crittenden v. Phoenix Mut. L. Ins. Co.* 41 Mich. 442; *Fowler v. Butterly*, 78 N. Y. 68, 34 Am. Rep. 507.

Sullivan, J., delivered the opinion of the court:

This action was brought to restrain the defendant Lillian Donovan, widow of Jere Donovan, deceased, from converting to her own use the proceeds of two certificates of life insurance issued to her late husband by fraternal beneficiary societies, and to impress such proceeds with a trust in favor of the plaintiffs as creditors of the insured. From a decree in favor of defendants, the plaintiffs have appealed.

Jere Donovan was postmaster at Geneva, in Fillmore county. He was indebted to the plaintiffs and others for borrowed money. He represented to his creditors that in case of his death they would be paid out of the moneys to be derived from insurance upon his life. The insurance carried by him was as follows: In the Knights of Pythias, \$1,000, payable to his two infant children; in the Ancient Order of United Workmen, \$2,000, of which sum \$1,000 was payable to his widow and \$500 to each of his children; in the Modern Woodmen of America, \$2,000, of which half was payable to his widow and half to his children. September 4, 1894, Mr. Donovan was taken sick. His sickness continued until October 25 of that year, when

he died. At times during his illness he was troubled and anxious about his debts, and expressed a desire that, in case he did not recover, they be paid out of his life insurance. On one occasion he asked Mr. Carson, an attorney, to call, and to him he gave a list of his liabilities. On another occasion, while his physician was present, he called his wife into the sick room, and said to her: "I want you to pay my debts. Will you do it?" to which she responded, "Yes." He also said, "Doctor, you hear this, don't you?" to which the doctor replied, "Yes." Nothing else was said or done. It is asserted by appellants that these facts and circumstances constituted Lillian Donovan a trustee of the fund afterwards received by her in satisfaction of the benefit certificates, and that she should be now compelled to execute the trust. Mrs. Donovan was appointed administratrix of her deceased husband's estate. After setting off to her the exemptions provided by law for the widow, there remained nothing for distribution among creditors. However, she voluntarily paid several claims against the estate, and the appellants, asserting that she did this in partial execution of the trust, earnestly insist that she be now required to carry out completely the wishes expressed by her husband in his last illness. To create a trust fund out of which a trustee may make disbursements, the trustor must have some present or future right to, or interest in, the property directed to be set apart; in other words, to constitute a valid trust there must be (1) a competent trustor, (2) a transfer to a competent person, (3) a fund or object capable of being transferred, and (4) a *cestui que trust* capable of taking or participating in the fund. *Sinking Fund Comrs. v. Walker*, 6 How. (Miss.) 143. Had Jere Donovan such a right or interest in the certificates in question, and have his creditors, the appellants here, the right to participate in the fund? We think not. The purposes and objects of these beneficiary organizations are vastly different from those of ordinary life insurance companies. The so-called "old line" life insurance companies immediately on the issuance of a policy confer on the beneficiary a valuable right which cannot be divested without the consent of such beneficiary. Such policies may be pledged or assigned by the beneficiary as security for debts of the insured. These policies often by law have a marketable or cash surrender value, making them a form of property. But not so with certificates in fraternal beneficiary societies. They are mere expectancies. The beneficiary has no vested rights in them, and the insured may at any time, at his option, change the beneficiary, provided only he keeps within the limitations established by the rules of the society, and complies with the laws respecting a change of beneficiary. Neither have these certificates a cash surrender value. The supreme court of Pennsylvania, in construing a certificate similar to those in question here, says: "The testator had no property in the fund. . . . The fund in fact was never his property. He had a power of appointment only and such power did not cre-

ate any property in him. . . . The purpose of these certificates excludes the claim that there was any property in him." *Northwestern Masonic Aid Asso. v. Jones*, 154 Pa. 99. The insured member of such societies has himself no interest in the fund. He possesses only a mere power of appointment. *Rollins v. McHatton*, 16 Colo. 203; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580. Jere Donovan had no property in the certificates. He had no right or interest therein upon which he could impress a trust. Upon his death the money arising from the certificates became absolutely the property of the beneficiaries, to do with as they saw fit. The widow could use the money to pay such of her husband's debts as she wished to pay, or she might retain it all for her individual use. The societies paying the money were organized to "issue certificates of indemnity calling for the payment of a certain sum, known and defined, in case of the death, . . . to the wife, widow, orphan, or orphans, or other persons dependent upon such members." Comp. Stat. 1895, chap. 16, § 198. The Constitution of the Ancient Order of United Workmen provides that "each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall, in every instance, be one or more members of his family, or someone related to him by blood, or who shall be dependent upon him." Const. A. O. U. W. art. 6, § 4. The by-laws of the Modern Woodmen of America provide that "the objects of this fraternity are to promote true neighborly regard and fraternal love, to bestow substantial benefits upon the family, widow, heirs, blood relations, affianced wife, or person dependent upon the member, and such others as may be permitted by the laws of the state of Illinois." By-Laws M. W. A. div. 1, § B. None of these designations include creditors, so that the insured did not have the right, even, to make a formal change designating his creditors as beneficiaries. The laws of this state governing such societies preclude creditors of a member from participation in the fund so created. The statutes of the states in which these societies were organized not being pleaded, we presume they are similar to our own. The statute or charter of the order designating beneficiaries controls. *Britton v. Supreme Council of R. A.* 46 N. J. Eq. 102; *National Mut. Aid Asso. v. Gonser*, 43 Ohio St. 1; *Caudell v. Woodward*, 96 Ky. 646. A person not of the class for whose benefit a mutual benefit association is organized cannot be a beneficiary. *Wolf v. District Grand Lodge No. 6, I. O. B. B.* 102 Mich. 23; *Britton v. Supreme Council of R. A.* 46 N. J. Eq. 102; *Alexander v. Parker*, 144 Ill. 355, 19 L. R. A. 187; *Norwegian Old People's Home Soc. v. Wilson*, 176 Ill. 94. The beneficiaries which may be designated are but few, and creditors of the member are not among them. Even though Jere Donovan had complied with all the provisions and forms required by the societies respecting a change of beneficiary, plaintiffs could not have been named, since creditors are not within the limita-

tions either of the statute or of the by-laws of either society. Either the statutes of the state or the charter or by-laws of mutual benefit societies usually provide that the fund is established for the benefit of the widow, children, orphans, relatives, or dependents of the deceased member; and, where such provision is made, the beneficiary designated must be in one of the classes mentioned. *Blasey v. Odd Fellows Mut. Relief Asso.* 142 Mass. 224; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593; *Supreme Council A. L. of H. v. Perry*, 140 Mass. 580; *Skilling v. Massachusetts Ben. Asso.* 146 Mass. 217. In *Skilling v. Massachusetts Ben. Asso.* the court says: "A person whose only relation to the deceased member is that of a creditor is not a person dependent upon him within the meaning of these statutes, and the promise to pay the plaintiff is void. Such a promise is beyond the powers of the association, and contravenes the intention of the statutes under which the association was organized. The plaintiff cannot, therefore, maintain an action on this promise, either for his own use, or for that of any other person." These fraternal beneficiary societies, in their present form, are comparatively recent creations. They respond to a popular demand for protection to dependents at reasonable cost. They provide what is often called the "poor man's insurance." In most, if not all, the primary object is to provide substantial benefits, in case of the death of the member, to the widow, orphans, or dependents of such member; to provide means for the family when the main support is gone. Their purposes are laudable. They provide means to maintain the widow, and feed, clothe, and educate the orphans, and thereby relieve the state of burdens which otherwise might fall upon it. The provisions for the creation and payment of these sacred funds to the properly designated beneficiaries should receive such liberal construction that the widow, the orphan, or other dependent may receive the intended benefit.

In determining who is entitled to receive the benefits of the provisions of societies of this kind, it is the duty of the court to construe the statute and their rules and regulations liberally, and in such manner as to carry out the beneficent purposes sought to be accomplished. *Ballou v. Gile*, 50 Wis. 614; *Supreme Council A. L. of H. v. Perry*, 140 Mass. 580. It is true, Mrs. Donovan did assent to her husband's request to pay his creditors, but, since he failed to provide the trust fund out of which payment might be made, the plaintiffs cannot recover from her as trustee. After her husband's death, there being no proper change of beneficiary, half the proceeds of the certificates in question became absolutely the money of Mrs. Donovan, and the promise she made was at most but a promise to pay her husband's debts out of her own property. There is no claim that the promise was in writing, and it is a familiar doctrine that a promise to answer for the debt, default, or misdoings of another is within the statute of frauds, and,

to be binding, must be in writing, signed by the party to be charged therewith. Comp. Stat. chap. 32, § 8. Mrs. Donovan cannot be held in this action, either as trustee or individually, for plaintiff's demands.

The decree of the trial court is therefore affirmed.

BLOOMFIELD STATE BANK, Appt.,
v.

H. N. MILLER et al.

(.....Neb.....)

- *1. A mortgage by the deposit of title deeds, without writing is not effective in this state.
2. While such a mortgage is recognised in England, and while the law of England has been adopted by statute in this state, the statute does not extend to those rules of the English law which contravene the object and purpose of our own statutes.
3. A mortgage by the deposit of title deeds violates the statute of frauds, and is contrary to the policy of the recording acts.
4. The exception of the statute of frauds with regard to estates arising by act or operation of law does not embrace cases where the creation of the estate depends solely on the intention of parties to a contract.
5. A court of equity cannot give effect to an oral contract declared void by the statute of frauds, under pretense of aiding an imperfect attempt to execute a contract.
6. Nor can such a court enforce a mortgage by deposit of title deeds because the loan which the deposit was made to secure has been actually received by the depositor.

(May 19, 1898.)

APPEAL by plaintiff from a judgment of the District Court for Knox County in favor of defendants in a proceeding instituted to enforce a mortgage alleged to have been effected by deposit of title deeds. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. A. A. Welch, for appellant:

The indorsement by the grantee of his name on the back of the contract and its delivery to another for the purpose and with the intent thereby to secure the payment of money loaned to the grantee by the person to whom the same is delivered created an equitable lien on the grantee's interest in said contract and land.

An equitable mortgage may arise from nonpayment of purchase money, deposit of title deeds, or an unsuccessful attempt to make a valid mortgage deed.

Gale v. Morris, 29 N. J. Eq. 222; *Griffin v. Griffin*, 18 N. J. Eq. 104; *Hackett v. Reynolds*, 4 R. I. 512; *Jackson, Lowell, v. Parkhurst*, 4 Wend. 369; *Chase v. Peck*, 21 N. Y. 584; *Rockwell v. Hobby*, 2 Sandf. Ch. 9; *Carpenter v. Black Hawk Gold Min. Co.* 65 N. Y.

*Headnotes by IRVINE, C.

NOTE.—The American law as to mortgages by deposit of title deeds rarely gets embodied in a direct decision, but it is presented with unusual fullness in the above case.

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51; *Jarvis v. Dutcher*, 16 Wis. 308; *Hutzler Bros. v. Phillips*, 26 S. C. 136.

An equitable mortgage may be created by an unsuccessful attempt to make a valid mortgage deed or to appropriate specific property to the discharge of a particular debt.

Gale v. Morris, 29 N. J. Eq. 222; 2 Story, Eq. Jur. § 1020; *Peckham v. Haddock*, 36 Ill. 38; *McClurg v. Phillips*, 49 Mo. 315; *White & T. Lead. Cas. in Eq.* 4th Am. ed. 954; *Abbott v. Godfrey*, 1 Mich. 178.

A mortgage defectively executed, or an imperfect attempt to create a mortgage upon specific property for the purpose of securing a debt, will create a specific lien upon the property so intended to be mortgaged.

Daggett v. Rankin, 31 Cal. 327; *Love v. Sierra Nevada Lake Water & Min. Co.* 32 Cal. 639, 91 Am. Dec. 602; *Peers v. McLaughlin*, 88 Cal. 294; *Remington v. Higgins*, 54 Cal. 620.

By a court of equity parties may be relieved from a mistake of law as well as fact, in the execution of powers and conveyance of real estate, and the real intention of parties carried out.

Remington v. Higgins, 54 Cal. 620; *Love v. Sierra Nevada Lake Water & Min. Co.* 32 Cal. 639, 91 Am. Dec. 602.

Parol agreement may be made to execute a mortgage in the future where the agreement is supported by a valuable consideration, and the agreement itself will be treated as a mortgage in the court of equity.

McCarty v. Brackenridge, 1 Tex. Civ. App. 170; *Hicks v. Morris*, 57 Tex. 658.

Blanks in a deed or conveyance may be filled to carry out the intention of the parties when authority therefor is express or implied, and this authority to fill the blanks may be implied from the facts attending the signature and delivery.

Garland v. Wells, 15 Neb. 298; *Reed v. Morton*, 24 Neb. 760, 1 L. R. A. 736; *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Brury v. Foster*, 2 Wall. 24, 17 L. ed. 780; *Curtis v. Buckley*, 14 Kan. 449; *Cridben v. Deal*, 21 Or. 211; *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535; *State v. Young*, 23 Minn. 551; *Nelson v. McDonald*, 80 Wis. 605; *Burnside v. Wayman*, 49 Mo. 356; *Chauncey v. Arnold*, 24 N. Y. 330; *McNab v. Young*, 81 Ill. 11; *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206.

The lien was not created merely by parol. It resulted by operation of law from the whole transaction between the parties.

Curtis v. Buckley, 14 Kan. 449; Browne, Stat. Fr. chap. 5, entitled *Conveyance by Operation of Law*.

French is in no position to question, deny, or make any objection to the form of plaintiff's acquiring the interest of defendant Miller.

McNab v. Young, 81 Ill. 11.

Where there are equal equities the first in order of time shall prevail.

1 Story, Eq. Jur. 12th ed. § 64d; 2 Story, Eq. Jur. 12th ed. § 1502; 1 Pom. Eq. Jur. §§ 413-415; 2 Pom. Eq. Jur. §§ 678-683; *Vat-*

tier v. Hinde, 7 Pet. 252, 8 L. ed. 675; *Oraig v. Leiper*, 2 Yerg. 193, 24 Am. Dec. 479; *Polk v. Gallant*, 22 N. C. (2 Dev. & B. Eq.) 395, 34 Am. Dec. 410.

If there was any agreement to transfer between Miller and French it was as much within the statute of frauds as plaintiff's.

The court will not decide the claim of plaintiff in this case void under the statute of frauds if the claim or interest of the party attacking the same is also void under the statute of frauds.

Smith v. Clark, 7 Wis. 551.

One who accepts a quitclaim deed from his grantor is bound at his peril to ascertain what equities, if any, exist against his title.

Bowman v. Griffith, 35 Neb. 361; *Pleasants v. Blodgett*, 39 Neb. 741; *Griffin v. Griffin*, 18 N. J. Eq. 104.

A bona fide purchaser must be one who purchases not only without notice, but with money actually paid; and if he acquires notice at any time before he pays he is not protected as a purchaser in good faith.

Veith v. McMurtry, 26 Neb. 341; *Garmire v. Willy*, 36 Neb. 340; *Savage v. Hazard*, 11 Neb. 323; *Warner v. Trou*, 36 Wis. 195.

Messrs. Carter & Brown, for appellees: The attempted transfer by Miller to plaintiff, if any there was, is within the statute of frauds, and is void.

Folsom v. McCague, 29 Neb. 124; *Smith v. Clark*, 7 Wis. 551; *Caulkins v. Whisler*, 29 Iowa, 495, 4 Am. Rep. 236.

The doctrine of authority to fill blanks is applicable to cases where the substance or essentials of the instrument are written out, showing the intention of the parties, with some minor portion left blank, and not where a party procures another party to write his name upon a piece of paper, and then deliberately writes over that name whatever he wants.

2 Am. & Eng. Enc. Law. p. 423; 1 Am. & Eng. Enc. Law, pp. 518, 519.

The rule of mortgage by delivery of title deed should not be recognized in this state where the doctrine of vendor's lien even is repudiated.

3 Pom. Eq. Jur. § 1265; *Bicknell v. Bicknell*, 31 Vt. 498; *Shitz v. Dieffenbach*, 3 Pa. St. 233; *Thomas's Appeal*, 30 Pa. 378; *Edwards v. Trumbull*, 50 Pa. 509; *Bower v. Oyster*, 3 Penn. & W. 239; *Probasco v. Johnson*, 2 Disney (Ohio) 96; *Bloom v. Noggle*, 4 Ohio St. 45; *Vanmeter v. McFaddin*, 8 B. Mon. 435; *Meador v. Meador*, 3 Heisk. 562; *Gothard v. Flynn*, 25 Miss. 58; *Lehman v. Collins*, 69 Ala. 127; 2 Washb. Real Prop. *502, 503; *Jones, Mortg.* § 185; 15 Cent. L. J. 46; *Browne, Stat. Fr.* 4th ed. § 64; 6 Am. & Eng. Enc. Law, p. 683; *Williams v. Hill*, 19 How. 246, 15 L. ed. 570.

A court of equity is as much bound by the statute of frauds as is the law court.

Bishop, Contr. § 1237; *Watson v. Erb*, 33 Ohio St. 35; *Abell v. Calderwood*, 4 Cal. 90; *Patterson v. Yeaton*, 47 Me. 308; *Beaman v. Buck*, 9 Smedes & M. 207; *Skipwith v. Dodd*, 24 Miss. 487.

The surrender of a security for an indebtedness due from the grantor to the grantee 44 L. R. A.

is sufficient to make the grantee a purchaser for value as against a third party.

Seymour v. Harrison, 20 Iowa, 592; *Alden v. Trubee*, 44 Conn. 455; *Spicer v. Waters*, 65 Barb. 227; *Kimball v. Hutchins*, 3 Conn. 450; *Jackson, Saunders, v. Cadwell*, 1 Cow. 622; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482; *Perry*, Tr. p. 218.

Possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest, whatever it may be, of the possessor.

Uhl v. May, 5 Neb. 157; *Conles v. McDowell*, 15 Neb. 184.

Even if the appellee French had had notice of the delivery of the contract in question to the plaintiff, with simply the signature of Miller on the back of it, he still might purchase the premises and rely upon defeating plaintiff's title to the premises.

Thompson v. Morgan, 6 Minn. 292; *Bloom v. Noggle*, 4 Ohio St. 46.

Irvine, C., delivered the opinion of the court:

D. C. Main held a contract with the state for the purchase of the N. W. $\frac{1}{4}$ of sec. 32. T. 32 N., of range 3 W., in Knox county, said land being state educational land. He also held a number of leases of other educational land in the vicinity. In 1892 he entered into contracts with H. N. Miller which had for their effect the transfer to Miller of Main's rights to the land, payment of the consideration or a part thereof being deferred. The contract first referred to, and out of which this action arises, was assigned to Miller by a separate instrument. January 20, 1893. Miller made his note to the Bloomfield State Bank for \$500, representing in part an overdraft, and in part a loan made at that time by the bank to Miller. At the same time, Miller wrote his name on the back of the assignment from Main to himself, and delivered the assignment in that condition to the bank, intending thereby to have it operate as security for the note. Prior thereto, he had, by formal written assignments, transferred his rights to the other lands to French, to secure a debt he owed the latter. In April or May, 1893, finding that he would be unable to meet the payments to Main, Miller negotiated for the sale of his rights to Sexton, Comstock, & Co. Sexton, Comstock, & Co. not being prepared, or not desiring to make immediate payment to Main, an arrangement was made among Miller, Main, French, and Sexton, Comstock, & Co., evidenced by a preliminary memorandum agreement, two formal contracts, and certain letters. No single contract was joined in by all the parties to the transaction, but the nature of the arrangement is made plain by a comparison of the different documents. Its precise nature is not material. Its general object was to procure contracts of purchase, in lieu of the leases, to pass all rights eventually to Sexton, Comstock, & Co., and, to this end, that French should pay to Main all moneys accruing to him under his contracts with Miller, obtain the assigned contracts from Main, and hold them until Sexton, Comstock, & Co. should repay French his advances to Miller

and to Main, when he should assign them to Sexton, Comstock, & Co. Accordingly, French paid Main what was due him, including the money due on the contract first mentioned. Down to this point, neither Main, French, nor Sexton, Comstock, & Co. knew of the transactions between Miller and the bank. Learning thereof, Main refused to transfer the contract with the state to French. The bank, on its part, learning of the other transactions, wrote, above Miller's signature on the assignment, an assignment thereof to itself. Then it began this action against Miller, Main, and French, alleging in its petition the debt to the bank, and that, to secure the payment thereof, Miller agreed to assign the contract with Main; that he wrote his name on the back thereof, and delivered it to the bank with authority to fill in above the signature a formal assignment. It prayed a foreclosure. Miller made default. French answered, denying all the material averments of the petition, and alleging that for the purpose of securing title and conveying to Sexton, Comstock, & Co., in accordance with his contract obligations, he had bought the land of Main, and paid him therefor, all in ignorance of any claim by plaintiff. By way of cross petition, he prayed that Main be required to assign the contract to him. Main, in his answer, pleaded his good faith, and offered to assign to whomever the court might determine, and to refund to French what he had paid, if the court should so order. The findings were against the plaintiff, and the court ordered a conveyance by Main to French. Plaintiff alone appeals.

By comparing the statement of facts with the issues, it will be seen that neither of the contesting parties succeeded in establishing the facts precisely as he pleaded them. The bank wholly failed to show that it had any authority to write the assignment over Miller's signature, or that the signature was placed there for such a purpose. Even if there had been such authority, the assignment was not written until after French's rights had accrued, in his ignorance of the bank's. The bank therefore can claim nothing under the written assignment. On the other hand, French pleaded only an assignment from Main. Main had already assigned to Miller, so that, under that pleading French could claim only a subrogation to Main's rights to the unpaid purchase money, provided the bank had any right derived from Miller, although, under the evidence, French or Sexton, Comstock, & Co., whom he represented, was shown to have acquired Miller's rights also. If the bank obtained no right, then it cannot complain of the decree between the other parties. If it did obtain any right from Miller, then the decree must, at least, be modified. The proof showing that the written assignment to the bank was unavailing, but also showing that the contract between Main and Miller was by the latter deposited with the bank with the clear intention on the part of both that it should stand as security for a debt in part then contracted, we have thus distinctly presented for the first time in this state the question

whether the doctrine of an equitable mortgage by a deposit of title deeds is sound.

It is unnecessary to review the English cases. When the doctrine was there first announced, it provoked much opposition, being justly considered a further invasion of the statute of frauds. Lord Eldon expressed his emphatic disapproval of it, but considered the rule too well fixed in his time to justify its overthrow. It must therefore be accepted as the established doctrine of the English courts, and as a part of the law of England. The common law is not with us an estate by inheritance, but one by purchase. It is here in force by virtue of statute, which provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted, and declared to be law within said territory." Comp. Stat. chap. 15, § 1. No one would assert that the phrase "common law" was there used in contradistinction to the rules of equity. It undoubtedly includes the law derived from the English court of chancery. On the other hand, it was not the whole body of the English law which was adopted, but only so much thereof as is applicable (to the nature of our institutions), and is not inconsistent with the Constitutions or statutes, past or future. There is certainly nothing in the Constitution which conflicts with the doctrine of parol mortgages, but when we examine the statutes the question assumes a different aspect. We have a statute of frauds in the main following the outline of the famous statute of 29 Car. II. chap. 3. By this, "no estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." Comp. Stat. chap. 32, § 3. By § 4 of the same chapter, § 3 shall not be construed "to prevent any trust from arising or being extinguished by implication or operation of law." By § 5, every contract for the sale of lands or any interest in lands shall be void, unless the contract or some note or memorandum be in writing, and signed by the party by whom the sale is made. By § 22, the term "estate and interest in lands" shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent. The language of these sections is so clear that it would be immediately conclusive against the theory of parol liens were it not for the fact that much of the language is taken from the English statute, which, in spite of its plain provisions, the English courts straightway set themselves to evade and fritter away, by a process of misconstruction as systematic as it was ingenious. For years the mischief of that policy has been realized, and the danger of further pur-

suings it has been by most courts carefully avoided. The spirit of the statute should certainly be preserved so far as possible. Its purpose and policy, no doubt, is to prevent the creation or transfer of estates in or liens upon lands, except by writing, definite and complete in its terms. To enforce a mortgage created by the mere deposit of title deeds is in the plainest violation of such purpose and policy. It directly offends the very letter of the law.

Again, in this state we have created by statute a system whereby conveyances, including mortgages, must be registered in a public office. The purpose of this system is to afford security to titles by a public record which parties dealing with land may, and for their own protection must, examine, and on which they may rely. Secret transfers and liens are sought thereby to be prevented. A mortgage by deposit of title deeds tends to defeat this purpose. The recording acts have another bearing on the question. In England title deeds followed the land. The evidence of title lay, not only in the delivery of a deed, but in its continued possession by the grantee. When, therefore, the owner parted with his muniments of title, he parted with the means of disposing of the land. When the deposit was by way of pledge, the pledgee, by his manual possession of the deeds, had the effective power to prevent an untoward disposition of the land, either such as would defraud him, or such as would defraud others ignorant of his rights. But, under our system, it is not usual to consult or even to inquire about the original conveyances. They have performed their chief office when they have been recorded. Thenceforth the records become the practical evidence of title. By deposit of the deeds, the pledgee does not obtain that effective control over the thing pledged which is essential to such a security when not evidenced by writing, whether that thing be real or personal.

For the reasons above stated, this court has held that the vendor of land, who delivers to his vendee a deed absolute, does not retain a lien thereon for the unpaid purchase money. *Edminster v. Higgins*, 6 Neb. 265; *Ansley v. Pasakro*, 22 Neb. 662. In *Folsom v. McCague*, 29 Neb. 124, Judge Norval, speaking of an assignment of a land contract where the place for the vendee's name was left blank, said: "To make a valid assignment of these contracts, it was as necessary to have an assignee as it was the signature of the assignor. Until someone's name was filled in these blanks as assignee the appellees appeared to be, and were, the real owners. . . . These assignments of the contracts in blank were in violation of the statute of frauds, and void." While none of these cases are decisive of that before us, they all recognize the principles already stated. We would, in the absence of authority elsewhere, say without hesitation that the doctrine of equitable mortgages by the deposit of title deeds, although a part of the law of England, is not here applicable, is contrary to our statutes, and was therefore not adopted by the legislature of the territory. This conclusion is re-enforced by an 44 L. R. A.

examination of the decisions in other states, where by custom or by statute the common law has been acquired. For some or all of the reasons suggested, the doctrine has been repudiated in the following cases: *Probasco v. Johnson*, 2 Disney (Ohio) 96; *Lehman v. Collins*, 69 Ala. 127; *Bower v. Oyster*, 3 Penr. & W. 239; *Shitz v. Dieffenbach*, 3 Pa. St. 233; *Vanmeter v. McFaddin*, 8 B. Mon. 435; *Bicknell v. Bicknell*, 31 Vt. 498; *Meador v. Meador*, 3 Heisk. 562; *Gothard v. Flynn*, 25 Miss. 58.

While the courts of many states have to some extent intimated an adherence to the English rule, it has always been on a citation of the English cases, without any discussion on principle of the objections to the enforcement of that rule in this country. Moreover, these cases are by no means so formidable as their bare citation in digests and text-books would indicate. New York invariably leads the list of states in these compilations, and the first case cited is *Jackson, M'Crea, v. Dunlap*, 1 Johns. Cas. 114, 1 Am. Dec. 100. There land had been sold. The deed had not been delivered, but was retained by the grantor as security for the purchase money. Four judges held that there had been no delivery, and that title had never passed. Kent alone thought that title had passed, but that an equitable mortgage had been created. He does not discuss the question, and his opinion was a dissent; but the case is cited as upholding the English rule. *Jackson, Lovell, v. Parkhurst*, 4 Wend. 369, merely holds that an equitable mortgage is not available as a defense in ejectment. The validity of such a mortgage for other purposes was not involved in the case. *Rockwell v. Hobby*, 2 Sandf. Ch. 10, was a case where a son had paid his mother's mortgage, and retained an unrecorded deed to her. It was there held that the retention of the deed made an equitable mortgage, but the case loses force from the further holding that, independently of the deed, the son was subrogated to the rights of the mortgagee whom he had paid. *Chase v. Peck*, 21 N. Y. 581, was a case of a deed absolute. The remarks about deposits of title deeds were *obiter*. In New Jersey a very peculiar thing has occurred. *Griffin v. Griffin*, 18 N. J. Eq. 104, was a bill to compel the defendant to surrender to plaintiff deeds to plaintiff's ancestor of land in New York. It appeared that they had been deposited as security. The court, citing the New York cases we have mentioned, took them as indicating that such a deposit operated in New York as a mortgage, and therefore very properly refused to decree their surrender, without any reference to the New Jersey law on the subject. But in *Gale v. Morris*, 29 N. J. Eq. 222, the court announced the English rule as in force in New Jersey, and cited *Griffin v. Griffin*, and also *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679, a case where the doctrine was not involved, but mentioned by way of remote illustration of a general equitable principle. Moreover, even *Gale v. Morris* did not require a decision of the question. That was a suit to reform a mortgage on a life estate, so as to embrace the fee. The

mistake as between the parties was admitted, and the issue was whether a subsequent mortgagee was charged with notice, so that the reformation could cut him out as to the reversion. *Hackett v. Reynolds*, 4 R. I. 512, enforces such a mortgage in a hard case, with the preliminary observation that the fraudulent design of the debtors was so transparent "that a court of equity would be disposed to find or to make a way to thwart them." From a peculiarly apologetic tone in the opinion it is evident that the court realized that it was making a way. *Hutzel Bros. v. Phillips*, 28 S. C. 136, often cited as sustaining the rule, holds distinctly that the case was not within it. There was a dissent to the intimation that the rule might be in force.

The following cases, frequently cited, will be found on investigation to involve no such question, and the remarks of the judges on the subject either to be obiter or made for the purpose of excluding the question from the case: *Mowry v. Wood*, 12 Wis. 414; *Jarvis v. Dutcher*, 16 Wis. 308; *Abbott v. Godfrey*, 1 Mich. 179; *Peckham v. Haddock*, 36 Ill. 38; *Roberts v. Richards*, 36 Ill. 339; *Carpenter v. Black Hawk Gold Min. Co.* 65 N. Y. 43; *Hall v. McDuff*, 24 Me. 311; *Wright v. Troutman*, 81 Ill. 374. *Williams v. Stratton*, 10 Smedes & M. 418, says: "Such a mortgage is in direct opposition to the statute of frauds, in regard to which we have said that we will create no exceptions not found in the statute." *Mandeville v. Welch*, 5 Wheat. 277, 5 L. ed. 87, does not sustain the doctrine. Judge Story merely says in that case: "It may be admitted that according to the course of the authorities in England, and as applicable to the state of land titles there," a deposit of title deeds creates a mortgage. Whatever inference might be drawn from that language as to the position of the Supreme Court of the United States is dispelled by the emphatic words of Justice Campbell in *Williams v. Hill*, 19 How. 246, 15 L. ed. 570: "Nor can the real property conveyed in the deed be retained as a security for advances, or debts subsequently made, on the strength of a parol engagement." The case of *First Nat. Bank v. Caldwell*, 4 Dill. 314, is entitled to more than passing consideration, not only from the eminent ability of the judge who decided it, but as being a case from this Federal district, and to which the law of Nebraska was applicable. There certain railroad coupons were held as a pledge. They were exchangeable for land, and, by arrangement of the debtor and creditor, they were exchanged, land contracts being issued in the name of the debtor, but delivered to the creditor. The court held that the pledgee had a lien superior to that of a judgment creditor. Judge Dillon, however, declined to pass on the question whether a lien could be created by the mere deposit of title deeds. The fact that there they stood in lieu of coupons held in perfect pledge was the controlling fact in his mind. Giving, however, due weight to his apparent opinion in favor of the English rule, we do not feel that we can adopt it in the face of what seems to us the overwhelming

ing reason and weight of authority against it.

The plaintiff argues that, so far as the reasons urged for denying the lien are founded on the statute of frauds, they are of no force because our statute excepts from its operation estates arising by act or operation of law. This phrase occurs twice in the statute,—once in § 3, already quoted, and again in § 4, with reference to trusts. Comp. Stat. chap. 32. The phrase is twice found in the statute of 29 Car. II. chap. 3, and in the same connection,—in § 3 in very similar words to our § 3; in § 8 with regard to trusts. Section 8 of the English statute excepts trusts arising by implication or construction of law, and extinguishments or transfers by act or operation of law; while our § 4 excepts trusts arising or extinguished by implication or operation of law. It is manifest, from the closeness of context, that the phrase was used in our statute in the English sense. We have not found any exact definition thereof. Chancellor Kent, in *Simonds v. Catlin*, Coleman & C. Cas. 346, said: "These words are strictly technical, and refer to certain definite estates, such as those by the curtesy and dower, or those created by remittitur." In Bouvier's Law Dictionary it is said that the term indicates the manner in which a party acquires rights without any act of his own. There can be no doubt that Parliament intended no more than these statements imply, at least in the 3d section of the statute. In the 8th section trusts were involved, and the object of the exception seems to have been to avoid the destruction of the ingenious method of conveyancing derived from the doctrine of trusts, and the construction which had been placed on the statute of uses, and to preserve resulting and constructive trusts. Whatever may have been the precise idea in the legislative mind, it is clear that the exception was not meant to give effect to contracts which the parties had failed to express in the form required by the statute. Such an interpretation would render the exception wholly destructive of the statute; yet it requires that interpretation to bring this case within the exception. The lien here arises, if at all, solely from the contract of the parties. It is not a result flowing by law independent of their contract, or even derivative from any valid contract which they made.

Finally, it is insisted that a court of equity will enforce the lien as the result of an imperfect attempt to create a legal mortgage. Certain California cases are cited in support of the argument. The power of equity is frequently asserted to reform instruments, and to compel their execution under certain circumstances. But neither the petition nor the evidence presents a case for the reformation of an instrument or the specific performance of a contract. There is not made out, as suggested, a case for the specific performance of an oral contract on the ground of part performance. The plaintiff has not altered its position except by paying the consideration, and that alone is not such a part performance as will take a case out of the statute of frauds. Moreover, there was no

contract to specifically enforce. Miller did not promise to execute a mortgage. He indorsed the contract, and delivered it, which was all that his contract contemplated. Nothing more could be required, at least

where the rights of third persons have intervened. In no way can the bank be given any relief except by giving effect to a transaction which the law has denounced as void. *Affirmed.*

INDIANA SUPREME COURT.

Sarah E. PUGH *et al.*, Appts.,

v.

David F. HIGHLEY *et al.*

(.....Ind.....)

A judgment creditor who, in good faith, buys land at a proper execution sale, on his own valid judgment, does not take the land subject to prior secret equities.

(March 9, 1899.)

APPEAL by defendants from a judgment of the Superior Court for Grant County in favor of plaintiffs in a suit brought to enforce a vendor's lien upon certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Moon & Wolf, for appellants:

A vendor's lien may be enforced against the vendee or a purchaser from the vendee with notice.

Deibler v. Barwick, 4 Blackf. 339; *Pierce v. Gates*, 7 Blackf. 162; *McCarty v. Pruett*, 4 Ind. 226; *Merritt v. Wells*, 18 Ind. 171; *Boling v. Howell*, 93 Ind. 329.

The recording act protects "any subsequent purchaser . . . in good faith and for a valuable consideration."

Rev. Stat. 1894, § 3350; *Wert v. Naylor*, 93 Ind. 431.

The burden is on a vendor, in a suit against a subsequent purchaser, to allege and prove facts which disclose that the grantee is not a bona fide purchaser.

McCarty v. Pruett, 4 Ind. 226; *Gaar v. Millikan*, 68 Ind. 208; *Johns v. Sewell*, 33 Ind. 1.

The presumption always is, in the absence of allegations to the contrary, that a purchaser of real estate is a bona fide purchaser.

Rooker v. Rooker, 75 Ind. 571; *Craig v. Major*, 139 Ind. 624; *Anthony v. Wheeler*, 130 Ill. 129; *Meek v. Skeen*, 23 U. S. App. 232, 60 Fed. Rep. 322, 8 C. C. A. 641; *Gratz v. Land & River Improv. Co.* 53 U. S. App. 499, 82 Fed. Rep. 381, 27 C. C. A. 305, 40 L. R. A. 393.

Appellant's rights were fixed by the sale. *Catherwood v. Watson*, 65 Ind. 581; *Rooker v. Rooker*, 75 Ind. 571; *Moss v. Jenkins*, 146 Ind. 589; *Maroney v. Boyle*, 141 N. Y. 462; *Riley v. Martinelli*, 97 Cal. 575, 21 L. R. A. 33.

Under our present law a bidder at sheriff's sale does not await the execution of a deed to become a purchaser.

Rev. Stat. 1894, § 778; *Heck v. Fink*, 85 Ind. 6.

NOTE.—As to claim of purchaser at judicial sale to be a bona fide purchaser, see *note* to *Riley v. Martinelli* (Cal.) 21 L. R. A. 33. 44 L. R. A.

A distinction must all the time be kept in mind between a mere judgment lien holder who, according to the weight of authority, is not protected against liens of which he had no notice when he took his judgment, and one who has become a purchaser at a sheriff's sale of his debtor's property.

A third person buying at sheriff's sale will be protected against secret liens and equities.

Before the purchase the judgment creditor has or may have a lien on all of his debtor's property. The moment he purchases at his own sheriff's sale, he loses his lien on all the debtor's property except only that portion which he purchases. If his title or lien on that fails, he loses his judgment which he has satisfied as well as the amount he has had to pay in cash for costs, unless he can bring himself within Rev. Stat. 1894, § 777.

Had Mrs. Pugh taken a deed from the owner of the land who was her debtor, in payment of her debt, and for no other consideration, she would have been protected.

Adams v. Vanderbeck, 148 Ind. 92; *People's Sav. Bank v. Bates*, 120 U. S. 556, 21 L. ed. 754; *Franklin Sav. Bank v. Taylor*, 9 U. S. App. 406, 53 Fed. Rep. 854, 4 C. C. A. 55; *Morse v. Cohannet Bank*, 3 Story, 389; *McMahon v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *Dillon v. Dorne*, 19 Ind. 203; *Aiken v. Bruen*, 21 Ind. 137; *Brannon v. May*, 42 Ind. 92; *Boling v. Howell*, 93 Ind. 329; *Work v. Brayton*, 5 Ind. 396; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

Why should not the rule that a precedent debt constitutes a valuable consideration for a conveyance apply to a purchase at sheriff's sale to satisfy such debt?

Orth v. Jennings, 8 Blackf. 426; *Milner v. Hyland*, 77 Ind. 458; 2 White & T. Lead. Cas. in Eq. pt. 1, p. 93.

The law requires the judgment creditor, in order to preserve his rights, to bid all the property is worth.

Hervey v. Krost, 116 Ind. 268; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 9 L. R. A. 676; *Anderson v. Anderson*, 129 Ind. 573.

If the title to be acquired is uncertain, bidders will be discouraged.

Horn v. Indianapolis Nat. Bank, 125 Ind. 381, 9 L. R. A. 676.

The question presented in this case is passed upon in *Catherwood v. Watson*, 65 Ind. 576; *Rooker v. Rooker*, 75 Ind. 571.

The purchaser at a sale under execution would possess the same rights as a purchaser of the execution defendant.

Orth v. Jennings, 8 Blackf. 420.

Doe, Hosier, v. Hall, 2 Ind. 556, 54 Am. Dec. 400, decides that a bona fide purchaser at sheriff's sale takes the land as against a

prior unrecorded deed of which he had no notice.

Gifford v. Bennett, 75 Ind. 528; *McMillan v. Hadley*, 78 Ind. 590; *Sills v. Lawson*, 133 Ind. 137.

It is said in many cases in other states that a purchaser at a judicial sale may be a bona fide purchaser.

Ohio L. Ins. Co. v. Ledyard, 8 Ala. 866; *Ellis v. Smith*, 10 Ga. 253; *Roberts v. Bourne*, 23 Me. 185, 39 Am. Dec. 614; *Jackson, Lansing, v. Chamberlain*, 8 Wend. 620; *Morrison v. Funk*, 23 Pa. 421; *Hetzl v. Barber*, 69 N. Y. 1; *Maroney v. Boyle*, 141 N. Y. 462; *Graff v. Louis*, 71 Fed. Rep. 591.

The very fact that a court of equity will limit the lien proceeds upon the assumption that, if the land is sold to a bona fide purchaser, the existing equities cannot be enforced against such purchaser.

Milner v. Hyland, 77 Ind. 458.

In *Vitto v. Hamilton*, 86 Ind. 137, the court reiterates the rule that an execution plaintiff who purchases at his own sale is a bona fide purchaser.

Pierce v. Spear, 94 Ind. 127.

The recording acts give to a bona fide purchaser at his own execution sale the same protection that is accorded by the registry laws to any other purchaser in good faith.

Bayley v. Greenleaf, 7 Wheat. 46, 5 L. ed. 393; *Neuman v. Davis*, 24 Fed. Rep. 609; *Tennant v. Watson*, 58 Ark. 252; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Foorman v. Wallace*, 75 Cal. 552; *Riley v. Martinelli*, 97 Cal. 575, 21 L. R. A. 33; *Halloway v. Platner*, 20 Iowa, 121, 89 Am. Dec. 517; *Butterfield v. Walsh*, 21 Iowa, 99, 89 Am. Dec. 557; *Walker v. Elston*, 21 Iowa, 529; *Butterfield v. Walsh*, 36 Iowa, 534; *Ettenheimer v. Northgraves*, 75 Iowa, 23; *Parker v. Prescott*, 87 Me. 444; *Woodward v. Sartwell*, 129 Mass. 210; *Luton v. Sharp*, 94 Mich. 202; *French v. DeBow*, 38 Mich. 708; *Davis v. Owsby*, 14 Mo. 170, 55 Am. Dec. 105; *Adams v. Buchanan*, 49 Mo. 64; *Chandler v. Bailey*, 89 Mo. 641; *Parks v. People's Bank*, 97 Mo. 130; *Hope v. Blair*, 105 Mo. 85; *Condit v. Wilson*, 36 N. J. Eq. 370; *Voorhis v. Westervelt*, 43 N. J. Eq. 644; *Hackensack Sav. Bank v. Morse*, 46 N. J. Eq. 161; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Wood v. Morehouse*, 45 N. Y. 368; *Sternberger v. Ragland*, 57 Ohio St. 148; *Paine v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585; *Meek v. Skeen*, 23 U. S. App. 232, 60 Fed. Rep. 322, 8 C. C. A. 641; *Reynolds v. Haskins*, 68 Vt. 426.

Where a judgment defendant who is a resident householder is the owner of less property than is exempt from execution a judgment against him does not become a lien against his real estate.

Dumbould v. Rouley, 113 Ind. 353; *Ray v. Yarnell*, 118 Ind. 112; *King v. Easton*, 135 Ind. 353; *Barnard v. Brown*, 112 Ind. 53; *Citizens' State Bank v. Harris*, 149 Ind. 208.

But where the owner or his grantee permits the land to be sold at sheriff's sale upon such judgment, the sale will convey title, if there is no redemption; and it will not be set aside where there has been no claim to exemption made before the sale.

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Moos v. Jenkins, 146 Ind. 589.

The fact that the bid of appellant Pugh was credited upon her judgment, except the costs which she paid in cash, does not place her in any different position from that which she would occupy if she had paid her bid in cash.

Robertson v. VanCleave, 129 Ind. 217, 15 L. R. A. 68; *Burton v. Ferguson*, 69 Ind. 480; *Clossen v. Whitney*, 39 Minn. 50; *Boos v. Morgan*, 130 Ind. 305; *Boots v. Ristine*, 146 Ind. 75.

The appellees, seeking the aid of a court of equity to enforce a vendor's lien,—a creature of courts of equity,—must show that its enforcement is not inequitable to appellant.

Richards v. Mackall, 124 U. S. 183, 31 L. ed. 396; *Willard v. Wood*, 164 U. S. 502, 41 L. ed. 531; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626.

The fact that no mortgage was taken for the unpaid purchase money and put upon record is itself a badge of fraud.

Hutchinson v. First Nat. Bank, 133 Ind. 271.

When it appeared from the evidence that the lien was concealed for the express purpose of giving Clayborn H. Highley a fictitious credit, the proof of fraud became conclusive.

Blennerhassett v. Sherman, 105 U. S. 100, 26 L. ed. 1080; *Dobson v. Snider*, 70 Fed. Rep. 10; *Montgomery v. Phillips*, 53 N. J. Eq. 203; *Jewett v. Sundback*, 5 S. D. 111; *Goll & F. Co. v. Miller*, 87 Iowa, 426; *Snouffer v. Kinley*, 96 Iowa, 102; *Steele v. Coon*, 27 Neb. 586; *Fetters v. Duvernois*, 73 Mich. 481; *Stock-Growers' Bank v. Newton*, 13 Colo. 245; *Lehman v. Van Winkle*, 92 Ala. 443; *State Sav. Bank v. Buck*, 123 Mo. 148; *Central Nat. Bank v. Doran*, 109 Mo. 40.

The acceptance of a note negotiable by the law merchant is prima facie a payment of the debt and a waiver of any vendor's lien.

Davis & R. Bldg. & Mfg. Co. v. Vico, 15 Ind. App. 117; *Sutton v. Baldwin*, 148 Ind. 361; *Teal v. Spangler*, 72 Ind. 380; *Smith v. Bettger*, 68 Ind. 254, 34 Am. Rep. 256.

Messrs. R. T. St. John and W. H. Charles, for appellees:

This court has in effect overruled the doctrine that the judgment creditor who purchases under his own judgment is a bona fide purchaser as against an existing vendor's lien.

Shirk v. Thomas, 121 Ind. 147; *White v. Wilson*, 6 Blackf. 448, 39 Am. Dec. 437; *Glidewell v. Spough*, 26 Ind. 319; *Taylor v. Duesterberg*, 109 Ind. 165; *Foltz v. Wert*, 103 Ind. 404; *Dickerson v. Tillinghast*, 4 Paige, 215, 25 Am. Dec. 528; *Boling v. Houcell*, 93 Ind. 329; *Petry v. Ambroscher*, 100 Ind. 510; *First Nat. Bank v. Connecticut Mut. L. Ins. Co.* 129 Ind. 241.

A precedent debt is a sufficient consideration for a mortgage, but such mortgage will be subject to the vendor's lien.

Oliver v. Piatt, 3 How. 333, 11 L. ed. 622.

One who has acquired his title by quitclaim deed cannot be regarded as a purchaser without notice.

May v. LeClaire, 11 Wall. 217, 20 L. ed. 50; *Villa v. Rodriguez*, 12 Wall. 323, 20 L.

ed. 406; *Baker v. Humphrey*, 101 U. S. 494, 25 L. ed. 1065.

One who takes premises purchased by him at sheriff's sale in payment of a pre-existing debt is not a bona fide purchaser within the meaning of the recording act.

Peck v. Mallams, 10 N. Y. 545.

A judgment is a lien only upon the debtor's interest in the land.

Paaton v. Sterne, 127 Ind. 289; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Bell v. Flaherty*, 45 Miss. 696; *Green v. Mizelle*, 54 Miss. 228; *Tarkington v. Purvis*, 128 Ind. 182, 9 L. R. A. 607.

Where a vendor has his lien on lands in possession of his vendee, and the vendee sells the land to a third party who without notice pays a valuable consideration therefor, such purchaser will take the land divested of the vendor's lien; but where such purchaser is a judgment creditor of the vendee, and purchases on his own judgment, he is not a bona fide purchaser as against the prior equity of the vendor; but takes title subject to the same.

Orb v. Coapstick, 136 Ind. 313; *Boling v. Nowell*, 93 Ind. 329; *Petry v. Ambroscher*, 100 Ind. 510; *Shirk v. Thomas*, 121 Ind. 147; *Tarkington v. Purvis*, 128 Ind. 182, 9 L. R. A. 607; *Old Nat. Bank v. Findley*, 131 Ind. 225; *Boos v. Morgan*, 130 Ind. 305; *Taylor v. Dueterberg*, 109 Ind. 165; *Wert v. Naylor*, 93 Ind. 431; *Adams v. Vanderbeck*, 148 Ind. 92.

Baker, J., delivered the opinion of the court:

Suit to foreclose vendor's lien. Appellees conveyed lands to one Clayborn Highley, and took his unsecured note therefor. Afterwards appellant recovered judgment against the grantee, and caused execution to issue. The sheriff levied on the lands in question. At the sale, appellant was the purchaser. When the time for redemption expired, she received a sheriff's deed for the lands. Complaint in two paragraphs. The first is silent concerning notice to appellant of appellee's equity. The second charges that appellant had notice before receiving the sheriff's deed. Appellant's several demurrers for want of facts were overruled. A demurrer was sustained to an answer of appellant, in which she averred that she bid at the sale, paid the costs, and receipted the sheriff for the full amount of her judgment, without knowledge or notice of appellees' claim. Judgment for appellees after trial on issues completed by answers of general denial and payment, and reply denying payment.

The question is: Does a judgment creditor, who in good faith buys at a proper execution sale on his own valid judgment, take the land subject to prior secret equities? The lien of a judgment attaches only to the actual interest of the debtor in the land. While the judgment remains unexecuted, the lien may be subordinated to any prior equity, though secret; for the creditor pays or surrenders nothing to or for the debtor, and continues to hold against the debtor his full claim, which the court has merely changed from a cause of action into a judg-

ment. A security for an antecedent debt will be upheld between the parties, but the taker will not be protected against prior secret equities, because he parts with nothing. But a purchaser who pays the owner the value of the land takes the title clear of equities of which he has no notice. And a creditor who, without notice, cancels a pre-existing debt in consideration of his debtor's conveying him land is a good-faith purchaser for value. To hold that the debtor may sell his land to a stranger, and turn over the purchase price (money, notes, goods, land) to his creditor in satisfaction of the debt, whereby the creditor is free from claimants of secret equities, and to hold that the creditor, if the debtor conveys the land to him in payment of the debt, is liable to be affected by secret equities, is to approve the roundabout and involved, and to condemn the straight and simple, method of accomplishing the same result,—using the land to pay the debt. A good-faith purchaser, other than the judgment creditor, at a proper execution sale on a valid judgment, who pays the sheriff the amount of his bid, acquires all the right, title, and interest in the land sold (except redemption) that the judgment debtor could have conveyed to him by deed or bargain and sale. As to secret equities, he stands on the same footing with the good-faith purchaser for value from the apparent owner of land. In both cases the purchaser irrevocably parts with his money, relying, and having the right to rely, on getting, not merely what the debtor actually owns, but what from the public records he apparently owns. In either case,—before the debtor himself conveys, or before the sheriff conveys for him,—the holder of the prior secret equity has had it in his power to prevent any one's being misled by the false situation. If either the subsequent purchaser or the holder of the secret equity must suffer or be postponed, it should be the latter, since his initiative made delusion by the debtor's apparent circumstances possible.

What, now, is the position of the judgment creditor who purchases at a proper execution sale on his own valid judgment? (The premises exclude the question of the effect upon the judgment creditor of irregularities in the proceedings.) The authorities holding that he is not a good-faith purchaser for value seem to be based upon either or both of two propositions,—that he has parted with nothing, has not changed his position for the worse; and that he will not be permitted to urge a claim that rises higher than the source of his right (by that meaning the lien of his judgment). The judgment creditor purchaser has parted with value, and has changed his position for the worse. He has paid to the sheriff the amount of his bid in cash, actually or constructively; for, if he merely receipts for payment of his judgment in whole or in part, the transaction, in contemplation of law, is the same as if he had paid the sheriff in cash, and the sheriff had paid him in cash. His payment is just as irrevocable as that of a stranger purchaser. His right to vacate the satisfaction of the judgment is no greater

than that of a stranger purchaser; and under Rev. Stat. 1881, § 765 (Burns's Rev. Stat. 1894, § 777; Horner's Rev. Stat. 1897, § 765), there can be no right of that kind in the present case, for defects in the proceedings and want of title in the debtor are excluded from the question, by the facts. If the judgment creditor purchaser does not pay at the time of the sale, he is liable to judgment for the amount of the bid, and damages, interest, and costs, like any other purchaser. Rev. Stat. 1881, § 760; Burns's Rev. Stat. 1894, § 772; Horner's Rev. Stat. 1897, § 760. He has also changed his position for the worse if he is not to be permitted to hold under the execution sale the same as a stranger purchaser. The debtor may have directed the sheriff to levy upon the very land that was subject to the secret equity. Manifestly, the judgment creditor, without notice, is ethically as innocent in bidding as is the stranger. By the sale, the execution becomes *functus officio*, and the judgment creditor has lost the lien of his execution upon the goods and chattels of his debtor. By the sale, the judgment is satisfied *pro tanto*, and the judgment creditor has lost the lien of his judgment upon the other lands of his debtor. But, it is said, he may not urge a claim of higher value than the source of his right,—that is, his judgment lien. Why not? If an innocent stranger pays for a deed, he acquires the apparent title of the grantor, and the holder of the secret equity will not be heard to say aught against it; that is, the purchaser gets more than the debtor had. Stronger than the innocent stranger's, however, are the equities of the judgment creditor purchaser without notice; for the holder of the secret equity has less opportunity to protect himself against the stranger than he has against the judgment creditor, since he may have no means of ascertaining, even by the exercise of the highest vigilance, to whom his secret trustee is about to convey, but it is only his own inaction that can prevent his learning of the judgment before sale,—in time to subordinate the lien to his rights. Shall equity offer a premium for sloth? If not, then the judgment creditor purchaser should likewise take more than the debtor had. If an owner of an antecedent debt cancels in good faith the obligation in consideration of a deed from his debtor he takes the title free from secret equities; that is, the purchaser gets more than the debtor had. Shall the private—maybe secret—extinguishment of the debt he held of more exalted worth in equity than the law's public and open satisfaction thereof? If not, then the judgment creditor purchaser should likewise take more than the debtor had. If a stranger without notice buys at execution sale, his purchase cuts off secret claims against the land; that is, the purchaser gets more than the debtor had. The law does not prohibit, but, on the contrary, encourages, the judgment creditor to bid; for it is in the interest of the law's execution of the judgment, and to the advantage of the debtor, that he should compete with the other bidders. If a stranger purchases, the sheriff pays over the money

to the judgment creditor, who thereby receives satisfaction out of property on which his judgment may not have been actually a lien. Shall equity accredit the circuitous, and discredit the direct, means to the same end? If not, then the judgment creditor purchaser should likewise take more than the debtor had. It is a misapprehension to say that the rights of a judgment creditor purchaser arise from the judgment lien, and therefore continue subject to prior secret equities. His position as purchaser is in no sort of legal privity with his position as judgment creditor. When the sale is made, he ceases to be a judgment creditor. His rights thenceforward are those of a purchaser at execution sale. The contention that the rights of a purchaser at execution sale are one thing if he is a stranger, and another if he is the judgment creditor, is untenable in reason.

The decisions of this court, upon analysis, are found in conformity with these principles. In *Catherwood v. Watson*, 65 Ind. 576, the facts were these: Daniel Watson bought land with his wife's money, and took title in his own name. Subsequently, Catherwood obtained judgment against one Mills, on which Daniel became replevin bail. The land was sold on execution to satisfy the judgment, and Catherwood purchased. Mrs. Watson sued to quiet title. Catherwood had no notice of her claim till after the execution sale. It was held that Catherwood was entitled to the land clear of Mrs. Watson's secret equity. It appears in *Rooker v. Rooker*, 75 Ind. 571, that Samuel Rooker used money of his wife in buying land, and took title in his own name. His wife had instructed him to buy the land for her daughter Mary. Samuel recognized the trust, and made a will, devising the land to Mary. In Samuel's lifetime, the Farmers' Friend Manufacturing Company recovered judgment against Samuel, and bought the land at execution sale on its judgment. The company had no notice of Mary's equities. Within the year of redemption, the company sold its certificate of sale to James Rooker, who knew about the claims of Mary. After James received a sheriff's deed, the guardian of Mary, her father having died in the meantime, brought suit to quiet title. It was decided that the company was a good-faith purchaser for value, and that, the rights of the parties having been fixed by the execution sale, James's knowledge of Mary's equities at the time he bought the certificate was immaterial. *Milner v. Hyland*, 77 Ind. 458. Hyland bought realty with his wife's money and took title in his own name. Milner and others recovered judgments against Hyland, on which executions were issued and levied on the land. Milner became purchaser at the sheriff's sale, which was made in part to satisfy Milner's own judgment. By the decision, Milner was fully protected against the secret equity of Mrs. Hyland. *Vitto v. Hamilton*, 86 Ind. 137. A mortgage was made to appellee, in which the land intended to be encumbered was not described. The same landowner later executed a mortgage to appellant, in which the same mis-

take occurred. Appellant brought suit against the mortgagor to reform and foreclose. Appellee was not a party. At the sale, appellant was the purchaser, without notice of appellee's equity. Subsequently appellee brought suit to reform and foreclose, but appellant was not a party. At the sale, appellee was the purchaser. Held, that appellant's purchase at his own sale cut off appellee's prior secret equity. In the ejectment case of *Pierce v. Spear*, 94 Ind. 127, the title resulting from an execution sale at which the judgment creditor was the purchaser was determined to be the paramount one.

Decisions to the same effect in other jurisdictions abound. *Tennant v. Watson*, 58 Ark. 252; *Newman v. Davis*, 24 Fed. Rep. 609; *Foorman v. Wallace*, 75 Cal. 552; *Riley v. Martinelli*, 97 Cal. 575, 21 L. R. A. 33; *Doyle v. Wade*, 23 Fla. 90; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Halloway v. Platner*, 20 Iowa, 121, 89 Am. Dec. 517; *Butterfield v. Walsh*, 21 Iowa, 99, 89 Am. Dec. 557; *Walker v. Elston*, 21 Iowa, 529; *Ettenheimer v. Northgraves*, 75 Iowa, 28; *Parker v. Prescott*, 87 Me. 444; *Woodward v. Sartwell*, 129 Mass. 210; *Luton v. Sharp*, 94 Mich. 202; *Adams v. Buchanan*, 49 Mo. 64; *Condit v. Wilson*, 36 N. J. Eq. 370; *Voorhis v. Westervelt*, 43 N. J. Eq. 644; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Wood v. Morehouse*, 45 N. Y. 368, 376; *Barto v. Tompkins County Nat. Bank*, 15 Hun, 11; *Paine v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585; *Sternberger v. Ragland*, 57 Ohio St. 148; *Grace v. Wade*, 45 Tex. 529; *Reynolds v. Haskins*, 68 Vt. 426; *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. ed. 393. The decisions in Arkansas, Florida, Illinois, New Jersey, and Texas apparently are controlled by statutes ranking judgment creditors with subsequent purchasers for value. The cases of *Gifford v. Bennett*, 75 Ind. 528; *Wert v. Naylor*, 93 Ind. 431; and *Adams v. Vanderbeck*, 148 Ind. 92,—holding that stranger purchasers at execution sales, and cancelers of antecedent debts, without notice, are innocent purchasers, are also authoritative in principle. The statements in *Boling v. Howell*, 93 Ind. 329; *Petry v. Ambroscher*, 100 Ind. 510; *Tarkington v. Purvis*, 128 Ind. 182, 9 L. R. A. 607; and *Orb v. Coapstick*, 136 Ind. 313,—in so far as they may be deemed to affirm that the holder of an antecedent debt who cancels his claim for a conveyance of land from his debtor takes subject to secret equities of which he had no notice, are disapproved.

Against the decisions in which was directly involved the very question that arises in the present appeal, no authority to the contrary in this state has been cited, nor has an extended investigation discovered one. There are, however, several instances of *obiter dicta*. In *Rooker v. Rooker*, 75 Ind. 571, and *Vitto v. Hamilton*, 86 Ind. 137, the expressions of dissent, by force of the term, are excluded from the decisions. In *Carnahan v. Yerkes*, 87 Ind. 62, 67, the following language was used: "An execution creditor, who bids off property at a sale upon his own execution, and applies the bid to the pay-

ment of his own judgment, is not regarded as a bona fide or innocent purchaser." The statement is incomplete, because silent as to notice. Applied to a judgment creditor purchaser with notice of the prior equity, it is right; to one without notice, wrong. The facts in the case disclose that the judgment creditor purchaser had notice, prior to the execution sale, of the senior rights of his adversary. The quotation must be limited, or regarded as *dictum*. In *Shirk v. Thomas*, 121 Ind. 147, 153, it was said: "*Rooker v. Rooker*, 75 Ind. 571; *Gifford v. Bennett*, 75 Ind. 528; *Vitto v. Hamilton*, 86 Ind. 137, . . . have, indeed, been overruled, and must be regarded as without force."

The great weight of authority, evidenced by our own well-considered cases, . . . is that a judgment creditor who buys at his own sale obtains only the interest which the judgment debtor had in the property at the time the judgment was entered." The facts were these: Albert Tyner on August 1, 1884, owned certain land. That day he deeded it to James Tyner. The deed was recorded in May, 1885. On December 6, 1884, James Tyner, for full value, deeded the land to Shirk's ancestor. This deed was recorded February 18, 1885. Shirk's ancestor went into possession under his deed, and Shirk was in possession at the time of the sale, under Thomas's judgment. On October 28, 1884, Thomas caused a writ of attachment to issue against Albert Tyner, on the ground of his nonresidency. The writ was levied on the land in question. January 8, 1885, Thomas recovered judgment in attachment. July 7, 1886, order of sale was issued. July 31, 1886, sale occurred and Thomas bought. Neither James Tyner nor Shirk's ancestor nor Shirk had any notice of the attachment proceedings. The deed from Albert Tyner had been on record fourteen months, and Shirk and his ancestor had been in possession of the land nineteen months, before Thomas purchased at the execution sale. When it was determined that the rights of Thomas as holder of a judgment in attachment were no greater than those of the holder of an ordinary judgment, and were therefore subordinate to prior equities, the case was ended. Thomas could not be an innocent purchaser at any sort of a sale that occurred more than a year after he had notice of the prior deeds. The quoted proposition is pure *dictum*. Nor does one of the seventeen cases cited in *Shirk v. Thomas* as supportive of the *dictum* uphold it. In *White v. Wilson*, 6 Blackf. 448, 39 Am. Dec. 437, a misdescription in a mortgage was corrected against judgment creditors, not against purchasers at execution sale. In *Glidewell v. Spaugh*, 26 Ind. 319, the right of a purchaser at execution sale was held inferior to the right of one in possession under an unrecorded deed at the time of the sale. Possession was notice. In *Watkins v. Jones*, 28 Ind. 12, the controversy was between a wife who sought to enforce a secret trust against her husband and a judgment creditor of the husband. No question concerning rights under execution sales was involved. Nor did the question

arise in *Troost v. Davis*, 31 Ind. 34, wherein the holder of a prior equity sought to enjoin an execution sale. In *Hampson v. Fall*, 64 Ind. 382, Fall sent money to his mother with which to buy land for him. She took title in her own name, and subsequently mortgaged the land to one Vawter, who knew of the trust. Vawter, for value, transferred the mortgage to Hampson who got a deed through foreclosure. Hampson had no notice of Fall's equity. Hampson's title was held to be paramount. There was no sheriff's sale in *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562. The holder of a prior equitable lien enjoined a judgment creditor from proceeding to execution sale on his judgment. In *Jones v. Rhoads*, 74 Ind. 510, it appears that Castor devised his lands to Daniel Rhoads, a stranger. The heirs of Castor brought an action to set aside the will. A compromise was made, under which the court entered judgment that the will was valid, the heirs quitclaimed to Daniel, and Daniel gave his notes secured by mortgage on the devised lands to Jones, as trustee of the heirs for the full value of the lands. Jones, as trustee, later got a deed through foreclosure. Before the notes and mortgage were executed, Patton had recovered against Daniel Rhoads a judgment on which Jacob Rhoads became replevin bail. After the foreclosure sale, Jacob paid Patton, caused execution to issue, and bought at the sale. Jacob was not a party to the foreclosure proceedings. On Jones's suit to quiet title, Jacob prevailed, because the judgment lien attached to the land before the mortgage lien did. In *Sharpe v. Davis*, 78 Ind. 17, an ineffectual effort was made to hold, by virtue of a sheriff's deed, land to which the title never was in the judgment debtor, and for which the defendant had a recorded deed before the execution sale occurred. The same *dictum* appears in the opinion, however. Judgment creditors, in *Boyd v. Anderson*, 102 Ind. 217, failed to prevent the reformation of a prior deed made by the judgment debtor. In *Heberd v. Wines*, 105 Ind. 237, a wife quieted her equitable title against a judgment creditor of her husband who held the legal title in trust for her. *Blair v. Smith*, 114 Ind.

114, was a case of collusion between husband and wife to defraud the husband's creditors, and the rights of purchasers at execution sale were in no way involved. In *Miller v. Noble*, 86 Ind. 527, Miller, at his own execution sale on judgment against the widow of John Noble, purchased land that the widow took under the statute. She had married again before the judgment was rendered. After her death during coverture, the Noble children recovered the land from Miller. The case presented no question of secret equities. *Hays v. Reger*, 102 Ind. 524, concerned solely the subjection of a judgment lien to a prior equity. In *Foltz v. Wert*, 103 Ind. 404, the purchaser at execution sale had constructive notice, and his assignee both constructive and actual notice, of the prior equities. *Wright v. Tichenor*, 104 Ind. 185, decides that a sale upon a judgment against the husband alone does not convey the interest of the wife. The case does not pertain in the least to the relation between purchasers at execution sale and holders of prior secret equities. In *Wright v. Jones*, 105 Ind. 17, creditors of a widower unsuccessfully sought to subject one third of his deceased wife's land in fee to the liens of their judgments, in spite of her will to the contrary made in pursuance of an agreement between the husband and wife. *Taylor v. Duesterberg*, 109 Ind. 165, was a suit by a creditor of a husband to set aside as fraudulent a deed to his wife. No question arose that related to rights under execution sales. The statement in *Shirk v. Thomas* that the cases of *Rooker v. Rooker*, *Gifford v. Bennett*, and *Vitito v. Hamilton* have been overruled, is wholly gratuitous. They enunciate principles that are founded in reason; they are not opposed by any decision in this state on the same or similar facts; they flow with the current of modern authority; and they certainly are not overborne by the dissent in the *Rooker* and *Vitito* cases, nor by the obiter dicta in *Sharpe v. Davis*, *Carnahan v. Yerkes*, and *Shirk v. Thomas*.

Judgment reversed, with instructions to sustain the demurrer to each paragraph of the complaint.

IOWA SUPREME COURT.

N. HAMLIN, Appt.,
v.

B. F. SIMPSON.

(105 Iowa, 125.)

1. The payee of a check who does not promptly present it for payment to the bank, which falls before it is presented, has the burden of proving that the maker was not injured thereby.

2. Oral evidence of an agreement by

NOTE.—For release of indorser of check by delay in presenting it, see *Kirkpatrick v. Puryear* (Tenn.) 22 L. R. A. 785, and note.

44 L. R. A.

the cashier of a bank to allow a depositor to check against a special deposit for which certificates of deposit have been issued is admissible in an action against such depositor by one to whom he had given a check for the amount of a debt, which check was not duly presented, for the purpose of showing that he had reasonable ground to believe that such check would be paid, although he had no general deposit in the bank.

3. A finding that the cashier of a bank agreed to allow defendant to check against the amount of a special deposit in the bank is sustained by positive evidence by defendant to that effect, and by

evidence that the bank, although hopelessly insolvent and making desperate efforts to keep its doors open, permitted defendant to overdraw his general account.

4. The maker of a check which the payee fails to present for some time and until after the bank has failed, is damaged thereby so as to be discharged from liability on the check, where at the time of the failure he had general and special deposits in the bank for which he held collateral security which would be insufficient to pay the amount which would have remained in the bank if the check had been paid.
5. Failure of the payee of a check to promptly present the same to the bank for payment will release the maker from liability if he is injured thereby where the bank subsequently fails, although his general deposit in the bank was overdrawn at the time, where he had a special deposit in the bank and had reasonable grounds to believe that the check would be paid because of a promise by the cashier to allow him to check against such special deposit.
6. A finding that defendant did not know that a bank upon which he drew a check in favor of plaintiff was insolvent at the time is sustained by evidence that two days thereafter he made a large deposit in the bank, although he took security for special deposits made by him therein, where such deposits were made at a time when banks were failing all over the country.

(April 8, 1898.)

A PPEAL by plaintiff from a judgment of the District Court for Audubon County in favor of defendant in an action brought to recover the purchase price of certain live stock sold by plaintiff to defendant for which defendant gave a check which plaintiff failed to collect. *Affirmed.*

Statement by **Waterman, J.:**

Plaintiff seeks to recover the sum of \$929.46 for hogs and cattle sold the defendant. The answer admits the purchase of said live stock at the price named, but avers that the price was settled for at the time by bank checks, which plaintiff held an unreasonable time before presenting for payment, and that the bank upon which they were drawn became insolvent. By way of reply, plaintiff says that, at the time defendant drew said checks and delivered them to plaintiff, he (defendant) had no funds with which to meet them in the bank upon which they were drawn; that at said time said bank was hopelessly insolvent, and that this fact was well known to defendant, and unknown to plaintiff; and that a presentment of said checks would have been useless. The case was tried to the court without a jury. There was a judgment dismissing plaintiff's petition, and in favor of defendant for costs. Plaintiff appeals.

Messrs. Willard & Willard for appellant.

Messrs. Theodore F. Meyers and F. E. Brainard, for appellee:

The plaintiff in this case was not compelled to accept a check in payment of his 44 L. R. A.

stock. He had an absolute right to demand payment in money only. When, instead of demanding and receiving money in payment, he receives and accepts defendant's checks, the law defines his duties and responsibilities thereafter.

Hamilton v. Winona Salt & Lumber Co. 95 Mich. 436; *Cincinnati Oyster & Fish Co. v. National Lafayette Bank*, 61 Ohio St. 106; 2 Parsons, Contr. 8th ed. 736.

What is undue delay in the presentment of a check, and the law relative thereto, is fixed and determined by the courts in many decisions.

Gifford v. Hardell, 88 Wis. 538; *First Nat. Bank v. Miller*, 37 Neb. 500.

Greater diligence must be used in the presentment of a check than a bill of exchange.

Anderson v. Gill, 79 Md. 312, 25 L. R. A. 200.

A bank deposit is subject to any arrangement which the depositor and the bank may make concerning it, so long as the rights of third persons are not injuriously affected.

Howard v. Roeben, 33 Cal. 399; *Chiles v. Garrison*, 32 Mo. 475; *National Bank v. Smith*, 66 N. Y. 271; *McEwen v. Davis*, 39 Ind. 109; *Morse, Banks & Banking*, § 158; *Lamb v. Morris*, 118 Ind. 179, 4 L. R. A. 111.

In determining whether the cashier of the Cass County Bank would have been authorized to pay the checks in question had the same been presented for payment by plaintiff, and whether defendant had sufficient funds on deposit with which to meet said checks, the court must take into consideration, not only the amount of defendant's open account, but also all indebtedness due from the Cass County Bank to defendant.

Industrial Trust, Title, & Sav. Co. v. Weakley, 103 Ala. 458; *Re State Bank*, 56 Minn. 119.

Defendant had an absolute right to, and did, rely upon the conversation with the cashier of the bank relative to the drawing of checks against the fund evidenced by certificates.

American Eash. Nat. Bank v. Gregg, 138 Ill. 596.

The time of closing of the doors of the bank, and the suspension of its business, is the time when the bank becomes insolvent in fact and in effect, so far as third persons and creditors are concerned; and is the time which the courts refer to when they speak of the insolvency of the party.

Yardley v. Philler, 3 Pa. Dist. R. 46, 58 Fed. Rep. 746. See *Hayes v. Beardsley*, 136 N. Y. 299; *Chemical Nat. Bank v. Armstrong*, 16 U. S. App. 465, 59 Fed. Rep. 372, 8 C. C. A. 155, 28 L. R. A. 231; *Anderson v. Rodgers*, 53 Kan. 542, 27 L. R. A. 248; *Diven v. Phelps*, 34 Barb. 224; *Industrial Trust, Title, & Sav. Co. v. Weakley*, 103 Ala. 458.

The cashier of a bank ordinarily has the exclusive control of the funds of the bank. Where a bank holds out to the world, as was done in this case, that the cashier alone had the right to issue certificates of deposit by his signature only, this is the best evidence that a holder of a certificate had a right to believe and rely upon the apparent authority of the cashier to dispense with the

formality of surrendering the certificate, in order to have the debt due him from the bank evidenced upon the books of the bank.

See *Barnes v. Ontario Bank*, 19 N. Y. 167; *Potter v. Merchants' Bank*, 28 N. Y. 649, 86 Am. Dec. 273; *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 99 Ala. 379, 20 L. R. A. 600; 2 Morawetz, Priv. Corp. §§ 593 et seq.; *Lamb v. Morris*, 118 Ind. 179, 4 L. R. A. 111.

Any amount paid out on Simpson's check would have been offset or rather operated as a payment or appropriation of so much of Simpson's account as the amount of the check called for.

Windisch & M. Brewing Co. v. Bank of Maryville, Ohio Supreme Court April 7, 1893.

As between the appellant and the appellee, appellee is entitled to be paid the balance due him from the Cass County Bank, \$1,690, in full before appellant can claim any benefit from the collaterals held by appellee.

Fuller v. Tomlinson Bros. 58 Iowa, 111; *Adams & F. Harvester Co. v. Tomlinson Bros.* 58 Iowa, 129; *Little v. Phoenix Bank*, 2 Hill, 425, 7 Hill, 359.

The taking of collateral security is not a waiver of demand or presentment and notice of nonpayment, unless it should appear that appellee is amply secured.

Bond v. Farnham, 5 Mass. 170, 4 Am. Dec. 47; *Mead v. Small*, 2 Me. 207, 11 Am. Dec. 67.

Waterman, J., delivered the opinion of the court:

The facts, as stipulated or established, are that on December 13, 1893, the defendant gave his two checks on the Cass County Bank of Atlantic to plaintiff in settlement for live stock purchased. One of the checks was for \$441.80; the other, for \$487.66. The checks were given by defendant, at plaintiff's home, in Audubon county, 16¼ miles from Atlantic, and 5½ miles from Brayton, a station on a railroad leading to Atlantic, upon which two trains a day, except Sunday, ran to the last-named town. There was a bank in Exira, a town 7 miles from plaintiff's home. Plaintiff never presented the checks for payment, and on December 27, 1893, the Cass County Bank, being insolvent, was placed in the hands of a receiver.

2. As an excuse for not presenting the checks for payment, and to show that defendant had suffered no injury by the failure so to do, the plaintiff alleges that defendant at the time he gave the checks had no funds in said bank against which to draw. In the ordinary course of business, the checks should have been presented for payment, at the latest, during business hours of the second day after their receipt, which would have been the 15th. Tiedeman, Com. Paper, § 443. At that time, and for some days before, defendant's general account with the bank was overdrawn. On December 16 he deposited \$1,150.07. During all this time defendant had on special deposit in this bank the sum of \$2,000, represented by two certificates of deposit for \$1,000 each. As a general rule, it may be said that a check drawn

on a bank in which the drawer has not sufficient funds to meet it need not be presented at all, in order to hold the drawer. This rule, however, has some qualifications. The reasons for it seem to be that it is deemed a fraud for one to give a check which he has no ground to believe will be paid, and that he does not need notice of the fact that the check is not paid, when he must have known that payment would be refused. But if he has reason to think his check will be honored, though he may have no credit balance on the books of the bank, his act in drawing it will not be a fraud; and he will be in a position to insist on prompt presentment, demand, and notice. In *Beauregard v. Knoulton*, 156 Mass. 395, the rule is said to be that the drawing of a check on a bank wherein the drawer has no funds, and no ground for a reasonable expectation that the check will be paid, is a fraud, and will excuse the failure to present for payment. See also *Industrial Trust, Title, & Sav. Co. v. Weakley*, 103 Ala. 458; *Case v. Morris*, 31 Pa. 100; *True v. Thomas*, 16 Me. 36; *Stanton v. Blossom*, 14 Mass. 116, 7 Am. Dec. 198; *French v. Bank of Columbia*, 4 Cranch, 141, 2 L. ed. 576; *Robinson v. Ames*, 20 Johns. 146, 11 Am. Dec. 259; *Merchants' Bank v. Easley*, 44 Mo. 286, 100 Am. Dec. 287; *Hill v. Norris*, 2 Stew. & P. (Ala.) 114. In speaking of the rule that excuses demand and notice when the drawer has no funds in the hands of the drawee, it is said in *Case v. Morris*, 31 Pa. 100: "It introduced an exception to a plain and intelligible rule of commercial law, which many eminent and experienced judges have since regretted. It is adhered to on the principle of *stare decisis*, but it is not to be extended a single step."

3. Under the rule stated, we have this situation: There being no funds to the credit of defendant's general account in the Cass County Bank, plaintiff was presumptively under no obligation to make demand for the money; but this presumption is rebuttable, and defendant seeks to overcome it by this showing: During all of this time he held certificates of deposit, issued by the bank, for the sum of \$2,000; and he claims to have had an arrangement with the cashier by which he was allowed to check against this amount.

4. Appellant's first objection to this defense is that any such agreement with the cashier would be within the statute of frauds, and that oral evidence cannot be received to establish it. Whatever merit there might be in this claim if this were an action on the agreement, it is certainly not good under the circumstances of this case. No more is being claimed here for the cashier's promise than that it gave defendant reasonable ground to believe his checks would be paid.

5. Next it is said that no such agreement is established. The defendant is the only witness to testify on this point; and while in several of his answers he gives conclusions, instead of specific facts, yet he does in one answer state clearly and positively that the cashier told him that he might check against this special deposit. The circumstances tend, we think, to corroborate him.

This bank for some time prior to December 27, 1893, was hopelessly insolvent. During the period of the transactions between these parties it was making desperate efforts, from day to day, to keep open its doors. It needed every dollar it could obtain to enable it to continue its business, and yet during this time defendant was allowed to overdraw his general account. This circumstance seems almost conclusive. Upon no other theory than an agreement such as defendant claims would this state of affairs have been permitted. We think defendant has established that he had reasonable ground to believe the checks given plaintiff would be paid on presentation. This being true, the failure to make timely demand and give proper notice will release defendant, if he has been damaged by such default.

6. The burden of proof is on plaintiff to show that defendant was not injured. *Kirkpatrick v. Puryear*, 93 Tenn. 409, 22 L. R. A. 785. When the bank went into the receiver's hands, defendant had on deposit \$2,000 on certificates, and \$640.53 on general account. This was the amount of his loss. But he holds some collateral security, which was given him by the bank prior to the failure. If the checks had been presented and paid, defendant's balance would have been \$1,711.07, and the undisputed testimony is that the collateral is insufficient to pay this amount. It affirmatively appears, then, that defendant has been damaged by plaintiff's default.

7. It is also urged by plaintiff that defend-

ant knew the bank was insolvent at the time he drew these checks. This defendant denies. But the fact that he took security for his deposits is offered as an argument in support of this allegation. We think, perhaps, the financial crisis of 1893 was a matter so affecting the interests of the whole people as that we may take judicial notice of it, and the condition of things resulting from it. About the time of this transaction, banks were failing in almost every part of the country. Even those that were entirely solvent hoarded their cash, and parted with it only on compulsion. Every bank depositor was nervous, and with good reason. Defendant's act in taking security, which might in ordinary times have meant much, under the circumstances then existing meant but little. It evidenced scarcely anything more than the timidity that was then generally prevalent among depositors. But if, perhaps, we have no right to take cognizance of these matters, of which no evidence was offered, there is one fact in testimony that is, in our minds, decisive of this point. Three days after these checks were given, defendant deposited \$1,150.07 in this bank, and more than \$600 of it remained, as we have already said, and was lost in the final wreck. Such action on defendant's part, it is not reasonable to believe, would have been taken, had he known the bank was insolvent. This covers the case as presented, and our conclusion is apparent.

The judgment below will be affirmed.

KENTUCKY COURT OF APPEALS.

George H. GOWDY, Admr., etc., of A. T. Gowdy, Deceased, Appt.,

v.
John A. JOHNSON.

(.....Ky.....)

1. A mistake of mere judgment with respect to the value of the lands set apart for a homestead will not be ground of impeaching the determination by which the homestead was set aside.

2. The loss of his family after acquiring a homestead will not terminate the homesteader's right.

3. An increase in the value of a homestead will not authorize a revaluation and reassignment,—at least when there has been no rapid or extraordinary increase of value, or any unreasonable outlay on the premises.

(November 3, 1898.)

NOTE.—Revaluation or reassignment of homestead for appreciation or depreciation of value.

- I. When the question arises.
- II. Change from fluctuation in prices.
- III. Change from improvements and additions.
- IV. Homestead in decedent's estates.

I. When the question arises.

The question whether a homestead will be re-assigned for a change in value can only arise under statutes limiting homesteads to a certain value as distinguished from those which limit them to a certain number of acres or quantity of land.

II. Change from fluctuation in prices.

Homesteads are purely statutory, and the question whether there can be a reassignment because of a change of value would seem to depend largely, if not entirely, upon the language 44 L. R. A.

of the particular statute in question. The rule of the principal case, however, would seem to be the prevailing one.

Thus, the Illinois statute gives to a debtor a homestead of the value of \$1,000 and no more, and where a homestead is set apart in conformity to the statute which is then worth \$1,000, and it afterwards materially increases in value, it may be reassigned to the same party and \$1,000 set off to him at the instance of a creditor. *Stubblefield v. Graves*, 50 Ill. 103.

A homestead declared and set off as exempt from execution or other process does not thereupon become fixed and permanent so as not again to be subject to reassignment and division, but may, upon an increase in value of the property so as to bring it above the statutory limit, be reassigned and set off at the instance of a creditor. *Mooney v. Moriarty*, 86 Ill. App. 175.

So, under the California statute limiting a homestead at its inception to \$5,000 in value, every increase of value works a reduction of the

APPEAL by defendant from a judgment of the Circuit Court for Taylor County in favor of plaintiff in an action to annul a levy upon and sale of a portion of the property which plaintiff claimed as a homestead. *Affirmed.*

The facts are stated in the opinion.

Mr. W. C. McChord, for appellant:

If appellee was not a bona fide housekeeper with a family, he was not and is not now entitled to a homestead in the land.

Stults v. Sale, 92 Ky. 5, 13 L. R. A. 743.

The allotment of homestead, as made under the Christie execution, was a mistake in

the valuation of the 92 acres, and was procured by fraud on the part of appellee.

Vallandigham v. Worthington, 85 Ky. 83; *Lawrence v. Edelen*, 6 Bush, 55; *Louden v. Yager*, 91 Ky. 57; *Caldwell v. Taylor*, 17 Ky. L. Rep. 781.

If the creditor is willing to give more for the land than \$1,000, and will pay into court \$1,000 for the debtor, he should be allowed to do so; or if the allotment can be made without impairing the value of the homestead, that is, leaves its value below \$1,000, this should be done.

Wilson v. Calvert, 15 Ky. L. Rep. 489.

area of the homestead until a point is reached when it cannot be further cut down and leave a homestead of the statutory value without material injury; and in such case no part of the premises constitutes a statutory homestead, but the value or proceeds of the premises to the extent of the statutory limit has the benefit of the exemption. *Estate of Delaney*, 37 Cal. 176.

And where lands dedicated as a homestead increase in value so as to exceed the prescribed limit under the Iowa statute (Sess. Laws 1848-49, chaps. 124, 152), the quantity must be reduced so as to make it consistent with the value allowed, and it must be ascertained whether it can be divided so as to leave a legal homestead, and this may be done by means of referees or other proceedings known to the law; and if the premises when reduced to the smallest quantity, as to the dwelling house and its appurtenances, exceed the statutory value, they are not exempt as a homestead. *Heifenstein v. Cave*, 3 Iowa, 287.

And a debtor may have a homestead under the Missouri statute exempting the homestead of every housekeeper or head of a family from attachment or execution except that it shall not exceed a designated quantity and value, but he must take and hold it subject to fluctuations in value; and if in the course of time it shall increase in value so as to be worth more than the statutory limit, it may be assigned again and the excess applied to the payment of his debts, and if it should depreciate in value he may add to it a claim and revaluation himself. *Beckner v. Rule*, 91 Mo. 62.

So, in *Beecher v. Baldy*, 7 Mich. 488, it was held that if a homestead is within the constitutional quantity under the constitutional provision of Michigan, but exceeds the constitutional value, it may be reduced in quantity so as to bring it within the required amount provided it can be so reduced by division as to leave a homestead within the specified value without cutting off any part of that which in fact goes to constitute a homestead. In such case the homestead so reduced would be exempt, while the balance might be sold on execution; but if when reduced so far as divisible it still exceeds the constitutional limit in value, it cannot be further divided. The courts cannot, in the absence of legislation, secure to the debtor a benefit, equal to the statutory amount, as the Constitution has only exempted a homestead as an entirety.

And in *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637, it was said that under the California statute neither quantity nor value can be taken into account as tests as to what the homestead is in fact in a given case. They do not come into action until after the homestead has been ascertained by other tests, and then they operate only as limitations. If the homestead when ascertained exceeds the quantity named where the limitation is by quantity, it must be reduced by cutting off the excess, and

if it exceeds the value named where the limitation is by value it must be divided if it can be done without material injury to the homestead, or, if not, it must be sold and the proceeds to the value named taken in lieu thereof.

Where a creditor claims that a homestead, though within the quantity limited by law, exceeds the specified value, the value may be ascertained either by directing an issue to a jury for that purpose or by reference to a commissioner to take proof and report. *Beecher v. Baldy*, 7 Mich. 488.

But under the North Carolina Constitution providing that a homestead shall not exceed a specified valuation, when the homestead is valued and completely laid off it is permanently established as to extent and value as well as in other respects, and cannot be extended as to quantity or enhanced as to value by revaluation under the statute or otherwise. *Vanatory v. Thornton*, 110 N. C. 10.

The purpose of N. C. Const. art. 4, securing a homestead not exceeding in value \$1,000 to the owner thereof to be exempt from sale under execution or other final process and of the statutory provisions enacted thereunder prescribing the method by which a homestead may be allotted and set off, giving reasonable opportunity to all creditors existing at the time to scrutinize all rights of the debtor and contest the allotment, is to give the appraisal and allotment fixedness and permanency, and if they fail to interpose objections within that time in the way prescribed they are concluded as to all questions except fraud, complicity, or other irregularity. *Gully v. Cole*, 96 N. C. 447.

And where a homestead has been allotted in the manner prescribed in N. C. Code, chap. 10, and the time for filing objections has passed and the return of the appraisers has been registered, a second allotment made at the instance of a judgment creditor will be treated as void, though his judgment may have been rendered and docketed after the homestead was first laid off. *Thornton v. Vanatory*, 107 N. C. 331.

And in *Gulley v. Cole*, 102 N. C. 333, it was held that a homestead as at first laid off continued to be effectual and cannot be disturbed by revaluation thereof and laying it off a second time, and that an attempt to do so would be void; but there was nothing in the case to show whether or not there was an enhancement in value.

So, under the Tennessee statute the value of the homestead should be ascertained and determined at the time at which it is set apart to the person entitled to it, the value being ascertained and the boundaries determined by judicial proceedings, and if it should subsequently depreciate in value or be estimated at a higher value it is not subject to subsequent valuations by proceedings instituted for that purpose, the intent being that the land set apart as a homestead shall not thereafter be sold so as to de-

When the property is enhanced in value so that it exceeds the statutory limit, the excess does not constitute a part of the statutory homestead.

Re Delaney, 37 Cal. 180; *Thompson, Homestead & Exemption*, § 109; *Waples, Homestead & Exemption* (1893) p. 216; 9 Am. & Eng. Enc. Law, p. 463; *Linch v. Broad*, 70 Tex. 92.

On rehearing.

There is a wide difference in the policy to conserve homes for the good of society and the state, and the policy to save the

property of poor debtors from execution for their own good, or, as contemplated by Kentucky laws, for the good of the dependent members of the debtor's family.

This decision establishes the principle that if A has a debt for \$1,000 against B, and A owns 100 acres of land worth \$100 per acre, and A should sue out execution and levy on the 100 acres, and the sheriff have appraisers appointed, and they, knowing that 10 acres of the land are sufficient to satisfy the judgment, should designate 10 acres for sale, and should set apart the 90 acres worth \$9,-

prive the occupants thereof of their possession so long as they have the rights to the homestead. *Hardy v. Lane*, 6 Lea, 380.

And in Texas a homestead dedicated under a former law, which has increased in value but not to exceed the value fixed in a subsequently enacted constitutional provision, will still be protected as a homestead. *Baylor v. San Antonio Nat. Bank*, 38 Tex. 448.

And see also *Richards v. Nelms*, 38 Tex. 445, *infra*, III.

III. Change from improvements and additions.

A homestead exemption must continue substantially the same as to its value under the North Carolina Constitution and statutes as it was at the time it was laid off to the debtor, and he cannot erect for any purpose buildings of great value on the exempted land and thus enhance its value and by such means shield his property from his creditors. *Vanstory v. Thornton*, 110 N. C. 10.

Where a lotowner constructs upon land laid off to him as a homestead a dwelling house or other buildings that become part of the land, thus making it of much greater value than the statutory limit, a creditor is entitled to have so much of the property as had been placed upon and made part of the homestead, making the land of greater value than the statutory limit applied to the satisfaction of his debt so far as it may be adequate for that purpose. *Ibid*.

So, in *Hardy v. Lane*, 6 Lea, 380, holding that a homestead is not subject to subsequent valuation on account of appreciation in value, the court declined to decide what, if any, remedy creditors might have in cases in which debtors expended extravagant sums upon their homesteads so as to raise the value above the limit.

A homestead will not be disturbed, however, for slight enhancement of its value, as by ordinary repairs or slight improvements, such as clearing land in the usual course of husbandry and the like. The increase must be substantial and extraordinary to work interference. *Vanstory v. Thornton*, 110 N. C. 10.

And where a homestead has been greatly enhanced in value in excess of the statutory limit by the erection thereon of a dwelling house or other improvements, a creditor cannot enforce his demand by ordinary process of execution against the property, but the court, in the exercise of its chancery jurisdiction, has power to direct all proper accounts to be taken, and to appoint commissioners to ascertain what additional value has been imparted to the homestead by the improvements, and to direct a sale of the excess to the best advantage of the parties. *Ibid*.

So, Texas act of February 2, 1860, providing that the subsequent increase in value of a homestead by reason of improvements or otherwise shall not subject the homestead to forced sale, protects the subsequent increase in value by reason of improvements and because of apprecia-

tion in value, but does not apply to an increase by an addition of other lots or other interests. *Richards v. Nelms*, 38 Tex. 445.

And where property when dedicated as a homestead was worth about \$1,200, but afterwards increased in value until it was worth more than \$2,000, an additional lot cannot be purchased and added to the homestead under the provision of that act that the homestead in a town or city shall be a lot or lots occupied or destined as a family residence not to exceed in value \$2,000 at the time of their destination as a homestead. *Ibid*.

Where a homestead is dedicated and the property increases in value, and other property is purchased and sought to be included in the homestead, the then value of the previously acquired property cannot be ignored and the last purchase made to relate back until the time of the original dedication in order to bring the whole within the legal homestead value. *Ibid*.

IV. Homestead in decedents' estates.

Where land is set off by the administrator of an estate to the widow of the intestate for a homestead, and it afterwards rises in value, a new assignment cannot be had to reduce the quantity. *Kenley v. Bryan*, 110 Ill. 652.

But where a homestead not worth more than the statutory limit at the time it was set apart afterwards becomes worth more than that amount it is an excessive homestead from which, on the death of the husband, the court should set off a homestead to the wife, with reference to the value of the property at the time of his death. *Linch v. Broad*, 70 Tex. 92.

And a wife upon the death of her husband takes, under Cal. homestead act of 1862, § 4, the property which immediately preceding his death constituted the homestead as defined and protected by statute, and nothing more, and not the specific parcel or parcels of land which were described in the declaration, and which may at one time have constituted the homestead, where it had increased in value so as to be above the statutory limit. *Re Delaney*, 37 Cal. 176.

But a homestead set off under Cal. Code Civ. Proc. § 474, providing that if the homestead selected by the husband and wife or either of them during their coverture, and recorded while both were living, was selected from community property, it vests on the death of the husband or wife absolutely in the survivor, goes absolutely to the survivor upon the death of one of them if it was within the statutory limit when set off, though at the time of the death its value exceeded the statutory limit. *Re Burdick*, 76 Cal. 639.

In the above case earlier decisions on the subject by the same court were distinguished upon the ground that they were made under materially different statutory provisions.

F. H. B.

000 as a homestead from ignorance of the law or defective judgment, C, who has a debt amounting to \$1,000 against B, is by this proceeding deprived of any right to subject any portion of the \$9,000 worth of the land to the payment of his debt, and he is thus deprived of his legal rights in a proceeding to which he is not a party and in which he has no legal right to file exceptions to, or make any other objections to, the allotment.

Appellant offers to take the land and pay therefor \$2,000, thus enabling appellee to get \$1,000 with which to purchase another homestead.

Thus, every right guaranteed to the debtor under the homestead law is preserved to appellee.

McMurray v. Shuck, 6 Bush, 112; *Bell v. Beach*, 80 Ky. 47.

Messrs. Garnett & Garnett and H. S. Robinson for appellee.

Hazelrigg, J., delivered the opinion of the court:

On June 26, 1879, one Christie caused an execution to be levied on 123 acres of land belonging to his debtor, the appellee, Johnson, who was a housekeeper with a family and entitled to a homestead. Appraisers Cundiff and Griffin were accordingly selected by the officer levying the execution to set apart the homestead, and did so by giving the debtor 92 acres of the tract. The residue of the land was sold by the officer. On November 5, 1883, the appellant, Gowdy, caused an execution against Johnson to be levied on the 92 acres theretofore laid off as a homestead; and appraisers Sublett and Burruss were selected, and they set apart the entire tract to the debtor as a homestead, at \$828. On November the 20th of the same year another execution issued on the same judgment, and appraisers Taylor and Shreve set apart the same tract, valuing it at \$969. Two other executions were issued subsequently, but no further effort seems to have been made to subject the homestead to the debt until December, 1894, when another execution issued, and appraisers Kerr and Romine set apart 29 acres of the tract as a homestead, valuing it at the statutory limit of \$1,000. The officer then proceeded to sell the residue under the execution, when the plaintiff therein bought it at the price of \$800, a sum considerably less than his debt and interest. Johnson then instituted this action in equity to have the levy and sale declared void, and his title and right quieted to the homestead as originally laid off. The answer of Gowdy sets up at length various matters supposed by him to authorize the revaluation of the homestead, and the levy on, and sale of, the excess of land over the value limit of the statute. Among other things, he avers that, as he was no party to the Christie execution, he is not bound by the action of the appraisers in setting apart the 92 acres; that as the Christie debt was small, and the residue of the tract left for sale was ample to pay the debt, the proceeding was merely formal; that as a matter of fact the 92 acres of land at that time were

worth at least \$1,500 or more,—a fact well known to the appraisers,—and their action was therefore fraudulent; that he is not estopped by the action of subsequent appraisers under his execution; and that since 1883 the land has increased in value to the extent of \$500 at least. He avers, further, that, prior to the last levy and sale under his execution, the debtor, Johnson, ceased to be a housekeeper with a family.

We are of opinion, as held by the chancellor on demurrer, that these averments do not constitute any reason whatever for disturbing the original setting apart of the 92 acres to Johnson as a homestead under the Christie execution. It is settled law that the action of the appraisers is final and conclusive against the world, unless impeached for fraud or mistake. The mistake meant is not one of mere judgment with respect to the value of the land set apart. That is the precise thing they are called on to do,—value the land and set it apart. If, intending to set apart 50 acres, they should, in fact, set apart, by mistake, 100 acres, this would afford ground for relief to any complaining creditor. Nor can there be relief in this case on the ground of fraud. The answer declares that more than ten years have elapsed since the alleged fraud (Ky. Stat. § 2519), and as relief against fraud or mistake should be sought within five years from the discovery thereof, and, in any event, within ten years from the act complained of, the averments were insufficient to afford ground for relief, and it was proper to so declare on demurrer.

It was not denied that Johnson was a housekeeper, and in the possession of the 92 acres, when Gowdy obtained the new appraisalment, and levied on and sold the residue of the tract; his averment on this subject being simply to the effect that Johnson had ceased to have a family. This question has been authoritatively settled by this court in *Stults v. Sale*, 92 Ky. 5, 13 L. R. A. 743, where it was held that, while it was essential to the creation of the homestead right that the debtor should have a family, it was not essential to the continuance of the right. The loss of his family, as by death or marriage, did not deprive him of the right.

The only remaining question is to ascertain what effect, if any, is to be given the averment of Gowdy, presented in the nature of a counterclaim, that the value of the homestead had increased to the extent of at least \$500 since 1883. He avers that it is now in fact worth \$2,500, and expresses his willingness to pay \$2,000 for it. Whether the fact that the homestead, as originally established, has so increased in value as to exceed the limit of value prescribed in the statute, may authorize a revaluation and reassignment, is a question not free from difficulty. It seems not to have been determined in this state, and in other states the courts have not agreed. In Missouri the statute seems to be quite similar to ours, and in *Beckner v. Rule*, 91 Mo. 62, it was said: "There is not a provision in the statute which looks to the conclusion that, when a homestead is once set off, it cannot be revalued. . . . The debtor may have a homestead, but he must

take and hold it subject to the fluctuations in value. If, in course of time, it should increase in value, so as to be worth more than the statutory limit, it may be assigned again, and the excess applied to the payment of his debts. If the assigned homestead should depreciate in value, he may add to it and claim a revaluation himself." In Illinois the same rule seems to prevail. *Stubblefield v. Graves*, 50 Ill. 103. In Tennessee under a similar statute, the opposite conclusion was reached. In *Hardy v. Lane*, 6 Lea, 380, it was said: "There is nothing in the act from which it can be inferred that it [the homestead] is subject to subsequent repeated valuations, if perchance it may appreciate in value, or be estimated at a higher value, by proceedings subsequently instituted for this purpose. The policy of the act is to secure a fixed and permanent abode and home for the head of the family, his wife and children, in the possession of which they should not be disquieted and disturbed, if by their industry they so far improve the premises as to make them really more valuable than they were when first assigned to them. Upon the construction contended for, i. e., that the homestead must always be kept to the exact value first assigned to it, the occupants would be constantly liable to the annoyance of new suits to ascertain, by the speculations and opinions of creditors and others, whether the homestead had not appreciated in value." In North Carolina (*Gully v. Cole*, 96 N. C. 447), it was held that, as no provision was made in the statute for laying off the homestead a second time, it could not be done, in the absence of fraud or irregularity in connection with the assignment. But whether the creditor might have an equitable remedy in case the homestead had greatly increased in value was a question not decided, although mentioned.

Our statute provides that, in addition to the personal property exempted from sale, there shall be exempt from sale, under execution, attachment, or judgment, except to foreclose a mortgage given by the owner or for purchase money due therefor, so much land, including the dwelling house and appurtenances owned by the debtors who are actual bona fide housekeepers with family resident in this commonwealth, as shall not exceed in value \$1,000. Other sections provide for valuation and allotment, and no sale is to be made of the homestead unless it is of greater value than \$1,000, and is not divisible without great diminution of its value. We thus see that the thing attempted to be protected from sale is the land,—the homestead itself. The object of the statute, as of all statutes of like character, is not so much to exempt a certain sum of money from subjection to debt, or land of a certain value, but it is intended to protect the homestead itself,—the dwelling house and appurtenances,—to the end that the citizens of the commonwealth may be home owners. The matter of value is a mere incident,—a proper one, it is true, as our lawmakers have conceived it to be the better rule that some limitation in value should be applied. In some

other states, we believe, no limitation of value is prescribed.

We have already seen that the act of setting apart the homestead, whether by the sheriff or by commissioners appointed under order of court, is a final and conclusive act. In effect, the act is an adjudication,—a judicial procedure *in rem*,—not to be disturbed except for fraud or mistake, as in other adjudications. We think this judgment in the homesteader's favor is, in effect, a judgment that he is the permanent holder of a certain described tract of land, and is entitled to the possession of it so long as it remains his homestead. The matter of its value, at most only an incident controlling the quantity of the assignment, is no longer a question of importance or interest to the owner and homesteader after his rights are once fixed to a particular boundary. That question is a closed one. It was never other than a preliminary one,—a condition precedent, as it were, to the final assignment of the homestead by metes and bounds. When that is fixed, the ownership and right of occupancy is fixed. We regard it as altogether repugnant to the policy and object of our homestead law that this fixed right of occupancy shall be made to depend on the fluctuations of the real-estate market. How often might it happen that homesteads of the prescribed value as originally assigned, and not susceptible of further division, would have to be sold, upon an advance in the market? It is against the policy of the law that any homestead be sold at all, and it is to be laid off—set apart—in all cases except where great diminution in value would result by a division. It is sold then as a matter of necessity, and the conditions which give rise to the necessity of selling the homestead of the citizen ought not to be multiplied or increased, after his rights have once been judicially determined and fixed of record.

The bad effect on the homesteader of rendering his habitation unstable, and increasing his anxiety for the continued shelter of his family, is not to be overlooked. While it is said that the state by such statutes is conferring merely a favor or privilege on the debtor, it is to be remembered that the state gets value received. It comes to be supported in time by a citizenship interested in the state and tied to her soil, of independent home owners, and not of transient and uncertain tenants. It was aptly said by Mr. Benton in the Senate of the United States, that "tenantry is unfavorable to freedom. It lays the foundation for separate orders in society, annihilates the love of country, and weakens the spirit of independence. The tenant has in fact no country, no hearth, no domestic altar, no household god. The freeholder, on the contrary, is the natural supporter of a free government; and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply their tenants." As already stated, we have heretofore decided, in effect, that once a homesteader always a homesteader. And we think it equally clear within certain limitations as to occupancy and possible excep-

tions to be noticed, once a homestead always a homestead.

Learned counsel suggest that a gold mine might be discovered on the premises of the original assignment as made. If so, or if an extravagant residence were erected on the premises, there would likely be found some equitable remedy for the creditor. The law will not brook fraud on the part of the homesteader, and, if extraordinary outlays of money or property are put on the exempted premises beyond what is reasonably necessary to the profitable use and comfortable enjoyment of the home as such, it might afford ground for the interposition of a chancellor. In the case before us there has been a presumably natural increase in the value of the premises of \$500, in a space of some ten or a dozen years; and the doctrine contended

for would have permitted the appellant, or some other creditor, to have cut off a part of the homestead every year of the ten. The result even then would have to be based on mere opinions and speculations as to value, reached often after years of constant legal warfare. However, we have before us no gold-mine case, or one involving any fraud on the part of the appellee, or unreasonable outlay on the premises, or the question of rapid and extraordinary inflation of prices. It will be time enough to consider such cases, if any such should arise, when they are reached.

The judgment granting the appellee the relief sought and dismissing appellant's counterclaim is affirmed.

Petition for rehearing overruled.

ILLINOIS SUPREME COURT.

ADDYSTON PIPE & STEEL COMPANY,
App't.,
v.

City of CHICAGO et al.

(170 Ill. 580.)

A creditor's bill will not lie against a municipal corporation to reach money due from it to a contractor who is a debtor of the complainant.

(December 22, 1897.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of defendants in a creditor's bill to reach a debt due by the defendant city to Michael J. Joyce. Affirmed.

The facts are stated in the opinion.

Mr. John T. Barker, for appellant;

A municipal corporation is a trustee holding property in trust for the use of the public (*Hyde Park v. Chicago*, 124 Ill. 156; *McCord v. Pike*, 121 Ill. 288), and, being a trustee for its constituents, it stands on the footing of other corporations.

Sherlock v. Winnetka, 59 Ill. 389.

Equity has no power to dispense with the plain requirements of a statute.

Stone v. Gardner, 20 Ill. 304, 71 Am. Dec. 268.

Its jurisdiction is ancient and ample, and not limited to the construction given to garnishment acts.

Smither v. Lewis, 1 Vern. 398; *Balch v. Wastall*, 1 P. Wms. 445; *Singer & T. Stone Co. v. Wheeler*, 6 Ill. App. 225.

The public is interested in the enforcement of lawful contracts, as well as in the suppression of illegal transactions.

Greenhood, Pub. Pol. 29.

A contract for work performed under the direction of a board of public works and of superintendents fixes the liability throughout.

Chicago v. Dermody, 61 Ill. 431.

A debt due by a municipal corporation to its creditor may by a creditor's bill be subjected to the satisfaction of a judgment against the creditor.

Furlong v. Thomassen, 19 Mo. App. 364; *Beal v. McVicker*, 3 Mo. App. 592; *Pendleton v. Perkins*, 49 Mo. 565; *Lyell v. St. Clair County Supers.* 3 McLean, 580; *Singer & T. Stone Co. v. Wheeler*, 6 Ill. App. 225; *Sinking Fund Comrs. v. Northern Bank*, 1 Met. (Ky.) 174.

Messrs. William G. Beale, Byron Boyden, and Edward B. Burling, for appellees:

A municipal corporation cannot be subjected to garnishment proceedings.

Chamberlain v. Gaillard, 26 Ala. 504; *Memphis v. Laski*, 9 Heisk. 511, 24 Am. Rep. 327; *People, Spain, v. Omaha*, 2 Neb. 169; *Hightower v. Slaton*, 54 Ga. 110, 21 Am. Rep. 273; *Wallace v. Lawyer*, 54 Ind. 508, 23 Am. Rep. 661; *School Dist. No. 4 v. Gage*, 39 Mich. 486, 33 Am. Rep. 421; *Erie v. Knapp*, 29 Pa. 175; *McDougal v. Hennepin County Supers.* 4 Minn. 189; *Burnham v. Fond du Lac*, 15 Wis. 194.

It is a mistaken point of view to regard a municipal corporation in the same manner as a corporation established for private gain. Nearly all the creditors of the city are receiving their money from the city in return for services of a public character. They are public servants, and the public should not be deprived of their services in order that an individual may secure payment of his debt.

Philadelphia Granite & Blue Stone Co. v. Douglass, 3 Pa. Dist. R. 133.

NOTE.—The above case seems to be an unusual one, for the reason that creditors' bills are not commonly brought against municipal corporations. The same reasons seem to apply to such cases that apply to garnishments. For 44 L. R. A.

exemption of municipal property from levy, see *Ellis v. Pratt City* (Ala.) 33 L. R. A. 264. As to garnishment of county, see note to *State, Summerfield, v. Tyler* (Wash.) 37 L. R. A. 207.

The answer of the city to a creditor's bill is conclusive.

King v. Clark, 3 Paige, 76; *Philadelphia F. Ins. Co. v. Central Nat. Bank*, 1 Ill. App. 344; *United States Ins. Co. v. Central Nat. Bank*, 7 Ill. App. 426; *Fifield v. Gorton*, 15 Ill. App. 458; *Bouton v. Smith*, 113 Ill. 481.

Craig, J., delivered the opinion of the court:

This is an appeal from a judgment of the appellate court affirming a judgment of the superior court of Cook county sustaining a demurrer to a creditor's bill brought by the Addyston Pipe & Steel Company against the city of Chicago and one Michael J. Joyce. It is alleged in the bill that the defendant Joyce had a contract with the city of Chicago, in and about the performance of which the complainant furnished him material and labor which he failed to pay for. The bill then alleges the obtaining of judgment, issuing of execution, and return of execution *nulla bona*; that the city holds money and effects which belong to the defendant Joyce; and prays discovery as is provided for in § 49, chap. 22, Hurd's Rev. Stat. 1893. In brief, the claim made in the bill is that the city of Chicago is indebted to Joyce for labor performed under his contract with the city, and complainant is entitled by creditors' bill to reach the money, and compel its payment to complainant. The demurrer was sustained in the superior court, and the judgment affirmed in the appellate court, on the sole ground that a creditor's bill will not lie against a municipal corporation; and the correctness of that decision is the only question presented by this record.

This court held, in *Chicago v. Hasley*, 25 Ill. 596, that the property of a municipal corporation like Chicago could not be levied upon and sold under an execution. This decision was predicated upon the grounds of public policy. It is there said: "There can be no doubt that the property of a private corporation may be seized and sold under a *fi. fa.* for the payment of its debts, as in the case of an individual. . . . The nature, objects, and liabilities of political, municipal, or public corporations, we think, stand on different grounds. These corporations signify a community, and are clothed with very extensive civil authority and political power. All municipal corporations are both public and political bodies. They are the embodiment of so much political power as may be adjudged necessary by the legislature granting the charter for the proper government of the people within the limits of the city or town incorporated. . . . For those purposes, the authorities can raise revenue by taxation, make public improvements, and defray the expenses thereof by taxation." The court then goes on to show that, if the property of the city could be levied on and sold, it would be impossible for it to perform the functions to the people for which it was created. In *Mervin v. Chicago*, 45 Ill. 134, 92 Am. Dec. 204, the question arose whether a municipal corporation was liable to garnishment; and the court after referring to *Chicago v. Hasley*, 25 44 I. R. A.

Ill. 596, with approval, held that it was not so liable. It is there said: "The question has been often before the American courts, and, although the decisions are not uniform, in a large majority of the cases it has been held the writ would not lie. The reason given for these decisions is uniformly the same, and is substantially that given by this court in the case in 25 Ill. It must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers to a very large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings, who are more dependent upon the municipal, for the security of life and property, than they are on either the state or the Federal government. To permit the great public duties of this corporation to be imperfectly performed, in order that individuals may the better collect their private debts, would be to pervert the great objects of its creation. That its efficiency for purposes of government would be impaired by holding it liable to garnishment cannot be doubted. A large and growing city, like Chicago, must constantly have hundreds of persons in its employment; and if the city cannot, at short intervals, make a settlement of these multitudinous accounts, but is liable to be drawn into court at the suit of every creditor of its numerous employees, it will not only be engaged in much expensive and vexatious litigation, in which it has no interest, but, if unable to safely pay its employees and contractors, it may lose the services of persons that may be of much value." A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits, in order that one private individual may the better collect a demand due from another. The doctrine announced in *Mervin v. Chicago* is fully sustained by the following authorities: *Chamberlain v. Gaillard*, 20 Ala. 504; *Memphis v. Laski*, 9 Heisk. 511, 24 Am. Rep. 327; *People, Spaul, v. Omaha*, 2 Neb. 189; *Hightower v. Slaton*, 54 Ga. 110, 21 Am. Rep. 273; *Wallace v. Lawyer*, 54 Ind. 508, 23 Am. Rep. 661; *School Dist. No. 4 v. Gage*, 39 Mich. 486, 33 Am. Rep. 421; *McDougal v. Hennepin County Supers.* 4 Minn. 184 (Gil. 130); *Burnham v. Fond du Lac*, 15 Wis. 194. The decision of the questions in these cases, as will be found upon examination, is predicated on the ground of public policy, and they fully sustain the doctrine announced by this court.

If, as we have held, a municipal corporation is not liable to the process of garnishment, upon what ground can a creditors' bill be maintained against a municipal corporation? If it is contrary to public policy to permit the one, upon the same ground and for like reasons must not the other be denied? The process of garnishment and a creditors' bill are, in effect, instituted for the same purpose. They are, as a general rule, instituted to reach money in the hands

of a third party, due and owing from a judgment debtor to a judgment creditor. A reference to the statute under which the two proceedings are instituted will show their similarity. Rev. Stat. 1893, chap. 62, § 1, provides that whenever a judgment shall be rendered by any court of record or any justice of the peace in this state, and an execution against the defendant in such judgment shall be returned by the proper officer "No property found," on the affidavit of the plaintiff or other credible person being filed with the clerk of such court or justice of the peace, that said defendant has no property, within the knowledge of such affiant, in his possession liable to execution, and that such affiant hath just reason to believe that any other person is indebted to such defendant, or hath any effects or estate of such defendant in his possession, custody, or charge, it shall be lawful for such clerk or justice of the peace to issue a summons against the person supposed to be indebted to, or supposed to have any of the effects or estate of, the said defendant, commanding him to appear before said court or justice as a garnishee; and said court or justice of the peace shall examine and proceed against such garnishee or garnishees, in the same manner as is required by law against garnishees in original attachments. Rev. Stat. 1893, chap. 22, § 49 (Chancery), provides: "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment, or delivery; and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money, or things in action, belonging to the defendant or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not."

Under the section of the statute providing for garnishment when an execution has been issued and returned "No property found," a summons may be issued against the person supposed to be indebted, commanding him to answer as garnishee. Under the other statute, where an execution has been issued and returned "No property found," a creditors' bill may be filed. The object attempted to be reached in each case is practically the same. In one case a judgment may be rendered as in an action at law, while in the other a money decree may be rendered. An execu-

tion may issue in either case. The two proceedings are so similar, and the result to be accomplished under both so nearly the same, that if it is contrary to public policy, as we have held it is, to allow garnishment against a municipal corporation, for the same reasons a creditors' bill cannot be sustained. Should the courts hold that a creditors' bill would lie against a municipal corporation, to reach money due its employees or contractors, a wide door would be open to all the evils mentioned in *Merwin v. Chicago*; and we are not prepared to establish a rule which might lead to such results. But it is said that in a garnishment proceeding the answer of the city may be controverted, and the city may thus be required to sustain the answer by evidence; while in a creditors' bill, where the city in its answer denies that it is in any manner indebted, that will end the litigation as to the city, and hence a different rule should be adopted when a creditors' bill is filed. In *Bouton v. Smith*, 113 Ill. 486, it was held that when a bill is for discovery only, and fails as such, it should be dismissed, and could not be retained for any other purpose. But where the bill seeks, not only discovery, but other relief, the court has jurisdiction to retain the bill for all purposes. Indeed, § 25 of the chancery act declares that the disclosure shall not be regarded conclusive. That section provides: "When the complainant shall require a discovery respecting the matters charged in the bill, the disclosure shall not be deemed conclusive, but, if a replication be filed, may be disproved or contradicted like any other testimony, according to the practice of courts of equity." It is therefore apparent from the ruling in the case last cited, and from the language of § 25 of the statute, that in many, if not all, creditors' bills which might be brought against a municipal corporation there would be as much controversy as would arise in a garnishment proceeding, and hence the rule that should control in the one case should also govern in the other.

We are satisfied that the judgment of the Appellate Court is correct, and it will be affirmed.

Isaac H. SNYDER, *Appt.*,
v.

City of MT. PULASKI *et al.*

(176 Ill. 397.)

1. Permission to use a well in a city street, given as part of an electric light franchise, is a mere license revocable at the pleasure of the municipality, although the licensee has made expenditures on the faith of it and would not have accepted the franchise without such permission.
2. One contracting with a city for the

NOTE.—As to limitation of power to grant property rights in streets, see also *Hibbard v. Chicago* (Ill.) 40 L. R. A. 621; *Augusta v. Burum* (Ga.) 26 L. R. A. 340; *Eddy v. Granger* (R. I.) 28 L. R. A. 517; *Stevens v. Muskegon* (Mich.) 36 L. R. A. 777; *Smith v. McDowell*, Hall (Ill.) 22 L. R. A. 393.

right to maintain a well in a public street is bound to take notice that the city has no power to bind itself by such a contract and may revoke it at any time.

(October 24, 1898.)

APPEAL by plaintiff from a judgment of the Appellate Court, Third District, affirming a decree of the Circuit Court for Logan County dismissing a bill filed to enjoin defendants from interfering with a well which complainant was alleged to have a contract right to maintain in a street. *Affirmed.*

Statement by Phillips, J.:

On March 24, 1891, the appellant was granted, by ordinance, the right to erect and operate an incandescent electric light plant in the village of Mt. Pulaski for the term of twenty years. On the 18th of April of the same year he purchased a lot on which a flour mill formerly stood, which, when in operation, had been supplied with water from a well in Green street, near its intersection with Spring street, in the village. This well was dug by the operators of the flour mill with the consent of the village authorities, and was connected with the lot by means of pipes laid underground. Afterwards, on June 23 of the same year, by an ordinance duly passed and approved, appellant was allowed the use of the well for the period of twenty years; the same to be maintained at his own expense, and to be so kept as to be safe to the traveling public. In October following, by another ordinance, he was granted the right to put in upon the streets of the village the necessary appliances for an arc system of electric lighting, with a contract for street lights for five years. In the erection of the incandescent plant he expended, in round numbers, \$9,000, and for the arc system about \$10,000 more. When the right to use the well was given him, he found that the Peoria, Decatur, & Evansville Railway Company was using it to supply its engines; and he entered in to a contract with it to supply it with water, using the railway company's pump until the following spring. In the spring of 1892 he discovered the water supply to be insufficient, and dug a well immediately adjoining the old one, inserting what is known as a "Cook's point" to connect the two. Later on he made contracts with various parties (among others, the Illinois Central Railroad Company and a flour mill) to furnish them water, and continued his business without interruption until November 25, 1895, when he was served with a notice, signed by the street commissioner, ordering him to remove the "Cook's point" and all other attachments placed in Green street by him, and the pump and attachments in this second well. The pump in it not being suitable to be placed in the old well, on December 13, 1895, he purchased a new one, with necessary pipe and apparatus, for the purpose of placing the same in the old well, the cost of which was about \$500. In order to lift the pump out of the new well, he erected a derrick, and was proceeding with the work of taking out the pump and appliances and put-

ting the new pump in the old well, when the events transpired which gave rise to this suit. On December 21, 1895, the city council (the village organization having been changed to that of a city organization) repealed the ordinance granting the appellant the use of the old well; and thereafter, while he was at work making the changes above mentioned, he was served with a notice, signed by the city attorney, stating that the city objected to the deepening of the old well, and to the placing of any appliances therein; which would enable him to draw water from a deeper level than the bottom of the well as it was originally constructed. He was also notified at the same time, verbally, by both the city marshal and the city attorney, to stop work, which he refused to do. While the work was going on, the street commissioner and others tore down the derrick, and filled up the pipe he was placing in the old well with brickbats and other materials, and also proceeded to fill up the well with dirt and rubbish. Thereupon he obtained an injunction restraining the city from interfering with and obstructing him in the work, and proceeded to clean out the old well and put down in it a new 8-inch pipe, driving the same about 30 feet below the bottom of the well. He then covered the well with a platform made of 4-inch oak plank, and filled up the new well. The evidence shows that, prior to this trouble, appellant maintained the well in a dangerous condition; that he permitted steam to escape into it in a manner calculated to frighten horses on the street, and kept it insecurely covered. The temporary injunction granted was, on the hearing, dissolved, and his bill dismissed. An appeal was taken to the appellate court for the third district, where the decree of the circuit court was affirmed, and the case is brought here by this further appeal.

Messrs. A. G. Jones and Blinn & Harris, for appellant:

Cities and villages have the power to provide for a supply of water by sinking wells, building cisterns, etc., and may maintain them in the public street.

Ill. Rev. Stat. chap. 24, art. 10, § 169; 2 Dill. Mun. Corp. 3d ed. § 690; *West v. Bancroft*, 32 Vt. 367; *Louisville v. Osborne*, 10 Bush, 226.

Municipalities, under the power of exclusive control of their streets, may allow any use of them consistent with public objects for which they are held.

Gregsten v. Chicago, 145 Ill. 452; *Nelson v. Godfrey*, 12 Ill. 20; *Quincy v. Bull*, 106 Ill. 337; *Gridley v. Bloomington*, 68 Ill. 47; *Chicago & N. W. R. Co. v. People*, Elgin, 91 Ill. 251; *Chicago Municipal Gaslight & Fuel Co. v. Lake*, 130 Ill. 42; 2 Dill. Mun. Corp. 3d ed. § 688; *Dickson v. Kewanee Electric Light & Motor Co.* 53 Ill. App. 381; *McCartney v. Chicago & E. R. Co.* 112 Ill. 611; *Western U. Teleg. Co. v. Guernsey & S. Electric Light Co.* 46 Mo. App. 120; *Union Coal Co. v. La Salle*, 34 Ill. App. 98; *People, Bransom, v. Walsh*, 96 Ill. 248, 36 Am. Rep. 135; *Chicago v. Rumsey*, 87 Ill. 364.

A contract made by a city officer, although

unauthorized, may be ratified so as to become binding upon the municipality.

1 Dill. Mun. Corp. 3d ed. § 463; *Shawnee-town v. Baker*, 85 Ill. 563; *Bruce v. Dickey*, 116 Ill. 534.

Where an ordinance is passed without consideration, if upon the faith of such an ordinance a person invests his money, that is a consideration; so that what may have been a revocable license ceases to be so and cannot be revoked.

Chicago Municipal Gaslight & Fuel Co. v. Lake, 130 Ill. 54; *Willoughby v. Lawrence*, 116 Ill. 20, 56 Am. Rep. 758; 13 Am. & Eng. Enc. Law, p. 548; *Re Erick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497; 2 Herman, *Estoppel & Res Adjudicata*, §§ 1040, 1041; *Russell v. Hubbard*, 59 Ill. 337; *Moale v. Baltimore*, 56 Md. 496; *White v. Smith*, 37 Mich. 291; *Harrison v. Boring*, 44 Tex. 255; *Williams v. Flood*, 63 Mich. 487; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Campbell v. Indianapolis & V. R. Co.* 110 Ind. 490.

A revocable license, where the use of property granted is in the nature of a public use, cannot be revoked without reasonable notice.

Houston & T. C. R. Co. v. Booser, 70 Tex. 530; *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 400.

Messrs. F. L. Tomlinson and Beach & Hednett for appellees.

Phillips, J., delivered the opinion of the court:

The streets of a city are dedicated for public use, and for these purposes the city council may improve and control them, and adopt needful rules for their management and use. But that body has no power to alien or otherwise encumber such streets, so long as they are public streets, but must hold them in trust for public uses only; and hence no easement or right therein not of a public character can be granted by a municipality, or acquired by any individual or corporation, for exclusive private use, to the exclusion of the public. *Field v. Barling*, 149 Ill. 556, 24 L. R. A. 406; *Hibbard v. Chicago*, 173 Ill. 91, 40 L. R. A. 621. A permanent encroachment upon public streets for a private use is a purpresture, and is in law a nuisance. *Driggs v. Phillips*, 103 N. Y. 77; *Smith v. State*, 23 N. J. L. 712; *Atty. Gen., Holtz, v. Heishon*, 18 N. J. Eq. 410; *State v. Woodward*, 23 Vt. 92; *Chamberlain v. Enfield*, 43 N. H. 356; *Com. v. King*, 13 Met. 115; *Hibbard v. Chicago*, *supra*. In the case last cited it was said (p. 98, 173 Ill. and p. 623, 40 L. R. A.): "Where the city has authorized a temporary use which causes a temporary obstruction, one having been licensed to exercise such temporary use would not be liable for a penalty, under the ordinances, for obstructing the street, as it was permitted as a matter of grace or favor. That such permission was given may be implied from circumstances. *Gridley v. Bloomington*, 68 Ill. 47. But when the city demands the removal of such a struc-

ture, it, if permitted to remain thereafter, becomes a nuisance."

The claim of the appellant that the second ordinance, which granted him the privilege of using the well, is part of the whole contract, and that without it he would not have accepted the franchise or erected the plant, in no way affects the question of law. He claims that the right to use the well was part of the consideration upon which he acted, and was intended as an inducement to him to accept the franchise and build the works. He must have acted with full knowledge of the fact that the municipality had no right or power to confer on him a right to a private use of the street, giving him a right to a permanent encroachment thereon, and allowing him to create a purpresture. There being no power in the city to make a discrimination in the use of the streets in favor of appellant, and permit him to have a permanent private use of the same, or to part thereof, if it has done so, the most that can be said is that it amounted to a mere license that would not render him amenable to punishment for a violation of an ordinance of the city in obstructing the street. Such permission to so use the street is not binding upon the city, and is not irrevocable. The municipality having no power to grant such permanent use, there can be no estoppel against it from requiring the street to be open in its entirety, because no estoppel can arise from an act of the municipal authorities done without authority of law. *Seeger v. Mueller*, 133 Ill. 86; *Pettis v. Johnson*, 56 Ind. 139; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 18 L. R. A. 832; *Day v. Green*, 4 Cush. 433.

There was power in the city council to pass the ordinance repealing the former ordinance granting the right to appellant to use the street; for such former ordinance, being without authority of law, might well be rescinded. Appellant acquired no right under the former ordinance against the public, nor did he acquire any right against the municipality by estoppel, nor by any right conferred by the ordinance, because the right conferred was a mere private use, and that private use created a purpresture. This fact it was the duty of appellant to know; hence a right existed in the city council to repeal the ordinance theretofore enacted granting the right to appellant to have and use this well in the public streets of the city.

It was not error in the circuit court of Logan county to dismiss appellant's bill, nor in the appellate court for the third district to affirm its decree.

The judgment of the Appellate Court for the Third District is affirmed.

Boggs, J., took no part in the decision of this case.

Rehearing denied December 13, 1898.

CHICAGO & EASTERN ILLINOIS RAIL-ROAD COMPANY, Appt.,
v.

R. A. ROUSE, Admr. etc., of George W. Brewer, Deceased.

(178 Ill. 132.)

1. The responsibility of the master for the act of a fellow servant is governed by the law of the place where the cause of action arose.
2. The liability of an employer for injury to an employee by a fellow servant in a state which has by statute abolished the common-law rule can be enforced in another state in which the common-law rule still prevails.

(February 17, 1899.)

A PPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Vermilion County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by negligence for which defendant was responsible. *Affirmed.*

The facts are stated in the opinion.

Messrs. Will H. Lyford, H. M. Steely, and Albert M. Cross, for appellant:

The courts of Illinois will not enforce the statutes of another state which are contrary to our public policy.

Pope v. Hanke, 155 Ill. 617, 28 L. R. A. 568; *Bank of Augusta v. Earle*, 13 Pet. 519, 580, 10 L. ed. 274, 308; *Story*, Conf. L. §§ 28, 38; *Chicago, B. & Q. R. Co. v. Gardiner*, 51 Neb. 70; *Armstrong v. Best*, 112 N. C. 59, 25 L. R. A. 188; *Tuttle v. National Bank of the Republic*, 161 Ill. 497, 34 L. R. A. 750; *Buell v. Brees Mill & Grain Co.* 65 Ill. App. 271.

The Illinois fellow-servant rule has its foundation in public policy.

Honner v. Illinois C. R. Co. 15 Ill. 550; *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339; *Illinois C. R. Co. v. Cox*, 21 Ill. 26, 71 Am. Dec. 298.

Therefore the Indiana statute which abrogates the Illinois common-law fellow-servant rule will not be enforced in Illinois.

Anderson v. Milwaukee & St. P. R. Co. 37 Wis. 321.

A statute creating a liability for damages for death by wrongful act will not be enforced in another state which has no such statute, or which has a radically different statute on that subject.

Richardson v. New York C. R. Co. 98 Mass. 85; *Ash v. Baltimore & O. R. Co.* 72 Md. 144; *Texas & P. R. Co. v. Richards*, 68 Tex. 375; *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, 1 L. R. A. 804; *Davis v. New York & N. E. R. Co.* 143 Mass. 301, 58 Am. Rep. 138; *Woodard v. Michigan, S.*

& N. I. R. Co. 10 Ohio St. 121; *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Lower v. Segal*, 59 N. J. L. 66; *Vawter v. Missouri P. R. Co.* 84 Mo. 679, 54 Am. Rep. 105.

The fellow-servant rule is founded in natural justice. This is shown (1) by the nature of the rule itself; (2) by the fact that three different tribunals, reasoning upon the question as one of first impression, unbiased by each other, reached the same conclusion (*Priestley v. Fowler*, 3 Mees. & W. 1; *Murray v. South Carolina R. Co.* 1 McMull. L. 385, 36 Am. Dec. 208; *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339); (3) by the consensus of opinion, in all common-law tribunals, without a dissenting voice, in favor of the rule; (4) this statute creating liability for a fellow servant's negligence, where the master has omitted no duty and is not to blame, is against good morals, in that it punishes in damages where, under our law, there is no fault.

In deciding this question of comity, the silence of the Illinois legislature, and its failure to modify or abolish the fellow-servant rule, as long held by our courts, is a clear indication of the public policy of this state regarding that rule.

Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243.

Questions of interstate law are decided on their merits as questions of law, and the residence or citizenship of the parties to the suit is immaterial.

Whitford v. Panama R. Co. 23 N. Y. 465; *Davis v. New York & N. E. R. Co.* 143 Mass. 301, 58 Am. Rep. 138; *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742.

Section 6 of the Indiana act is contrary to the policy of our law.

Eckman v. Chicago, B. & Q. R. Co. 169 Ill. 312, 38 L. R. A. 750.

Under the Illinois law, engineers, firemen, and conductors are fellow servants.

Ohio & M. R. Co. v. Robb, 36 Ill. App. 627; *Chicago & A. R. Co. v. Brandou*, 65 Ill. App. 150; *Illinois C. R. Co. v. Meyer*, 65 Ill. App. 531; *Terre Haute & I. R. Co. v. Leeper*, 30 Ill. App. 194.

Messrs. Tilton & Cundiff, for appellee: The statute of Indiana under which this judgment was obtained has been construed by the supreme court of the state which enacted it, and our courts will respect such construction; and this statute is the law governing this case.

Pittsburg, C. C. & St. L. R. Co. v. Montgomery (Ind.) 49 N. E. 582.

If the courts of a state have construed a statute the courts of a sister state will ordinarily respect their construction.

Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 645; *Shelby v. Guy*, 11 Wheat. 367, 6 L. ed. 469; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Leavenworth County v. Barnes*, 94 U. S. 70, 24 L. ed. 63; *Adams v. Nashville*, 95 U. S. 19,

NOTE.—For law of place governing actions for negligence, see *Alabama G. S. R. Co. v. Carroll (Ala.)* 18 L. R. A. 433; *Illinois C. R. Co. v. Ihlenberg (C. C. App. 6th C.)* 34 L. R. A. 393; *Evey v. Mexican C. R. Co. (C. C. App. 5th C.)* 88 L. R. A. 387.
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24 L. ed. 369; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491.

The statute abrogating the fellow-servant rule has been held constitutional in the following cases:

Pittsburg, C. C. & St. L. R. Co. v. Montgomery (Ind.) 49 N. E. 582; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 32 Minn. 435.

The following authorities have held actions of this character to be transitory and not local, and that they can be maintained in any court to whose jurisdiction the defendant can be subjected.

•*Rorer*, *Interstate Law*, p. 217; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *The Scotland*, 105 U. S. 29, 26 L. ed. 1003; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958; *Higgins v. Central New England & W. R. Co.* 155 Mass. 176; *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491; *McLeod v. Connecticut & P. Rivers R. Co.* 58 Vt. 727; *Hanna v. Grand Trunk R. Co.* 41 Ill. App. 116; *Shedd v. Moran*, 10 Ill. App. 618.

An action may be maintained in one state if not contrary to its own policy, for a wrong done in another state and actionable there, although a like wrong would not be actionable in the state where the suit is brought.

Huntington v. Attrill, 146 U. S. 670, 36 L. ed. 1128; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771; *Higgins v. Central New England & W. R. Co.* 155 Mass. 176; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 54 Am. Rep. 39; *Northern P. R. Co. v. Babcock*, 154 U. S. 198, 38 L. ed. 960; *Hanna v. Grand Trunk R. Co.* 41 Ill. App. 116.

Granting that while engaged upon that portion of the appellant's railroad lying in Illinois the relation of fellow servant existed between the deceased and the conductor whose negligence caused his death, and that he assumed the risks incident thereto, it does not necessarily follow that he assumed like risks when engaged on his engine in Indiana, where the statutes gave a right of recovery therefor.

Boston & M. R. Co. v. McDuffey, 51 U. S. App. 111, 79 Fed. Rep. 937, 25 C. C. A. 247.

The question as to whether the engineer and conductor of the extra freight were fellow servants of the deceased does not arise.

BOGGS, J., delivered the opinion of the court:

George W. Brewer, deceased, appellee's intestate, during his lifetime and at the time of his death, was a resident of Vermillion county, in this state. The appellant, a corporation organized under the laws of this 44 L. R. A.

state, was engaged in operating its trains over its own lines and leased lines of railway in the states of Illinois and Indiana. Said intestate was employed as a fireman on one of appellant's locomotive engines, and, while engaged in the discharge of his duty in that capacity on an engine drawing a passenger train along the line of appellant's road in the state of Indiana, was killed by a collision between the said engine and train upon which he was employed, and another engine, drawing a freight train, controlled and operated by other servants of the appellant company upon its said line of road in the state of Indiana. This was an action on the case, commenced in the circuit court of Vermillion county, Illinois, by the appellee, administrator of the said Brewer, to recover damages for the benefit of those entitled to receive distribution of the personal effects of the said deceased.

The declaration, in some of the counts, charged that the collision was occasioned by the negligence of the conductor of the freight train, and, in other counts, that the trains collided because of the negligence of the engineer of the freight train, and counted and predicated the right of recovery upon an alleged liability created by the statute of the state of Indiana in such cases, and set forth the statute of such state, and such statute was produced in evidence. Section 7083 of the Indiana statute provides that where the death of an employee of any railroad company or other corporation is caused by the negligence of any person in the employ or service of such corporation who has charge of any locomotive engine or train of cars upon any railroad, or by the negligence of any fellow servant engaged in the same common service in any of the several departments of such corporation, while the employee so killed is obeying or conforming to the orders of some superior having authority to direct at the time of such death, the railway company or other corporation operating such locomotive engine or train shall be liable to respond to the personal representatives of such deceased in damages in a sum not exceeding \$10,000, to be distributed to the widow and children, if any, or next of kin, of the deceased, in the same manner as personal property of the deceased. A plea of not guilty was filed, and the cause submitted to and heard by a jury, who returned a verdict in favor of the appellee administrator in the sum of \$5,000. The judgment was affirmed by the judgment of the appellate court for the third district on appeal, and the appellant company has prosecuted a further appeal to this court.

The effect of the statute of Indiana is to abrogate the doctrine which, it seems to be conceded, would otherwise be applicable to the facts of this case,—that the appellant company, as employer, is not to be held liable for an injury, fatal or otherwise, to an employee which was occasioned by the negligence of a fellow servant of such employee. The principal question arising is whether this statute will be applied and the doctrine thereof enforced in an action instituted and maintained in the courts of this state. or

whether the law as it exists in this state will govern and control. Actions not penal, but for pecuniary damages for torts or civil injuries to the person or property, are transitory, and, if actionable where committed, in general may be maintained in any jurisdiction in which the defendant can be legally served with process. We think it well settled that, without regard to the rule which may obtain as to a cause of action which accrued under the laws of a separate and distinct nation, a right of action which has accrued under the statute of a sister state of the Union will be enforced by the courts of another state of the Union, unless against good morals, natural justice, or the general interest of the citizens of the state in which the action is brought. Dicey, *Confl. Laws*, pp. 667-669, § 1; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *The Scotland*, 105 U. S. 29, 28 L. ed. 1003; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958; *Higgins v. Central New England & W. R. Co.* 155 Mass. 176; *Walsh v. New York & N. E. R. Co.* 160 Mass. 571; *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 64 Am. Rep. 39; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491; *East Tennessee, V. & G. R. Co. v. Lewis*, 89 Tenn. 235; *McLeod v. Connecticut & P. Rivers R. Co.* 58 Vt. 726.

It is argued by counsel for appellant that an action cannot be maintained in this cause in our courts, for the reason, as alleged, that the laws of the two states are materially variant, it being, as counsel insist, against natural justice and the established public policy of this state to hold an employer liable for injuries inflicted upon an employee by a fellow servant. This position finds support in the opinion rendered by the supreme court of Wisconsin in *Anderson v. Milwaukee & St. P. R. Co.* 37 Wis. 321, and also in expressions employed in opinions rendered in cases in the courts of England. But such is not the prevailing doctrine in the courts of this country. The supreme court of the state of Minnesota, having before it the precise point in the case of *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, gave forcible and clear expression of that which we conceive to be the correct doctrine. In that case the injury was inflicted in the state of Iowa, and was actionable under a statute of that state making railroad corporations liable for damages sustained by an employee in consequence of the negligence of a fellow servant. The rule of nonliability for injuries caused by a fellow servant obtained in Minnesota, where the action was brought. The court said: "The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action, while all that pertains merely to the remedy will be

controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*. The defendant admits the general rule to be as thus stated, but contends that, as to statutory actions like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text writers—notably, Rorer on Interstate Law—seem to lay down this rule, but the authorities cited generally fail to sustain it. . . . But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens." The same question engaged the attention of the supreme court of the state of Massachusetts in *Walsh v. New York & N. E. R. Co.* 160 Mass. 571, and it was said: "If, however, we assume, as was ruled and as we do assume, that, if the accident had happened in this state, the plaintiff could not have recovered, it is argued he cannot recover now. . . . As between the states of this Union when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties." In *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 953, the observations of the supreme court of the state of Minnesota in *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, were quoted with approval, and the principles of that case applied. And in *Boston & M. R. Co. v. McDuffey*, 51 U. S. App. 111, 79 Fed. Rep. 934, 25 C. C. A. 247, it was ruled the responsibility of the master for the act of a fellow servant is governed by the law of the place where the cause of action arose. In *East Tennessee, V. & G. R. Co. v. Lewis*, 89 Tenn. 235, the suit was brought in Tennessee to recover damages for

injuries received by an employee in the state of Georgia. The trial court charged the jury the plaintiff could recover, though guilty of contributory negligence. Such was the law of Tennessee, the place of the forum. The rule in the state of Georgia, the place where the injury was received, precluded recovery if the neglect of the person injured contributed to his injury. The court held the law of the state of Georgia controlled, and that the rule in the state of Tennessee, where the case was being tried, was not applicable to the case. The supreme court of the state of Indiana has declared the statute in question to be constitutional and valid. *Pittsburg, C. C. & St. L. R. Co. v. Montgomery* (Ind.) 49 N. E. 582. The right of action accrued and became complete in that state. In this state the doctrine of *respondet superior* does not apply to a case where an employee is injured or killed by the neglect of a fellow servant, but the doctrine of *respondet superior* is, in general, recognized in the jurisprudence of this state, and we perceive no ground warranting us to declare the enforcement of the doctrine as enlarged or extended by the Indiana statute must be regarded as so repugnant to good morals or natural justice, or so prejudicial to the best interests of our people, that we should shut the doors of our courts against a suitor who seeks to enforce a right of action which arose under the statute of the sister state.

What has been said disposes of all objections to the action of the court in giving, refusing, and modifying instructions to the jury, except the complaint as to one instruction given for the appellee, relative to the liability of the company in the event they should find the trains collided because of the negligence of the conductor of the freight train. The criticism made upon this instruction is that there was no evidence to support it. We think the objection is not well grounded. The testimony of the engineer of the freight train, which was proceeding northward, tended to show he was induced to refrain from putting the train upon the side track at the stations of Atherton and Lyford by a remark, in the nature of directions, made to him by the conductor at Otter Creek Junction. It further appeared that the conductor was riding in the cab of the engine of the freight train when that train ran past the side tracks at Atherton and Lyford. The trains collided 500 feet north of Lyford. The freight train should have been placed on the side track at Atherton or at Lyford, and this the conductor knew, or would have known had he kept his orders in mind, and noted the fact that his train was moving on the time of the passenger train, which was coming south.

No other errors are assigned, and the judgment of the Appellate Court is affirmed.

MARYLAND COURT OF APPEALS.

CLARK & McCULLOH, *Appts.*,

v.

Julius C. RENNINGER *et al.*, Trustees for John J. Beeghly.

(.....Md.....)

A person employed to cut merchantable timber by a contract which provides for a settlement each month, but for the retention of 25 per cent of the amount due until the sum of \$500 shall be held as a forfeiture for the satisfactory completion of the job, is a contractor, and not an employee or person in the employ of the owner of the timber, within the meaning of act 1878, chap. 108, providing for a receiver of an employer who fails to pay employees as required by the act.

(March 14, 1899.)

A PPEAL by defendants from a decree of the Circuit Court for Garrett County in favor of plaintiff in a proceeding under the manufacturers' and miners' law of Garrett County to have defendant's property placed in the hands of a receiver for failure to pay labor claims. *Reversed.*

The facts are stated in the opinion.

Messrs. Gilmore S. Hamill and Robert H. Gordon, for appellants:

The act of 1878, chap. 108, § 50, specially

provides for an indebtedness, either to persons in the employ of the manufacturers or to the furnishers of raw material. Any suit which might have been brought looking to the enforcement of the lien provided for by that act must be based upon an actual indebtedness, and not upon unliquidated damages under a contract; in other words, it is the same as if an action of *indebitatus assumpsit* had been brought, and all actions of that kind are subject to pleas of non-assumpsit; and under the plea of non-assumpsit the defendant may show that the contract was conditional and that part of it was not performed by the plaintiff.

Alexander v. Gardner, 1 Scott, 281; see note, Brantley's Edition, 9 Gill, 215.

Under that plea the defendant may show that the goods delivered were not such as were contracted for, or that the work was done in an unworkmanlike manner, although there was a special contract to pay for the goods or work at a certain price, and the plaintiff can then recover only on the *quantum meruit*.

Cousins v. Paddon, 2 Crompt. M. & R. 547; *Cooper v. Whitehouse*, 6 Car. & P. 545.

The right to recoup damages is well settled.

Rees v. Logsdon, 68 Md. 93; *Coates v. Sangston*, 5 Md. 133; *Lee v. Rutledge*, 51

NOTE.—On the question, Who are employees? see also *Tod v. Kentucky Union R. Co.* (C. C. App. 6th C.) 18 L. R. A. 305, and note; also *Palmer v. Van Santvoord* (N. Y.) 38 L. R. A. 402; *Bos-44 L. R. A.*

ton & A. R. Co. v. Mercantile Trust & D. Co. (Md.) 38 L. R. A. 97; *Lewis v. Fisher* (Md.) 20 L. R. A. 278.

Md. 311; *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635.

Messrs. Julius C. Renninger and Thomas J. Peddieord, for appellees:

It cannot be successfully contended that the plaintiff was not an employee, simply because the terms of the employment were reduced to writing. There are no limitations to the employment under the statute.

Act 1847, chap. 228; *Hicks v. Consolidation Coal Co.* 77 Md. 86.

Briscoe, J., delivered the opinion of the court:

This is a proceeding, under the act of 1878, chap. 108, codified as article 12, §§ 145-149, Code of Public Local Laws, known as the manufacturers' and miners' law of Garrett county. The 145th section of this act provides: "If any individual engaged in mining or manufacturing in said county, or any association or body corporate engaged in any business whatever therein, shall for the space of thirty days be indebted to the persons in their employ, or to furnishers of any raw material, in the aggregate sum of \$25 and shall neglect or refuse to pay the same for the space of thirty days, the circuit court for said county, as a court of equity, or the judge thereof in vacation, shall, upon the petition of the employees or furnishers of raw material or any number of them, appoint a receiver to take charge of the affairs of such individual, association, or body corporate, with a view to their liquidation and settlement.

On the 15th of October, 1896, John J. Beeghly, a citizen of Garrett county, filed a petition in the circuit court of that county, wherein it is stated that he was in the employ of, and a furnisher of raw materials for, the defendants, Clark & McCulloh, manufacturers of lumber and tan bark in Garrett county; that they were indebted to him in a sum aggregating more than \$2,000 and have been so indebted for more than thirty days, and prayed for the appointment of a receiver under the provisions of the act. On the 17th of October a receiver was appointed and qualified.

Subsequently, on the 20th of October, the defendants filed an answer, denying the allegations of the petition, and alleging "that the plaintiff was not an employee or a furnisher of raw material, within the meaning of the act, for the reason that he was distinctly a contractor, and was to receive a certain contract price upon the performance on his part of the terms of the agreement; that he was not a furnisher of raw material, because the timber from the land which he was cutting belonged to the defendants and not the contractor."

By an agreement between the parties, the receiver was discharged, and the case referred to the auditor to take testimony and to make a report; and from an order of the court ratifying certain audits, this appeal has been taken.

In the view we take of the case, it will not be necessary for us to decide all the questions raised on the appeal. If the circuit court for Garrett county had no jurisdiction, 44 L. R. A.

under the local statute, to entertain this case, then the order or decree will have to be reversed and the plaintiff's petition dismissed.

The act of 1878, chap. 108, applies in express terms "to persons in their employ or to furnishers of any raw material."

There can be no question that the plaintiff does not come within that part of the act which relates to furnishers of raw material, because it appears from the contract that the material to be furnished belonged to the defendants, and, unless he was an employee or "a person in their employ," he cannot claim the benefit of the act. It will be seen by the contract between the parties that the defendants who were engaged in the manufacture of lumber and tan bark in Garrett county, agreed to furnish from their farm certain timber to the plaintiff, who was to cut the merchantable timber, sell the bark, and deliver the same within a certain time to the defendants. It was agreed "that there should be a settlement at the end of each month, and that 75 per cent of the balance due at said settlement shall be paid on the 20th of the following month, and the remainder retained until it shall be (\$500) five hundred dollars as a forfeiture for the satisfactory completion of the job; when the job is completed, said forfeiture to be paid in full."

Such being the contract, we are of opinion that the plaintiff was a contractor and not an employee, or "a person in their employ," within the meaning of the Acts 1878, chap. 108.

Who are to be included within the term "employees" is a subject which has recently been passed upon by this and other courts.

In *Lewis v. Fisher*, 80 Md. 139, 26 L. R. A. 278, it was held that an attorney at law, under the insolvent law, was not an employee within the meaning of that statute, and was not entitled to claim priority for the payment of his fees for professional services.

In *American Casualty Ins. Co.'s Case*, 82 Md. 566, 38 L. R. A. 97, it was said an insurance adjuster was not an employee within the terms of the statute.

In *Vane v. Newcombe*, 132 U. S. 233, 33 L. ed. 315, the Supreme Court says: "It seems clear to us that . . . was a contractor with the company, and not an employee. . . . We think the distinction pointed out by the circuit court is a sound one, namely, that to be an employee within the meaning of the statute, Vane must have been a servant bound in some degree, at least, to the duties of a servant, and not, as he was, a mere contractor, bound only to produce, or cause to be produced, a certain result,—a result of labor, to be sure,—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party."

In *Louisville, E. & St. L. R. Co. v. Wilson*, 136 U. S. 505, 34 L. ed. 1025, it is said that the terms "officers and employees" both, alike refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an offi-

cer nor an employee. They imply continuity of service, and exclude those employed for a special and single transaction. An attorney of an individual, retained for a single suit, is not his employee. It is true he was engaged to render services, but his engagement is rather that of a contractor than that of an employee.

In *Rosser v. Kentucky Union R. Co.* 6 U. S. App. 186, 52 Fed. Rep. 241, 3 C. C. A. 60, 18 L. R. A. 305, contractors were distinctly held not to be employees.

It is clear, we think, that the statute in this case did not mean to include contractors in the language, "persons in their employ." And strength is given to this conclusion by an examination of the act, originally passed for Allegany county, when Garrett was a part thereof, which contained the word "contractors." Acts 1847, chap. 228. But by

the subsequent legislation, the word "contractors" is omitted from both the Acts 1878, chap. 108, and art. 12 of the Code of Public Local Laws, §§ 145-149.

The case of *Hicks v. Consolidation Coal Co.* 77 Md. 91, relied on by the appellees, cannot control the decision of this case. We said in that case that "ore, clay, and coal" could be included under the head of "furnishers of any raw material," because "the subsequent legislation had used general terms which comprehend them."

For the reasons we have given, the decree of the circuit court for Garrett county, dated the 18th of May, 1898, will be reversed and the plaintiff's petition dismissed, with costs in both courts.

Decree reversed, and petition dismissed with costs.

MICHIGAN SUPREME COURT.

James H. RUDELL *et al.*, *Pliffs. in Err.*,
v.
OGDENSBURG TRANSIT COMPANY.

(.....Mich.....)

1. A contract by a carrier to deliver goods at destination at a certain time, which allows the usual period for making the trip, is within the general authority of the carrier's agent.
2. A shipper's contract with a carrier cannot be changed by handing a receipt or bill of lading to his clerk.

(July 12, 1898.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover damages for failure to deliver goods in defendant's possession for transportation when it agreed to do so. *Reversed.*

Statement by Grant, Ch. J.:

Plaintiffs, commission merchants in Detroit, shipped a quantity of potatoes and onions by the defendant's line to Chicago. Plaintiffs had sold them to merchants in Chicago, at a certain price, provided they were delivered there by the 12th of July, 1894. This was during the great railroad strike, when prices for produce in Chicago were very high. Plaintiffs gave evidence tending to show that they made the contract of carriage with Mr. Chesebrough, the local agent for the defendant in Detroit, on the morning of July 9; that defendant agreed to deliver them in Chicago by noon of the 12th, barring shipwreck and fire; that the goods were delivered to the defendant at the time agreed upon; that the defendant failed to deliver the goods until the 14th; that meanwhile the price had fallen; the consignees refused to

accept; and that the goods were sold at the best price obtainable, which was much less than the contract price. Defendant denied that it guaranteed to deliver at a fixed time. Mr. Chesebrough admitted informing plaintiffs that the boat would leave about 10 o'clock on the morning of the 12th; that it would arrive at Chicago within fifty hours; and that the goods were shipped on that understanding. The case was submitted to the jury, who found a verdict for plaintiffs. One of the defenses was that Mr. Chesebrough had no authority to make the contract of guaranty that the steamer would arrive at a certain time. It was stipulated that this question might be further argued upon a motion for a new trial, and that, if the court should then determine that no such authority was shown, the verdict might be set aside, and judgment rendered for the defendant, and that, if upon appeal to this court that decision was reversed, judgment might be rendered here for the plaintiffs. The court did set the verdict aside, and rendered judgment for the defendant.

Messrs. Bowen, Douglas, & Whiting, for plaintiffs in error:

The principal is bound in all cases where the agent is acting within the scope of his authority although in fact he has in a particular instance exceeded or violated his instructions and acted without instructions.

Leo Austrian & Co. v. Springer, 94 Mich. 343; *Methuen Co. v. Hayes*, 33 Me. 169; *Trainer v. Morison*, 78 Me. 160, 57 Am. Rep. 790; *English v. Ayer*, 79 Mich. 516; *Mechem, Agency*, §§ 283, 287; *Story, Agency*, §§ 127, 443; 1 Am. & Eng. Enc. Law, 2d ed. pp. 989, 990.

As common carriers, especially at the present time, transact the greater part, if not all, of their business with the public through

NOTE.—For contracts for freight transportation made by agents in general, see note to *Miller v. South Carolina R. Co.* (S. C.) 9 L. R. A. 838. The precise point decided in the present 44 L. R. A.

case, as to the agent's authority to contract for transportation within a definite time, seems to be new.

agents and servants, it is plain that the public have a right to assume that they are authorized to do whatever they attempt to do.

Lawson, Carr. 332; Hutchinson, Carr. § 267; *Wilson v. New York, N. & B. R. Co.* 18 Eng. L. & Eq. 557; *Pickford v. Grand Junction R. Co.* 12 Mees. & W. 766.

Every presumption is in favor of the authority of the station agent to enter for his company into contracts for transportation, when such contracts are not of an unusual or extraordinary character.

5 Am. & Eng. Enc. Law, 2d ed. p. 351, note 13; *Easton v. Dudley*, 78 Tex. 236; *Wood, Railway Law*, 450; *Foster v. Cleveland, C. O. & St. L. R. Co.* 56 Fed. Rep. 434; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527; *Hutchings v. Ladd*, 16 Mich. 493.

It is error to instruct the jury that the burden of proof is on the plaintiff to show the authority of the station agent to contract to furnish cars at a certain date.

5 Am. & Eng. Enc. Law, 2d ed. p. 351; *Gulf, C. & S. F. R. Co. v. Wright*, 1 Tex. Civ. App. 403.

In all cases where the facts are in dispute a question as to whether or not there was an agency, and if so, as to the authority of the agent, is one of fact, to be determined by the jury under proper instructions from the court.

1 Am. & Eng. Enc. Law, 2d ed. p. 986; *Mechem, Agency*, § 106; *Missouri P. R. Co. v. Carpenter*, 44 Kan. 257.

The road was bound for damages for non-delivery within the time contracted for by their station agent.

Goddard v. Mallory, 52 Barb. 87; *Deming v. Grand Trunk R. Co.* 48 N. H. 455, 2 Am. Rep. 267; *Wood v. Chicago, M. & St. P. R. Co.* 68 Iowa, 491, 56 Am. Rep. 861; *Harrison v. Missouri P. R. Co.* 74 Mo. 364, 41 Am. Rep. 318; *Gulf, C. & S. F. R. Co. v. Hume Bros.* 87 Tex. 211; *Goodrich v. Thompson*, 44 N. Y. 324; *Lake Erie & W. R. Co. v. Rosenberg*, 31 Ill. App. 47; *Easton v. Dudley*, 78 Tex. 236; *McCarty v. Gulf, C. & S. F. R. Co.* 79 Tex. 33; *Missouri, K. & T. R. Co. v. Graves* (Tex. App.) 10 S. W. 102.

Messrs. Wisner & Harvey, for defendant in error:

The customary way of carrying on the business of a common carrier is by issuing bills of lading, which constitute the contract between the parties.

Abbott, Shipping, p. 322; *Redfield, Carr.* pp. 307-309.

Unless specially authorized, the agent had no right to change the contract as drafted by the company.

On petition for rehearing.

The receipt or bill of lading issued by a common carrier to a consignor, and received by him without objection, is the contract between the parties, and fixes their liabilities and rights.

McMillan v. Michigan S. & N. I. R. Co. 16 Mich. 79, 93 Am. Dec. 208; *Smith v. American Exp. Co.* 108 Mich. 572.

To constitute a valid agreement there must be a meeting of minds upon every feature and element thereof of which the consideration is one.

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Fire Ins. Asso. v. Wickham, 141 U. S. 564, 35 L. ed. 860; *Michigan College of Medicine v. Charlesworth*, 54 Mich. 522; *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708.

This pretended contract made by and left resting in parol does not in law constitute a contract, the verdict of the jury to the contrary notwithstanding.

Said bills of lading constituted the contract between the parties.

McMillan v. Michigan S. & N. I. R. Co. 16 Mich. 79, 93 Am. Dec. 208; *Smith v. American Exp. Co.* 108 Mich. 572.

Grant, Ch. J., delivered the opinion of the court:

The jury settled the contract in behalf of the plaintiffs. The sole question, therefore, is the authority of defendant's agent to make the contract. A shipping agent of a common carrier has general authority to make all reasonable contracts of shipment. Any undisclosed limitation does not bind the shipper. Has such an agent authority to agree to deliver goods at the place of destination at a particular time? Only when contracts are of an unusual and extraordinary character is the shipper put to inquiry as to the agent's authority. *Hutchinson, Carr.* § 267; 5 Am. & Eng. Enc. Law, 2d ed. p. 351. A guaranty to a theatrical troupe that it would arrive at a given time is held valid. *Foster v. Cleveland, C. C. & St. L. R. Co.* 56 Fed. Rep. 434. One writer says: "As common carriers, especially at the present day, transact the greater part, if not all, of their business with the public through agents and servants, it is plain that the public have a right to assume that they are authorized to do whatever they attempt to do." *Lawson, Carr.* p. 332. This rule does not include contracts so unusual and extraordinary that they cannot reasonably be included within the general authority. Delays sometimes occur, both on land and water. Many cases like the present and that of the theatrical troupe are constantly arising, where delivery at a certain time is essential. When the shipper and the carrier agree, through its agent, upon a date of delivery at destination which gives the usual time to make the trip, such contract cannot be held unusual or extraordinary, and is within the general authority of the agent. The carrying business of the country is mostly done by corporations which act through agents who, as in this case, frequently solicit business; and, when the contract is a reasonable one, it must be upheld, in the absence of notice of lack of authority.

It is urged that the customary way of carrying on the business of a common carrier is by issuing bills of lading, which constitute the contract between the parties. This custom is not conclusive of the authority of the agent, or of the reasonableness of the contracts he assumes to make. Plaintiffs testified that they knew nothing of a bill of lading in this case, and had never seen any before the trial. Defendant introduced a bill of lading, which it claims was given to

plaintiffs' clerk at the time of or soon after the delivery of the goods to it. The contract was made before, and defendant could not change it by handing a receipt or bill of lading to a clerk.

The judgment is reversed, and judgment

entered in this court for the plaintiffs, with costs of both courts.

The other Justices concur.

Rehearing denied.

NEW YORK COURT OF APPEALS.

Erwin STEINBACK, *Respt.*,
v.

Louise DIEPENBROCK, *Exrx.*, etc., of Alois Diepenbrock, Deceased, *Appt.*,
and

William ERDTMANN, *Respt.*

(158 N. Y. 24.)

1. One having no insurable interest in the life of another may acquire by assignment a valid policy upon his life, and enforce it to the full amount.
2. A life insurance policy taken out by one upon his own life for the purpose of assigning it to another having no insurable interest will be invalid.

(January 10, 1899.)

A PPEAL by defendant Diepenbrock from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term of the Court of Common Pleas for the City and County of New York in favor of plaintiff and defendant Erdtmann in an action brought to recover the proceeds of a life insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. William Philippeau, A. Edward Woodruff, and Max Meyer, for appellant:

The assignment from Alois Diepenbrock to the defendant Erdtmann cannot be sustained unless it is affirmatively shown that it was a fair and bona fide transaction and free from all suspicious circumstances.

Re Smith, 95 N. Y. 516; *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428; *Nesbit v. Lockman*, 34 N. Y. 167; *Green v. Roworth*, 113 N. Y. 462; *Barnard v. Gantz*, 140 N. Y. 249; *Empire State Ins. Co. v. American Cent. Ins. Co.* 138 N. Y. 446; *Sears v. Shafer*, 6 N. Y. 268.

The circumstances disclosed by the record under which the assignment to Erdtmann was executed were such as to call for the application of the doctrine of constructive fraud.

The plaintiff had the burden of proving, not only that the deceased fully understood the act, but that he was not induced by any influence of Erdtmann and that he, Erdtmann, took no unfair advantage of his superior knowledge and influence.

Cowee v. Cornell, 75 N. Y. 99, 31 Am. Rep.

428; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Conkey v. Bond*, 36 N. Y. 427; *Bain v. Brown*, 56 N. Y. 285.

The plaintiff had no insurable interest in the life of the insured and admitted upon the trial that he bought the policy as a speculation. Such a transaction should not be sanctioned by this court.

Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516.

It cannot be said that this court in the cases relied upon by the respondent intended to be understood that a speculation in human life, such as the plaintiff admits it to be, is in all respects a legal transaction, and will be upheld and enforced in this state.

Olmsted v. Keyes, 85 N. Y. 593; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 523; *Warnock v. Davis*, 104 U. S. 782, 26 L. ed. 927; *Holmes v. Gilman*, 138 N. Y. 369, 20 L. R. A. 566.

The assignment of a policy to a party not having an insurable interest is as objectionable as "the taking out of a policy in his name."

Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Stevens v. Warren*, 101 Mass. 564; *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Ruth v. Katterman*, 112 Pa. 251; *Hoffman v. Hoke*, 122 Pa. 377, 1 L. R. A. 229; *Downey v. Hoffer*, 110 Pa. 109.

In the case of an assignment of a life insurance policy for a nominal consideration the interests of justice will be promoted if this court should hold that such an assignment is presumptively made as collateral and require the assignee as part of his case to affirmatively prove that the assignment was a bona fide transaction free from suspicion and for a valuable consideration.

Mr. James Cowden Meyers, with *Messrs. Goepel & Raegenor*, and *Thomas M. Rowlette*, for respondents:

There is no presumption in law that an assignment of a policy of life insurance was made as collateral to secure a loan.

St. John v. American Mut. L. Ins. Co. 2 Duer, 219, *Affirmed* in 13 N. Y. 31, 64 Am. Dec. 529.

The plaintiff's title is not impeached by

NOTE.—For validity of the assignment of a life insurance policy to one who has no insurable interest in the life of the insured, see also *Rittler v. Smith* (Md.) 2 L. R. A. 844; *Roller v. Bean* (Va.) 6 L. R. A. 136; *Johnson v. Alex-44 L. R. A.*

ander (Ind.) 9 L. R. A. 660, and *note*; *Hewlett v. Home for Incurables* (Md.) 17 L. R. A. 447; *Mutual Reserve Fund Life Assn. v. Hurst* (Md.) 20 L. R. A. 761.

want of interest in the life of the defendant Diepenbrock's testator.

St. John v. American Mut. L. Ins. Co. 13 N. Y. 31, 64 Am. Dec. 529; *Valton v. National Fund Life Assur. Co.* 20 N. Y. 32; *Olmsted v. Keyes*, 85 N. Y. 593; *Wright v. Mutual Ben. Life Assn. of America*, 118 N. Y. 237, 6 L. R. A. 731; *Walsh v. Mutual L. Ins. Co.* 133 N. Y. 408; *Geoffroy v. Gilbert*, 5 App. Div. 98, Affirmed in 154 N. Y. 741.

Parker, Ch. J., delivered the opinion of the court:

The counsel for the appellant in his argument insisted with great earnestness and force that the position several times asserted by this court in support of the legality of the assignment of a policy of insurance to a person having no insurable interest in the life of the insured is a mistaken one, and in conflict with the decisions of the United States Supreme Court and the court of last resort in many of the states. *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Schonfeld v. Turner*, 75 Tex. 324, 7 L. R. A. 189; *Basye v. Adams*, 81 Ky. 368; and *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316, furnish support for his assertion as to the rule in the United States Supreme Court and in some of the other states. Supported by these authorities, the counsel challenged the correctness of the rule that concededly has been long acquiesced in in this state by the courts and the profession. Indeed, Mr. Justice Field, in his opinion in *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, stated the rule in this state to be that a valid assignment of a policy of insurance could be made to a person without interest in the insured. But the appellant contends that, while this may be the rule here, the decisions in other jurisdictions demonstrate that our position is wrong as a matter of sound public policy, and therefore, the true rule should be laid down, notwithstanding that expressions inducing the belief that the above rule obtained may have been made by our courts. It is urged that this task will not be a difficult one, for the reason, as the appellant contends, that there have been no cases in this state where the question was necessarily up for decision, and, therefore, all that has been said upon that subject by this court is mere *dictum*.

In *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 31, 64 Am. Dec. 529, a recovery in favor of the plaintiff against an insurance company was sustained where it appeared that one Noyes had effected policies of insurance upon his own life and shortly afterwards assigned them to the plaintiff for a valuable consideration. In the answer the defendant alleged, by way of defense, that the plaintiff was entitled to recover only the amount of money that he had advanced as a consideration of the transfer of the policy to him, and that, if defendant was liable beyond such amount upon the policy, the personal representatives were interested in the excess, and therefore necessary parties to the suit. And upon the close of the evidence the counsel for 44 L. R. A.

the defendant pressed the point that the plaintiff had no insurable interest in the life of the insured, and therefore was not entitled to judgment. The court regarded the question as one necessary to be passed upon in the final disposition of the case, and, after considering it, held that the policies in question were valid in their inception, and that the assignment of them to the plaintiff did not affect the liability of the company, and that to entitle the assignee to a recovery it was not necessary for him to have had an insurable interest in the life of the insured. The next case was *Valton v. National Fund Life Assur. Co.* 20 N. Y. 32, where Schumacher obtained a policy on his life for \$10,000, and by his articles of copartnership agreed that the plaintiff and another partner should become the owners of the policy and all due thereon in the event of his death before the termination of the partnership. This contingency happened, and the court held that it operated to vest absolutely the title to the policy in the plaintiff and his other partner, and a recovery could be had thereon as against the defendants. It will be observed that in the cases cited the contest was between the assignee and the company issuing the policy, and the question was not squarely presented whether, as between the assignor and the assignee, the assignee would be entitled to retain more than the sum actually invested by him, which is the rule in some jurisdictions. But it necessarily was decided that the policy was not rendered invalid by the assignment, and, further, that the assignee acquired thereby the right to enforce collection of the full amount of the policy from the company.

In *Olmsted v. Keyes*, 85 N. Y. 593, the plaintiff, having obtained the proceeds of a policy of life insurance, brought an action for the purpose of ascertaining and determining the conflicting claims of various defendants to the moneys paid on the policy. It appeared that Keyes procured a policy of insurance on his life, payable to the plaintiff as trustee for his wife Huldah; Huldah died intestate a few years later; afterwards Keyes married again, and thereupon the plaintiff, for value, assigned the policy to Keyes's second wife, at his request. Keyes subsequently died intestate, leaving him surviving, his widow and one child by her and several children by his first wife. It was held that during the life of the first wife the policy was her property, and upon her death the title vested in her husband as survivor, and, he having caused it to be assigned to his second wife, the assignment vested the title in her, and she alone was entitled to the money due thereon. There was a difference of view in the court as to the disposition of the case, and the argument that led to the decision considered with care the assignability of a policy of life insurance like any other contract. In the course of the argument the court referred to and considered many authorities in England and in this country, and reached the conclusion that, while an insurable interest is necessary to enable one to take out a policy of insurance on the life of another, it is not necessary that the assignee of a policy valid-

ly issued should have such an interest. After careful examination of that opinion, we find it impossible to reach any other conclusion than that it was intended to put at rest whatever controversy there may have been in this state touching the assignability of a valid policy of insurance. The case at bar is the only one we know of where the rule laid down in the case last referred to has been seriously questioned, although it is true that some discussion of the principle was had in *Wright v. Mutual Ben. Life Assn. of America*, 118 N. Y. 237, 6 L. R. A. 731, where the defendant unsuccessfully challenged the right of the assignee to recover, on the ground, among others, that the plaintiff had not an insurable interest in the life of the insured at the time of the assignment. The court in its opinion cited the case of *Olmsted v. Keyes*, 85 N. Y. 593.

The result of our further examination persuades us that what has been understood to be the rule in this state is not only in line with the authorities in most jurisdictions upon that subject, but is sound as a matter of public policy. It was formerly the rule in England that, while a policy of insurance could not be assigned at law, it could in equity. By the act of 1867 (30 & 31 Vict. chap. 144), a policy of life insurance was made assignable at law, and in some of the decisions it was said by the court that the object of the statute was to enable the assignee to sue in his own name; but it did not in any other way improve the position of the assignee, who could before that secure the money in equity. *British Equitable Ins. Co. v. Great Western R. Co.* 38 L. J. Ch. N. S. 132; *Re Turcan*, L. R. 40 Ch. Div. 5. The rule asserted by this court has also been held to be the law in many of our sister states in a number of cases, where the question has been raised either in actions brought by personal representatives of the assignor to recover the money received by the assignee on a policy or in suits brought by the company issuing the policy for the purpose of determining whether the personal representatives or the assignee were entitled to the proceeds, all claimants being made parties defendant. *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Eckel v. Renner*, 41 Ohio St. 232; *Martin v. Stubbings*, 126 Ill. 387, 403; *Fitzpatrick v. Hartford L. & Annuity Ins. Co.* 56 Conn. 116, and 17 Atl. 411; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Murphy v. Red*, 64 Miss. 614, 60 Am. Rep. 68; *Rittler v. Smith*, 70 Md. 261, 2 L. R. A. 844. These authorities are, it seems to us, well grounded in principle. They recognize, not only the existence of, but the necessity for, the rule that forbids any insurance upon the life of a person in which the person for whose benefit the insurance is made has no interest. Such a policy constitutes what is termed a "wager policy," or a mere speculative contract upon the life of the insured, with a direct interest in favor of its early termination. It is, in terms, forbidden by statute in England (14 Geo. III. chap. 48), and in many other jurisdictions, including this state (Laws 1892, chap. 690, § 55); and this court held in *Ruse v. Mutual Ben. L. Ins.* 41 L. R. A.

Co. 23 N. Y. 516, that such insurance is void at common law, and that the English statute, in so far as it prohibits such insurance, is merely a declaratory act.

But the question we are considering presupposes a valid contract of insurance, the policy being issued either for the benefit of the assured personally, or for the benefit of someone having an insurable interest in the assured at the time of the taking out of the policy. Such a policy constitutes a contract to pay a certain amount of money to the payee on the death of the assured. It is a chose in action, with all the ordinary incidents belonging thereto, and as such may be assigned, either as collateral or absolutely, as the payee may elect. While an insurable interest in the payee is necessary, in the first instance, to the creation of a valid contract, it is not necessary that such interest should continue. The case of a wife divorced from her husband will serve as an illustration. The policy taken out for her benefit during the existence of the married relation is not affected by a subsequent severance of that relation through a decree of a court of competent jurisdiction, by which she ceases to have an insurable interest in his life. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251. The materiality of the value of the interest has relation to the question whether the policy is taken out in good faith, and not as a gambling transaction. If it be taken out in good faith, then a sound public policy would seem to require that the payee should be permitted to treat it as he may any other chose in action, and go to the best market he can find, either to sell it or borrow money on it. It would substantially confine him to such terms as the company issuing the policy should choose to make with him, if he should be limited in his choice of a purchaser to the party having an interest in the continuance of the life of the assured.

On the other hand, it is said that, if the payee of a policy be allowed to assign it, a safe and convenient method is provided by which a wagering contract can be safely made. The insured, instead of taking out a policy payable to a person having no insurable interest in his life, can take it out to himself, and at once assign it to such person. But such an attempt would not prove successful, for a policy issued and assigned, under such circumstances, would be none the less a wagering policy because of the form of it. The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of one transaction. *Cammaock v. Lewis*, 15 Wall. 643, 21 L. ed. 244, and *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, were cases where the policies were taken out in order that they might be assigned to the assignees, through their procurement, under circumstances that might well be held to be in evasion of the law prohibiting gaming policies. In *Warnock's Case* the agreement touching the procurement of the policy and the use to be made of it, including the

promise to assign it, was in writing, and executed the very day the policy was applied for, and the day following the assured executed an assignment of the policy, which had in the meantime been issued in pursuance of such an agreement. The insurance company paid over the money to the assignee, and the court held that the personal representatives of the assured were entitled to receive from the assignees all the money, except the sums advanced by them under the agreement, plus the sum paid by them to the widow. In the opinion it is said that the assignment of the policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. That remark was clearly true as applied to the facts of that case, for the policy was taken out in pursuance of an agreement to assign it. It was therefore, in fact, a policy taken out for the benefit of parties having no insurable interest, although in form issued to the assured, and by him assigned to such parties. In such case the court will always declare the fact to be as it is, without regard to the effort of the parties to hide the truth and cheat the law. But the language employed by the court, and evidently advisedly, is broad enough to cover all assignments of policies to parties not having an insurable interest, including as well those taken out in good faith, and kept up as long as the financial condition of the insured permits, as those deliberately taken out for the purpose of speculation upon a life that the intended beneficiary, whether as payee in the policy or by assignment, has no interest in prolonging. The point of actual separation between the cases asserting the assignability and those asserting the nonassignability of policies of insurance to persons not interested in the continuance of the life of the assured seems to be that those asserting nonassignability proceed on the assumption that the question is one of law, and that, if a policy is not assignable in one case, it cannot be in any case; while in the other line of cases the underlying principle is that all valid contracts are assignable, but that contracts are not necessarily valid and free from the taint of gambling because upon their face they appear to be regularly and properly issued. In order to ascertain the truth, all the facts and circumstances may be proved, and if it then appear that the parties intended by the contract to enable a third and uninterested party to speculate upon the life of another, the court will declare such contract invalid, not because of the assignment, but in spite of it.

Warnock's Case and this one are very wide apart in their facts, and serve very well to illustrate the necessity for the position taken by the courts of this state upon this general subject. In December, 1887, Alois Diepenbrock took out a policy of insurance on his life in the Equitable Life Assurance Society. He paid the premiums regularly down to December, 1892, a period of about five years, at which time the surrender value of the policy was about \$485. He was pressed for money, and finally sold the policy to the defendant Erdtmann for \$600, or something

like \$115 more than he would have received by the surrender of the policy to the company. He had paid a much larger sum in premiums,—something over \$2,000,—and there seems to be no good reason why a person owning such a policy, and obliged to sell it, should not be permitted to get back as much as possible of the money that he has paid out for insurance. His condition of health may have changed very materially, of which fact the company can take no advantage; for in its contract it made allowance for that possibility. There is no good reason for saying that an insured person should not have the right, whenever his necessities press him, because of a failing condition of health that assures a speedy death, to realize on his policy, and obtain for it something like a fair price, which may, perhaps, be almost equal to its face value.

The personal representatives of the assured contested the assignment, also, on the ground that it was intended as collateral, although in form a valid assignment; but the special term found otherwise, and the appellate division approved that finding, so that question is no longer open for consideration.

Other questions are presented by the appellant, but, after a careful examination of them, we conclude that no error was committed below that will support a reversal of the judgment.

The judgment should be affirmed, with costs.

All concur, except *Martin, J.*, absent.

PEOPLE of the State of New York, *as rel.*
COMMISSIONERS OF PUBLIC CHAR-
ITIES AND CORRECTION, *Respts.*,
v.

William CULLEN, *Appt.*

(153 N. Y. 629.)

1. Legislative power to enlarge the jurisdiction of the court of appeals by providing for a review of certain judgments of inferior courts that were not reviewable before is not taken away by the provision of Const. art. 6, § 9, providing that the legislature may further restrict such jurisdiction.
2. A judicial separation at the suit of the wife, although it does not dissolve the marriage, does so far terminate or suspend the relation of husband and wife that the husband cannot be guilty of the statutory offense of abandonment or desertion.
3. The failure of a decree of separation to make any allowance for the wife, while it provides that an application for that purpose may be thereafter made in

NOTE.—The statutes making it a criminal offense for a man to abandon his family are of comparatively recent date. The offense is purely statutory. On the question of the effect of a limited divorce upon the husband's liability in such cases, the above decision seems to be the first. For bond required from husband to support wife, see *Murray v. Murray* (Cal.) 37 L. R. A. 628.

case of a material change in the husband's pecuniary circumstances, does not leave him liable to a prosecution for abandonment or desertion in case she becomes a charge upon the public.

(October 5, 1897.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the Court of Special Sessions of the City and County of New York affirming a magistrate's conviction of defendant as a disorderly person. *Reversed.*

The facts are stated in the opinion.

Mr. Payson Merrill, for appellant:

The statute under which this defendant was convicted is a penal statute, and as such is to be strictly construed.

People, Harrington, v. Special Sessions Ct. 15 N. Y. S. R. 328.

The offense of which the defendant was convicted comes within the definition of a crime in § 3 of the Penal Code.

People, Kopp, v. French, 102 N. Y. 583; *People v. Pettit*, 74 N. Y. 320; *People v. Crandon*, 17 Hun, 490; *Cummings & Gilbert, Poor Laws*, 120.

The object of the statute is not to create a new obligation on the part of the husband, but to provide a new remedy for enforcing an existing obligation and to punish a failure to fulfil it. The statute has no application in a case where no obligation exists.

People v. Brady, 13 Misc. 294; *People, Douglass, v. Naehr*, 30 Hun, 461.

The obligation of the defendant to support the complainant was terminated by the decree of 1883.

2 Parsons, Contr. p. 85; Tyler, Infancy & Coverture, § 700, p. 924; Schouler, Husb. & W. § 118; Schouler, Dom. Rel. § 222; *Kamp v. Kamp*, 59 N. Y. 212; *Romaine v. Chauncey*, 129 N. Y. 566, 14 L. R. A. 712; *Galusha v. Galusha*, 116 N. Y. 635, 6 L. R. A. 487; *Wetmore v. Wetmore*, 149 N. Y. 520, 33 L. R. A. 708; *People v. Pettit*, 74 N. Y. 320.

The statute under which these proceedings were taken was not intended to apply to a case where the obligation of the material contract has been modified by a decree of limited divorce at the instance of the wife.

People, Douglass, v. Naehr, 30 Hun, 461.

The judgment of separation between the complainant and the defendant in 1883 is binding upon the people in this proceeding.

People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; *Rigney v. Rigney*, 127 N. Y. 408.

The offense of abandonment must be one which leaves the wife without adequate support or in danger of becoming a charge upon the people, but one of the essential conditions of the offense is abandonment, and this abandonment must be a voluntary act.

Fitzgerald v. Fitzgerald, L. R. 1 Prob. & Div. 694; *Thompson v. Thompson*, 1 Swab. & T. 231, 4 Jur. N. S. 717; *Pape v. Pape*, L. R. 20 Q. B. Div. p. 76; *Reg. v. Leresche*, 65 L. T. N. S. 602; *Williams v. Williams*, 130 N. Y. 193, 14 L. R. A. 220.

Messrs. Percy McElrath and George W. Lyon, for respondents:

The law under which this appeal is sought to be brought is unconstitutional.

44 L. R. A.

It is sufficient to convict one as a disorderly person if he is proved to have abandoned his wife in the city of New York without adequate support or to have left her in danger of becoming a burden upon the public, or to have neglected to provide for her according to his means.

Bulkley v. Boyce, 48 Hun, 259; *People, Lichtenstein, v. Hodgson*, 126 N. Y. 648; *People, Harrington, v. Special Sessions Ct.* 15 N. Y. S. R. 329.

There is a marked distinction between the legal consequences which result from a divorce a *vinculo matrimonii* and a separation merely from bed and board.

N. Y. Code Civ. Proc. §§ 1756, 1762; 2 Bishop, Mar. & Div. §§ 726-741; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Burr v. Burr*, 10 Paige, 25; *Tonjes v. Tonjes*, 14 App. Div. 542.

A divorce from bed and board works no change in the relation of the parties, either to each other or to third persons, except in authorizing them to live apart until they mutually come together.

2 Bishop, Mar. & Div. § 729.

This divorce does not deprive the wife of any estate or property rights she may hold independently of her husband or adversely to him.

2 Bishop, Mar. & Div. § 741.

The liability of a husband to provide for his wife "continues irrespective of the judgment."

Tonjes v. Tonjes, 14 App. Div. 542; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Burr v. Burr*, 10 Paige, 25; *Erkenbrach v. Erkenbrach*, 96 N. Y. 465.

The plaintiffs in this proceeding were not parties or privies to the action in the superior court, and are in no way bound or estopped by the judgment or orders made in that action.

Monroe County Supers. v. Budlong, 51 Barb. 515; *Collins v. Hydorn*, 135 N. Y. 320; *Furlong v. Banta*, 80 Hun, 248; *Re State Reservation Comrs.* 37 Hun, 553; *People v. Rohrs*, 49 Hun, 150.

To make a former recovery a bar, the litigation must have been between the same parties or their privies. By privies are meant persons who are represented by the parties, or claim under them, or in privity with them, who have mutual and successive relationship to the same right or thing.

Goddard v. Benson, 15 Abb. Pr. 191; *Scott v. Drennen*, 9 Daly, 226; *Furlong v. Banta*, 80 Hun, 248; *Booth v. Powers*, 56 N. Y. 22; *Neeson v. Troy*, 20 Hun, 173.

The offense of being a disorderly person is one against the public, and as such is dealt with and punished.

People v. Crandon, 17 Hun, 490; *People v. Mitchell*, 2 Thomp. & C. 172; *Stowell v. Chamberlain*, 60 N. Y. 276; *Stannard v. Hubbell*, 123 N. Y. 531.

The plaintiffs herein are not bound by immaterial and collateral facts decided in a previous action.

Hecht v. Hecht, 14 Misc. 597; *Galusha v. Galusha*, 138 N. Y. 272; *House v. Lockwood*, 137 N. Y. 250; *Shaw v. Broadbent*, 129 N.

Y. 123; *Stannard v. Hubbell*, 123 N. Y. 528; *Springer v. Bien*, 128 N. Y. 102.

The question of alimony was entirely collateral to the main issue in this case.

Bigelow, Estoppel, 158; *Barrs v. Jackson*, 1 *Younge & C. Ch. Cas.* 585; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675.

A judgment in a former suit is conclusive as to existing rights, but not as to matters which may subsequently arise.

People, Lichtenstein, v. Hodgson, 126 N. Y. 648; *Smith v. McCluskey*, 45 Barb. 610; *Brennan v. Blath*, 3 Daly, 479.

It was not the intent of the superior court that their failure to order the payment of alimony should deprive the plaintiff of all support from her husband. It was the practice of that court to deny such applications for alimony on the ground that the applicant would find a more speedy and efficient means of procuring support by having the proceedings brought before a police magistrate, as was done in this case.

Ruopp v. Ruopp, 35 N. Y. Supp. 251; *Patton v. Patton*, 13 Misc. 726.

Eliza Cullen is not the plaintiff in this proceeding. The proceedings may be instituted and maintained with utter disregard to her wishes or action in the premises. Whether or no she has made a demand for support is not the question in this matter.

People v. Meyer, 12 Misc. 615; *People, Lichtenstein, v. Hodgson*, 126 N. Y. 648.

The offense is one against the people, not against the wife.

People v. Crandon, 17 Hun, 490.

O'Brien, J., delivered the opinion of the court:

The defendant was tried before one of the city magistrates in the city of New York, and was adjudged to be a disorderly person, in that he had abandoned his wife, and had left her in danger of becoming a charge upon the public. The proceeding was instituted before the magistrate upon a verified complaint of the wife on the 12th day of August, 1896. The trial resulted in a conviction on the 12th day of December, 1896, and the defendant was thereupon ordered to pay to the commissioners of public charities the sum of \$8 per week for one year for their indemnity, and for the support of his family in the meantime. It appeared that the defendant and the complainant were married in the year 1862, and that they separated in 1868, since which date they have not lived together. There is no issue of the marriage. It further appeared that on the 15th day of October, 1883, in an action for separation from bed and board, instituted by the wife in the superior court, judgment was entered upon her motion that the parties be separated from bed and board, and that the defendant pay the costs of the action. The judgment recited that it appeared from the report of a referee that the present circumstances and abilities of the defendant are such that he cannot personally pay any sum whatever for alimony and counsel, and no sum was allowed for either purpose. The judgment, however, contained a clause to the effect that, in the event of the pecuniary cir-

cumstances of the defendant becoming materially changed, touching his ability to support his wife, an application for that purpose might be made at the foot of the judgment, by any party in interest, for a modification of the judgment touching the support of the wife, or any other matter as might appear to be just. The conviction of the defendant upon these facts was reviewed and affirmed by the court of sessions, and subsequently by the appellate division of the supreme court. Until the enactment of a recent statute, this court had no power to review a judgment originating in such a proceeding. *People, Public Charities & C. Comrs., v. Cullen*, 151 N. Y. 54. But, by chapter 601, § 20, Laws 1895, provision is made for an appeal to this court from such a judgment when adverse to the defendant.

The learned counsel for the people contends that this statute is unconstitutional and void, and moves to dismiss the appeal. This contention is founded upon the provisions of article 6, § 9, of the Constitution, regulating the jurisdiction of this court, and providing that the legislature may further restrict this jurisdiction. It was never supposed that there was anything in the Constitution to prohibit the legislature from enlarging the jurisdiction of this court, and extending it to new cases, from time to time, as it thought proper, save only in those special cases enumerated in the article, which are expressly withdrawn from review. The jurisdiction must be confined to questions of law, and in some cases the unanimous decision of the appellate division is made final. These limitations are, of course, binding upon the legislature, as well as the courts, and cannot be transcended. But, subject to these provisions, it is entirely competent for the legislature to provide for a review in this court of any question of law involved in a judgment after a hearing in the appellate division. The power to further restrict appeals does not, by any fair or reasonable implication, exclude the power to enlarge the jurisdiction by providing for a review of certain judgments of inferior courts that were not reviewable before. The questions that may be considered in such cases are, of course, limited by the restrictions contained in the Constitution; but the sole question here is whether the legislature has the power to enact a statute providing for a final review in this court of a judgment or order made by a magistrate convicting a party as a disorderly person. There is no good reason to doubt the existence of such power. The judgment or order must be one entered upon the decision of the appellate division finally determining some action or special proceeding, when the appeal is given as matter of right. None of the limitations upon appeals to this court contained in the Constitution have been ignored by the statute in question, and so we think the jurisdiction to review the decisions below is clear.

The question is purely one of law, whether, upon the undisputed facts presented by the record, the defendant had abandoned or deserted his wife, within the fair meaning

of the statute. The charge of which the defendant was convicted, if not a crime within the meaning of the Penal Code, was clearly of a criminal nature, and it was incumbent upon the people to prove it. The statute is summary, highly penal, and should be strictly construed. *People, Kopp, v. French*, 102 N. Y. 583; *People v. Pettit*, 74 N. Y. 320; *People, Douglass, v. Naehr*, 30 Hun, 461. It is the duty of the husband to support his wife, but he is not bound to support her away from his home, even though such home may be disagreeable to her. The statute under which the defendant was convicted evidently contemplates the actual existence of the marriage relations. After a judicial separation at the suit of the wife, the relation is so far terminated or suspended that the husband cannot be guilty of abandonment or desertion in any legal sense. The judgment operated to change the contract relations between the parties, and required them to live apart from each other. The wife was relieved from her marital duties, and the husband's obligation to support her could not remain as it was before. It was no longer possible for him to discharge it in the sense that the marriage state contemplates. In such cases the court generally substitutes, in place of the contract obligation to support, recognized by the common law, a provision for suitable maintenance, according to the circumstances of the parties, to be paid by the husband, or from his estate. When a judicial decree of separation from bed and board has once been pronounced, the common-law obligation to support the wife, if not entirely abrogated, is greatly modified. Alimony then becomes the regular measure of the husband's obligation. It is granted or withheld always in furtherance of justice, and the amount is regulated by the exercise of a sound discretion, according to the circumstances of the parties. When the marriage bond was modified by the decree of separation, the legal obligation to support the wife in the sense that it existed before ceased, and in its place was substituted the power of the court to appropriate some part of the property or earnings of the husband to that purpose, as justice might require. *Kamp v. Kamp*, 59 N. Y. 212; *Romaine v. Chauncey*, 129 N. Y. 566, 14 L. R. A. 712; *Galusha v. Galusha*, 116 N. Y. 635, 6 L. R. A. 487; *Wetmore v. Wetmore*, 149 N. Y. 520, 33 L. R. A. 708; *Schouler, Husb. & W.* § 118; 2 *Parsons, Contr.* p. 85; *Tyler, Infancy & Coverture*, § 700, p. 924. In this respect, there does not appear to be any difference between an absolute and limited divorce, based upon the misconduct of the husband. In neither case can there be an abandonment or desertion, within the meaning of the statute. The statute was never intended to apply to a case like this, where the obligations of the marital contract have been modified by a decree of the court, and where the defendant is guilty of no act, except to obey the decree.

It is quite true, as the learned counsel for the people contends, that the judgment in the divorce action did not dissolve the marriage. The parties still remained husband

and wife in the eye of the law. Neither the husband nor the wife was competent to contract a new marriage. But, practically, the duties and obligations of the marriage relation were radically affected and wholly changed. The wife had been relieved from all her obligations. She was no longer bound to perform any of the duties of a wife.

If it be said that the husband was still under obligations to support the wife, the question arises, How was he to discharge this obligation? Certainly not in the manner contemplated by the marriage contract, and enjoined by the common law, since they had been separated by the decree of a competent court. The marital duty of the husband to support the wife always presupposes the fact that they are living together as husband and wife. This obligation, in its proper sense, contemplates an actual union of the two parties, maintaining to each other the practical relations of husband and wife. When they have been separated by the judgment of a court for the misconduct of the husband it is true that the obligation of the husband is not wholly terminated, but it assumes another form, and rests upon different principles. Their duties and obligations towards each other during the separation are just what the court may have prescribed, and no other. Those implied from the actual existence of the marriage relations have ceased, or are suspended, and the provisions of the decree of a court of equity have been substituted in their place. An action for a limited divorce is really an appeal to a court of equity by one of the parties to a marriage contract for a modification of the marriage relations, duties, and obligations as they exist at common law. The court is virtually asked to change and readjust these relations, and to prescribe such new duties and obligations to be observed by the litigants as justice may require. Such a decree, when made, is the charter that, during the separation, must regulate the obligations and duties of the parties. They cannot be regulated by the decree and the common law at the same time. The two methods of enforcing the marital duties and obligations are wholly inconsistent with each other. They proceed upon theories, and are based upon principles, so radically different, that both cannot operate together. The decree, so long as it remains in force, must be presumed to contain all the provisions for the support of the wife that justice required, or that the circumstances of the husband would warrant. If, by reason of changed conditions and circumstances, it becomes unjust to either party, the remedy is to apply for its modification. The statute in question cannot be made to take the place of the decree. It was not intended to apply to a case where the wife had procured from a court of equity a readjustment of her marriage relations. It has been adjudged by the decree that the defendant, by misconduct, has forfeited all right to the services or society of his wife, and yet the husband has been convicted of an offense of a criminal nature, for failing to do something that the decree does

not require him to do. It may be that the husband ought, in justice and equity, to be compelled to support his wife, or to contribute to her support. That is a question of which the divorce court has still jurisdiction and it must be presumed that when appealed to by the wife it will determine her claim in conformity with justice. But the question here is whether the husband has committed the statutory offense of desertion or abandonment. The criminal law does not, as a rule, deal with acts or motives that are merely constructive. It deals with the actual conduct and motives of men. Abandonment, in the sense in which the term is used in the statute, means the actual and wilful desertion by the husband of the wife. It is the wilful act of actually leaving her, or separating from her, and the withdrawal of all aid and protection implied in the marriage relations. If the wife herself procures the separation, or consents to it, the case does not come within the statute. It cannot be the result of an agreement, or affected by the judgment of a court, but must be what is known to the criminal law as wilful and voluntary desertion or abandonment. In *Fitzgerald v. Fitzgerald*, L. R. 1 Prob. & Div. 694, the court thus stated the rule applicable to the construction of a similar statute: "No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. . . . If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion,' in my judgment, becomes from that moment impossible to either, at least until their common-law life and home have been resumed." And desertion or abandonment has been defined in substantially the same language in other cases. *Pape v. Pape*, L. R. 20 Q. B. Div. 76; *Thompson v.*

Thompson, 1 Swab. & T. 231. The same or similar terms, when used in the law of marriage and divorce, have been defined by this court, and it is held that desertion means the wilful and voluntary separation by the husband from his wife without justification, and with the intention of not returning. *Williams v. Williams*, 130 N. Y. 193, 14 L. R. A. 220. Abandonment cannot mean anything more than desertion. When used to characterize the act of the husband, the words are generally used interchangeably.

The fact that the court in the decree of separation made no allowance for the wife does not change the situation. The court did exercise its power and discretion on the subject, and held that the pecuniary circumstances of the defendant would not warrant an allowance then, but left it open to the complainant to apply for alimony whenever the pecuniary circumstances of the defendant changed. This remedy has always been open to the wife, and is open to her still. If the defendant has any pecuniary ability to contribute to his wife's support, the divorce court has the power to modify the decree. If he has not, then there is really no ground for this proceeding. The age and physical condition of the defendant leave no room for the supposition that he is capable of earning anything for this purpose.

We think that the charge of abandonment was not sustained by the facts, and that the conviction of the defendant, under the circumstances, was erroneous. The defendant had not abandoned his wife, within any fair interpretation of the statute.

The order of the Appellate Division, the Special Sessions, and the magistrate should be reversed, and the defendant discharged.

All concur, except Gray, J., absent.

NORTH CAROLINA SUPREME COURT.

Max PRETZFELDER

v.

MERCHANTS INSURANCE COMPANY
of Newark *et al.*, Appts.

(123 N. C. 164.)

The waiver of proofs of loss effected by the insurer's demand for arbitration is not affected by the failure of the arbitration because of inability of the arbitrators to agree without fault of the assured so that such proofs can be subsequently demanded.

(November 22, 1898.)

APPEAL by defendants from a judgment of the Superior Court for Guilford County in favor of plaintiff in an action brought to recover the amounts alleged to be due on a certain fire insurance policy. *Affirmed.*

The facts are stated in the opinion.

NOTE.—On the question of the irrevocability of a waiver of proofs of loss the case seems to be somewhat of a departure from, or at least an 44 L. R. A.

Mr. John W. Hinsdale, for appellants: The arbitration clause is a valid stipulation.

Scott v. Avery, 8 Exch. 487, 5 H. L. Cas. 811; *Hamilton v. Liverpool, L. & G. Ins. Co.* 136 U. S. 255, 34 L. ed. 423; *Pioneer Mfg. Co. v. Phoenix Assur. Co.* 106 N. C. 28; 2 Am. & Eng. Enc. Law, p. 574.

The appraisal clause being a condition precedent, the assured cannot maintain an action upon the policy without performance of legal excuse.

Ostrander, Ins. § 275; *Campbell v. American Popular Life Ins. Co.* 1 MacArth. 246, 29 Am. Rep. 591; *Hickerson v. German-American Ins. Co.* 96 Tenn. 193, 32 L. R. A. 172; *Brock v. Dwelling House Ins. Co.* 102 Mich. 583, 26 L. R. A. 623; *Gasser v. Sun Fire Office*, 42 Minn. 315; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9; *Uhrig v. Williamsburgh City F. Ins. Co.* 101 N. Y. 362; *Daven-*

advance upon, the prior decisions, as it holds in effect that a waiver by demand for arbitration is not revoked by the failure to arbitrate.

port v. Long Island Ins. Co. 10 Daly, 538; *Chapman v. Rockford Ins. Co.* 89 Wis. 572, 28 L. R. A. 405.

When the award is defeated by the misconduct of either of the appraisers, it will be chargeable to the party by whom he has been selected.

Ostrander, Ins. § 267.

The failure to organize a new board of appraisers on March 18 was caused by the plaintiff.

Davenport v. Long Island Ins. Co. 10 Daly, 535.

The assured should be held responsible for the unreasonable conduct of his appraiser.

Braddy v. New York Brewery F. Ins. Co. 115 N. C. 354; *Howard Ins. Co. v. Hocking*, 115 Pa. 416; 2 May, Ins. § 496b; *Uhrig v. Williamsburgh City F. Ins. Co.* 101 N. Y. 362; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. 205; *Snodgrass v. Gavit*, 28 Pa. 224; *Lauman v. Young*, 31 Pa. 306; *O'Reilly v. Kerns*, 52 Pa. 214; *Howard v. Allegheny Valley R. Co.* 69 Pa. 489; *Hostetter v. Pittsburgh*, 107 Pa. 419; *Page v. Vankirk*, 1 Brewst. (Pa.) 285; *Yost v. McKee*, 179 Pa. 381; 2 Am. & Eng. Enc. Law, N. S. p. 576.

The furnishing of proof of loss is a condition precedent to the bringing of a suit.

When the policy makes the rendering of "proof of loss" a condition precedent, a failure to observe the condition is fatal.

7 Am. & Eng. Enc. Law, p. 1043, note; May, Ins. § 493, note; 4 Joyce, Ins. §§ 3275, 3260, 3281, 3333; 2 Biddle, Ins. § 990, p. 263; 2 Bacon, Life Ins. § 410; Cooke, Ins. § 113; *Underwood v. Farmers' Joint Stock Ins. Co.* 57 N. Y. 500; Richards, Ins. § 160; *Blakeley v. Phenix Ins. Co.* 20 Wis. 205, 31 Am. Dec. 388; 2 Wood, Ins. §§ 436-438, 449, pp. 927, 930, 989; *Gould v. Dwelling-House Ins. Co.* 90 Mich. 302, Distinguishing *Tubbs v. Dwelling-House Ins. Co.* 84 Mich. 646, and *Aurora F. & M. Ins. Co. v. Kranich*, 36 Mich. 293. See also *Blossom v. Lycoming F. Ins. Co.* 64 N. Y. 164, Following *Savage v. Howard Ins. Co.* 52 N. Y. 502, 11 Am. Rep. 741; and *Scammon v. Germania Ins. Co.* 101 Ill. 621; 2 Beach, Ins. § 1210, note 1; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356; *Shapiro v. Western Home Ins. Co.* 51 Minn. 239; *Dwelling-House Ins. Co. v. Osborn*, 1 Kan. App. 197; *McDermott v. Lycoming F. Ins. Co.* 12 Jones & S. 221; *Cameron v. Canada F. & M. Ins. Co.* 6 Ont. Rep. 392; *Bowes v. Insurance Co.* 4 Pug. & B. 437; *Ostrander, Ins.* § 223, p. 522; *Woodfin v. Asheville Mut. Ins. Co.* 51 N. C. (6 Jones, L.) 559; *Boyle v. North Carolina Mut. Ins. Co.* 52 N. C. (7 Jones, L.) 373; *Weidert v. State Ins. Co.* 19 Or. 261; *German Ins. Co. v. Davis*, 40 Neb. 700; *O'Reilly v. Guardian Mut. L. Ins. Co.* 60 N. Y. 169, 19 Am. Rep. 151; *Sergeant v. London & L. & G. Ins. Co.* 85 Hun, 31.

There has been no waiver of proof of loss.

Ostrander, Ins. § 366, p. 762; May, Ins. § 507, p. 1168; 2 Biddle, Ins. § 1048, p. 318, § 1052, p. 321; 2 Wood, Fire Ins. § 439, p. 943; *Phenix Ins. Co. v. Lebcher*, 20 Ill. App. 450; *Davis v. Canada Farmers Mut. Ins. Co.* 39 U. C. Q. B. 452; *Gooden v. Amoskeag F. Ins. Co.* 20 N. H. 73; *Beatty v. Ly-*

coming County Mut. Ins. Co. 66 Pa. 9, 5 Am. Rep. 318; *Ripley v. Aetna Ins. Co.* 30 N. Y. 136, 86 Am. Dec. 362; *Everett v. London & L. Ins. Co.* 142 Pa. 332; *National Ins. Co. v. Brown*, 128 Pa. 386; *David v. Oakland Home Ins. Co.* 11 Wash. 181; *Findeisen v. Metropole F. Ins. Co.* 57 Vt. 520; *Hanna v. American Cent. Ins. Co.* 36 Mo. App. 538; *Diehl v. Adams County Mut. Ins. Co.* 58 Pa. 452, 98 Am. Dec. 302.

Whether there was waiver of proof of loss is a question of fact for the jury.

2 Joyce, Ins. § 3281; 2 Biddle, Ins. § 1149, and cases in note; *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. 259; *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 23 L. ed. 868; *Enterprise Ins. Co. v. Parisot*, 35 Ohio St. 35, 35 Am. Rep. 589; *Findeisen v. Metropole F. Ins. Co.* 57 Vt. 520; 2 Wood, Ins. § 452, p. 979; *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179.

The burden of proof is on the plaintiff to show waiver of proof of loss.

McPike v. Western Assur. Co. 61 Miss. 37; *Eaton v. Supreme Lodge K. of H. (U. S. C. C. S. D. Ohio)* 15 Ins. L. J. 762; 2 Biddle, Ins. § 1149, p. 416; *Mitchell v. Home Ins. Co.* 32 Iowa, 421; *Commonwealth Ins. Co. v. Sennett*, 41 Pa. 161; *Cory v. Boylston F. & M. Ins. Co.* 107 Mass. 140, 9 Am. Rep. 14; *Wood, Ins.* § 424, p. 734; *German Ins. Co. v. Fairbank*, 32 Neb. 750; *Citizens' F. Ins. Security & L. Co. v. Doll*, 35 Md. 89; *Fayerweather v. Phenix Ins. Co.* 22 Jones & S. 545; *German Ins. Co. v. Davis*, 40 Neb. 700; *Gale v. State Ins. Co.* 33 Mo. App. 664.

A waiver not acted upon will not excuse an assured from furnishing proofs of loss.

2 Biddle, Ins. § 1148, p. 415, § 1059, p. 342; 4 Joyce, Ins. § 3371; *Scottish Union & Nat. Ins. Co. v. Clancy*, 71 Tex. 9.

The fact that the company sends an agent to examine the premises does not constitute a waiver of proofs.

Wood, Ins. § 442, p. 979; 2 Biddle, Ins. § 1140, p. 408; 2 May, Ins. § 471, p. 1095; *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179; *Burnham v. Royal Ins. Co.* 75 Mo. App. 394; *People's Bank v. Aetna Ins. Co.* 42 U. S. App. 81, 74 Fed. Rep. 507, 20 C. C. A. 630; *Leigh v. Springfield F. & M. Ins. Co.* 37 Mo. App. 542; *Maddox v. German Ins. Co.* 39 Mo. App. 198; *Busch v. Insurance Co.* 6 Phila. 252; *Knudson v. Hekla F. Ins. Co.* 75 Wis. 198; *Scottish Union & Nat. Ins. Co. v. Clancy*, 83 Tex. 113; *Briggs v. Fireman's Fund Ins. Co.* 65 Mich. 52.

The demand for appraisal was not a waiver of proof of loss.

Porter v. German-American Ins. Co. 62 Mo. App. 520; *Hanna v. American Cent. Ins. Co.* 36 Mo. App. 538; *Scottish Union & Nat. Ins. Co. v. Clancy*, 71 Tex. 5; *Caledonian Ins. Co. v. Cooke*, 19 Ky. L. Rep. 651; *Bammessel v. Brewers' F. Ins. Co.* 43 Wis. 463; *Gale v. State Ins. Co.* 33 Mo. App. 664; *Carroll v. Girard F. Ins. Co.* 72 Cal. 297; *Walker v. German Ins. Co.* 51 Kan. 725; *Bishop v. Agricultural Ins. Co.* 130 N. Y. 488; *Rademacher v. Greenwich Ins. Co.* 75 Hun, 83; *Jacobs v. St. Paul F. & M. Ins. Co.* 86 Iowa, 145; *Snowden v. Kittanning Ins. Co.* 122 Pa.

502; *Allemania F. Ins. Co. v. Pitts Exposition Soc.* (Pa.) 11 Atl. 572.

There could be no waiver of proof of loss in the face of an express demand for it.

2 Wood, Ins. § 439, p. 946; 2 Biddle, Ins. § 1140, p. 409; Ostrander, Ins. § 366, p. 762; *Harrison v. German-American F. Ins. Co.* 67 Fed. Rep. 578; *Scottish Union & Nat. Ins. Co. v. Clancy*, 71 Tex. 5, 83 Tex. 113.

Waiver may be revoked unless a right has been relinquished for a consideration, or the assured has acted upon the waiver to his prejudice.

Ostrander, Ins. § 364, p. 759; Beach, Ins. § 778, p. 195; 4 Joyce, Ins. § 3371; *Hahn v. Guardian Assur. Co.* 23 Or. 576.

On petition to rehear.

A simple demand for an appraisal is not a waiver of proof of loss.

Porter v. German-American Ins. Co. 62 Mo. App. 520; *Hanna v. American Cent. Ins. Co.* 36 Mo. App. 538; *Scottish Union & Nat. Ins. Co. v. Clancy*, 71 Tex. 5.

Waiver is the "intentional relinquishment of a known right," and it "must be upon consideration, or operation by estoppel."

28 Am. & Eng. Enc. Law, pp. 526-531; *Wool v. Edenton*, 117 N. C. 1.

Even if there had been a waiver of the proof of loss, such waiver could be revoked by an express demand for proofs at any time before the waiver was acted upon, and while there was yet time to furnish the proofs.

4 Joyce, Ins. § 3371; Ostrander, Ins. § 364; Beach, Ins. § 778; *Hahn v. Guardian Assur. Co.* 23 Or. 576.

Mr. J. T. Morehead also for appellants. *Messrs. R. R. King, A. L. Brooks, and J. E. Boyd* for appellee.

Clark, J., delivered the opinion of the court:

The first exception, for failure to submit additional issues, is without merit. Every phase of the dispute as to the facts could have been passed upon under the five issues submitted by the court. *Willis v. Atlantic & D. R. Co.* 122 N. C. 906; *Patterson v. Mills*, 121 N. C. 258; *Coley v. Statesville*, 121 N. C. 301. The additional issue asked for, which was most pressed, was: "Did defendants waive proofs of loss?" Upon the issues found and the undisputed evidence, that was a question of law, for the demand alleged by the defendants, for a reference of the loss to the appraisers, under a provision in the policy, was a waiver of proofs of loss, which became useless if the appraisers were to view the loss themselves and adjust the damages. *Allemania F. Ins. Co. v. Pitts Exposition Soc.* (Pa.) 11 Atl. 572; 2 May, Ins. § 468; *Dibrell v. Georgia Home Ins. Co.* 110 N. C. 193 (at p. 206 and bottom of p. 209). After the appraisal fell through, without plaintiff's fault, as the jury find, the plaintiff with propriety might, and probably should, have furnished proofs of loss, but not being compelled to do so the failure is rather a technicality than a meritorious defense, and should not work a forfeiture of all right of recovery for the goods insured and damaged.

When this cause was here on the former 44 L. R. A.

appeal it was held that if the appraisal fell through by no fault of the plaintiff, he is relegated to his right of action. It is there said (116 N. C. at pp. 490, 497): "The arbitrators were appointed but disagreed and refused to go on, and finally broke up without making an award. Subsequent attempts to agree upon another board failed. The parties were thus relegated to their legal rights, and the action can be maintained. *Braddy v. New York Bowery F. Ins. Co.* 115 N. C. 354. Indeed, as intimated in that case, we think the proper rule is laid down in *Howard Ins. Co. v. Hooking*, 115 Pa. 416, that where the arbitrators, or a majority of them, fail to agree upon an award, the plaintiff (unless he is shown to have acted in bad faith in selecting his arbitrator) is not compelled to submit to another arbitration and another delay, but may forthwith bring his action in the courts." The defendants recognize that this was so held, but ask the court to "reconsider and re-examine" the point in the light of additional authorities and evidence. The proposition to rehear a cause by raising the same points upon a second appeal cannot be entertained. It was the duty of the judge below to follow the ruling made here. If there was additional testimony, it was all submitted to the jury upon the fifth issue,—"Was the failure of the appraisers to make an award caused by the plaintiffs, or any of them?" which was found in the negative.

In this appeal, there are sixty-four exceptions, but all of them which are worthy of any consideration are embraced in the three propositions we have discussed; indeed, many of them are repetitions in slightly different words of those three exceptions.

If fatal errors have been committed on a trial, they can be surely summed up in less than sixty-four assignments. It would simplify an appeal and give more time for argument on the really serious exceptions if counsel, who naturally in the hurry of a trial, take, out of abundant caution, numerous exceptions, should in the cool and deliberate moments of making out their statement of case on appeal sift out and abandon those they find trivial or untenable. This would aid the court to a just consideration of the appeal by directing its attention to what counsel deem the fatal errors only, which in the vast majority of cases can be presented by a very few exceptions. Certainly it can never be necessary to attempt to convince an appellate court that sixty-four fatal errors, each justifying a new trial (and none other should be presented here), have been committed below. More than eight and a half years have elapsed since this loss was sustained, and we find no error that would justify further delay of settlement. The learned brief of appellant's counsel is well indexed, which is commendable, but there is no index to the transcript, which is required by the rules of this court, 19 (3) and 20. *Alexander v. Alexander*, 120 N. C. 472, 474.

Affirmed.

Rehearing denied.

**Frank THRIFT
v.
ELIZABETH CITY, Appt.**

(122 N. C. 81.)

1. Water and lights are not in themselves such necessary expenses of a town, within the meaning of Const. art. 7, § 7, that an unusual levy of tax may be made or a debt incurred without proper legislative authority and the approval of the popular vote.
2. An ordinance granting the exclusive privilege for thirty years to construct and maintain waterworks within the corporate limits of the town, and the exclusive use of its streets, alleys, sidewalks, public grounds, streams, and bridges, is within the condemnation of Const. art. 1, § 31, declaring that "perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed."

(May 26, 1898.)

APPEAL by defendant from a judgment of the Superior Court for Pasquotank County enjoining it from entering into a contract for a water supply. *Affirmed.*

The facts are stated in the opinion.

Mr. I. M. Meekins, for appellant:

Powers of a municipal corporation fall within well-defined limits. Among them are those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

1 Dill. Mun. Corp. 4th ed. § 89.

Repairing bridges and building them are necessary expenses of a county.

Brodnax v. Groom, 64 N. C. 244; *Satterthwaite v. Beaufort County Comrs.* 76 N. C. 155; *Evans v. Cumberland County Comrs.* 89 N. C. 154.

Building a courthouse is a necessary expense.

Halcombe v. Haywood Comrs. 89 N. C. 346; *Vaughn v. Forsyth County Comrs.* 117 N. C. 429.

Nothing can be more conducive to the comfort, convenience, and health of a city or town than a system by which pure and wholesome water can at all times be obtained as per the contract in question.

Wilson v. Charlotte, 74 N. C. 748.

The town simply proposes to bind itself for a reasonable period to take the water at a stipulated price so as to induce a company to undertake at great expense the erection of waterworks without the pledge on the part of the city.

Under the peculiar circumstances of the case, the contract under consideration should be sustained as based upon a necessary expense.

People, Green, v. McClintock, 45 Cal. 11.

The authority to make such a contract under the general welfare provision of the town charter is in a charter where the power is a

necessary incident, as in our case, to the power given as the discharge of a duty enjoined.

Hardy v. Waltham, 3 Met. 163; *Allen v. Taunton*, 19 Pick. 485; *Atlantic City Waterworks v. Atlantic City*, 48 N. J. L. 378; *Grant v. Davenport*, 36 Iowa, 396; *Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co.* 73 Iowa, 513; *Columbus Waterworks v. Columbus*, 48 Kan. 102, 15 L. R. A. 354.

The validity of exclusive privilege can only be contested by another company or person claiming such right.

Grant v. Davenport, 36 Iowa, 396.

A city has the authority to grant a franchise to a person or corporation to establish waterworks, and is empowered to rent hydrants from such persons or corporations.

Wood v. National Waterworks Co. 33 Kan. 590; *Columbus Waterworks Co. v. Columbus*, 46 Kan. 666; *Burlington Waterworks Co. v. Burlington*, 43 Kan. 725; *Manley v. Emelen*, 46 Kan. 656; *Dill. Mun. Corp.* 4th ed. §§ 146, 443, and notes to § 568; 15 Am. & Eng. Enc. Law, pp. 1115, 1118, and cases cited; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 16 L. R. A. 485; *Columbus Waterworks Co. v. Columbus*, 48 Kan. 99, 15 L. R. A. 354; *Pontchartrain R. Co. v. Orleans Nav. Co.* 15 La. 404; *Pontchartrain R. Co. v. New Orleans & C. R. Co.* 11 La. Ann. 253; *Pontchartrain R. Co. v. Lafayette & P. R. Co.* 10 La. Ann. 741; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.* 27 La. Ann. 138.

In the same manner as Congress may reward the discovery of a new invention or mode of constructing roads, by an exclusive privilege, the legislature may reward those who employ their capital and industry in doubtful enterprises for the construction of a railway between two points which may be of great utility to the public, though the success of the enterprise may be precarious.

Pontchartrain P. R. Co. v. Orleans Nav. Co. 15 La. 404; *Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co.* 73 Iowa, 513; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *The Binghamton Bridge*, 3 Wall. 51, 18 L. ed. 137; *Bridge Proprietors v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *Louisville Gas Co. v. Citizens' Gas Co.* 115 U. S. 683, 29 L. ed. 510; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 30 L. ed. 563; *Newport v. Light Co.* 8 Ky. L. Rep. 22; *Louisville v. Wible*, 84 Ky. 290; *Atlantic City Waterworks v. Atlantic City*, 48 N. J. L. 378; *Memphis v. Memphis Water Co.* 5 Heisk. 495; *State v. Milwaukee Gaslight Co.* 29 Wis. 454, 9 Am. Rep. 598; *Citizens' Water Co. v. Bridgeport Hydraulic Co.* 55 Conn. 1.

Messrs. Shepherd & Busbee, for appellee:

The ordinance in question is a contract by which the defendants pledge the faith and credit of the town within § 7, art. 7, of the State Constitution, and the same is not a

NOTE.—As to exclusiveness of franchise to a water company, see also *Re Brooklyn* (N. Y.) 26 L. R. A. 270; *Illinois Trust & Sav. Bank v. Arkansas City* (C. C. App. 8th C.) 34 L. R. A. 518.

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See also 46 L. R. A. 687.

necessary expense within the said constitutional provision.

Charlotte v. Shepard, 120 N. C. 411; *Cartersville Improv. Gas & W. Co. v. Cartersville*, 89 Ga. 683.

A grant of the exclusive use of the streets cannot be made without express legislative authority.

See *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435; 29 Am. & Eng. Enc. Law, p. 13, note 1.

Douglas, J., delivered the opinion of the court:

This is an action brought to enjoin the board of commissioners of Elizabeth City from entering into a contract with the defendant White for a water supply for the town and its inhabitants for the term of thirty years. Sections 1 and 7 of said contract are as follows:

"Sec. 1. Be it ordained by the town commissioners of the town of Elizabeth City, that the exclusive privilege be and is hereby granted to the said John Orlando White, his associates or assigns, for a term of thirty years from and after the passage and approval of this ordinance, to construct and maintain waterworks within the corporate limits of the town of Elizabeth City, North Carolina, for supplying said town and its inhabitants with water for public and private uses; and to use the streets, alleys, sidewalks, public grounds, streams, and bridges of said town of Elizabeth City embraced within the entire territory of the present corporate limits of the town, and all territory under their jurisdiction, and also whatever other territory and additions may at any time hereafter be annexed to said corporate limits, and become a part and portion thereof, for the purpose of placing, constructing, embedding, laying, taking up, and repairing pipes, conduits, mains, buildings, machinery, hydrants, and other structures, appliances, and other devices, needful and requisite for the supplying, conducting, and service of water to said town and its inhabitants."

"Sec. 7. In consideration of the advantages, conveniences, and benefits which may result to said town and its inhabitants from the construction, maintenance, and operation of said waterworks and of the water supply hereby secured for public and private uses, and as an incentive and inducement for the said grantee, his associates or assigns, to enter upon the construction of said waterworks, the exclusive franchise and license hereby granted to and vested in the said John Orlando White, his associates or assigns, shall remain in full force and effect for the full term of thirty years from the date of the completion of said waterworks. And the said town of Elizabeth City does hereby agree to rent to said grantee, his associates or assigns, for the use and purposes hereinafter mentioned, the seventy (70) hydrants hereinbefore mentioned for and during the term of thirty years, beginning at the time of the completion of said waterworks. Said town of Elizabeth City agrees to pay the said John Orlando White, his associates

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or assigns, rent for the use of said seventy (70) hydrants, the sum of \$40 each, yearly, or, for the whole seventy hydrants, the sum of \$2,800 yearly, which rent shall be paid in equal semi-annual instalments on or before the last day of June and December in each and every year during said term."

It is admitted that there is no express statutory authority for such contract, and no legislative authority whatever, other than the section in the town charter authorizing the levy of taxes for general purposes not to exceed 75 cents on the \$100 valuation. The plaintiff contends "that the ordinance in question is a contract by which the defendants pledge the faith and credit of the town, within § 7 of article 7 of the state Constitution, and that the same is not a necessary expense, within the said constitutional provision," and that no grant of the exclusive use of the streets can be made "without express legislative authority." The defendants contend that the rental of an adequate water supply is such a necessary expense of the ordinary city government as not to require a submission to a popular vote of the inhabitants. It is apparently admitted that the rental can be paid from the ordinary tax levy, within the limit allowed by the charter.

The court below rendered the following judgment: "The court is of the opinion: (1) That waterworks are not a necessary expense, within the meaning of the Constitution. *Shepard v. Charlotte*. (2) That it is beyond the power of the defendants to levy an increased tax, for the purposes set out in the pleadings, without further legislation approved by a majority of the qualified voters. (3) That it is not within the power of the defendants to bind the corporation for thirty years' rental. It is adjudged, upon the pleadings, that the defendant be perpetually enjoined against proceeding further in the execution of said ordinance, or accepting bond and paying out the revenues of the town under said ordinance, and from levying any tax in furtherance of, or discharge of, such obligation growing out of said ordinance, or doing any of the acts or things set out in paragraph 10 of the complaint."

We see no error in the judgment. It may now be taken as well settled by this court that water and lights are not in themselves such necessary expenses of a town as to authorize an unusual levy of tax, or the incurring of a debt, without proper legislative authority, and the approval of a popular vote. *Charlotte v. Shepard*, 120 N. C. 411, and same case on rehearing at this term, 122 N. C. 602; *Mayo v. Washington Comrs.* (at this term) 122 N. C. 5, 40 L. R. A. 163. In the consideration of this question, we see no substantial difference between issuing bonds to run for thirty years, and the making of a binding contract for the same period, requiring the town to pay a large yearly sum, which cannot be reduced, but which may be greatly enlarged. In *Mayo v. Washington Comrs.* 122 N. C. 5, 40 L. R. A. 163, it was held that the town of Washington could not issue, without legislative authority and popular ratification, \$20,000 of bonds running thirty years, and bearing not more

than 6 per cent interest; and yet it is contended that the town of Elizabeth City can, without either such authority or ratification, bind itself for the same period of time to pay an annual rental which can never be less than 6 per cent on \$46,600. In our opinion, both come equally under the same principle of public policy and within the constitutional prohibitions. We do not wish to be understood as being opposed to waterworks or electric lights, or any other modern conveniences that may conduce to the growth and development of our towns, or the health and comfort of our inhabitants. Nor is there any inherent objection to towns owning and operating their own waterworks and light plants, whenever it is the will of their people, properly expressed under valid legislative authority. The experience of the past has shown the wisdom of the constitutional restrictions, and, whether wise or not, it is our duty to enforce them whenever they apply.

There is another fatal defect in the proposed contract, and, as it is presented in the record, we feel called upon to decide it, in justice to the contracting parties. It would probably be included in any new contract, and might be relied on as having received the apparent approval of our silent acquiescence. Those provisions of the ordinance granting the exclusive privilege to construct and maintain waterworks within the corporate limits of the town, and the exclusive use of its streets, alleys, sidewalks, public grounds, streams, and bridges, come within the condemnation of § 31 of article 1 of the Constitution of this state, which declares that "perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed." A monopoly need not be a perpetuity, nor is a perpetuity necessarily a monopoly; but both, existing either jointly or severally, are within the constitutional prohibition. There can be few, if any, monopolies more dangerous in their tendencies, and unjust and harmful in their results, than those that pertain to municipal corporations. In the present age of activity in scientific research, and wonderful development in mechanical inventions and discoveries, it is highly improbable that any present system will long remain the best. Improved methods and cheaper appliances will result, and yet the town would deliberately surrender to a private individual its highest attributes of delegated sovereignty, and would place beyond its power for nearly a generation all opportunity of securing for its citizens the benefits and improvements of a progressive age. It not only would be bound for its annual rental, which would always increase with the extension of its territory and the growth of its population, but its citizens, deprived of every chance of obtaining water from any other source, would be compelled to pay exorbitant charges, or be cut off, at the will of the company. The courts might afford relief, but it is the better public policy to encourage competition, instead of fostering monopolies, and thus, as far as possible, avoid the necessity of judicial interference. All authorities hold that no such

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exclusive privilege can be granted by a municipal corporation without express legislative authority, and this of itself would settle the case at bar; but we feel compelled to go further, and say that, while the point is not now directly before us, we do not wish to be understood as conceding the power of the legislature itself to grant such exclusive privileges. In our opinion, they come directly within the meaning of "monopolies," as construed in the light of our institutions, the genius of our people, and the spirit of our laws. We are not inadvertent to some decisions to the contrary in other jurisdictions, but in all of them, where the power is admitted, it is strictly construed. As was said by Chief Justice Taney in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 548, 9 L. ed. 773, 824: "The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations." In some of them, as in *Memphis v. Memphis Water Co.* 5 Heisk. 405, 529, the error has apparently arisen from adopting the substance of Lord Coke's definition of a "monopoly," as "an exclusive right granted to a few of something which was before of common right." Our theory of government, proceeding directly from the people, and resting upon their will, is essentially different—at least, in principle—from that of England; and common-law maxims and definitions, framed while the judges were still under the spell of the feudal system, must be construed by us in the light of changed conditions. Under our system of government, all rights and privileges are primarily or common right, unless their restraint becomes necessary for the public good, and municipal corporations are beginning to be considered rather in the light of public agencies. Section 37 of article 1 of the Constitution (the Declaration of Rights) declares that "this enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people." We do not mean to say that any citizen has a right to dig up a public street for the purpose of laying water pipes without permission from the city, as this would seriously interfere with its primary use; nor is a municipal corporation compelled to give to everyone that may apply, authority to establish a system of gas or water works, or electric lights. All that the law says is that neither the corporation nor the legislature shall deprive itself of the power of providing for the future necessities of the people, and thus "disarm themselves of the powers necessary to accomplish the ends of their creation." We do not regard this as a new principle, but simply as the legitimate result of what has already been said by this court. *McRee v. Wilmington & R. R. Co.* 41 N. C. (2 Jones, L.) 186, 189; *Simonton v. Lanier*, 71 N. C. 498; *Washington Toll Bridge Co. v. Beaufort Comrs.* 81 N. C. 491, 498.

It is stated in the ordinance now under

consideration that this exclusive privilege is granted as an "incentive and inducement" for the construction of said waterworks, and it is argued that we should not drive away foreign capital by too strict a legal construction, but should rather encourage its investment in our state. All the encouragement that we can offer is the fullest protection of

the law, meted out with even-handed justice. But it is said that we should be influenced by motives of public policy. Even so; we see no true principle of public policy which requires us to follow the dangerous experiment of sowing the dragon's teeth in the hope of reaping a golden harvest.
The judgment is affirmed.

OREGON SUPREME COURT.

Ellen G. BOND, *Respt.*,
v.
Rudolph MARTIN *et al.*, *Appts.*

(.....Or.....)

A nonresident may claim an exemption of household furniture from execution under Hill's Ann. Laws, § 282, subd. 4, providing that household furniture to a specified value shall be exempt from execution if owned by a householder and in actual use or kept for use by and for his family, or when being removed from one habitation to another on a change of residence.

(August 13, 1898.)

APPEAL by defendant from a judgment of the Circuit Court for Umatilla County in favor of plaintiff in an action brought to recover possession of household furniture seized by defendants under execution. *Affirmed.*

The facts are stated in the opinion.

Messrs. John J. Balleray and M. A. Butler, for appellants:

The statutes of the state (Hill's Code, p. 353, § 282) providing that the following property shall be exempt from execution if selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon thereafter, before sale thereof, as the same shall be known to him, and not otherwise, applies only to a defendant who is a resident of this state. It is not the intention of the statute to create any exemption in favor of foreigners, nor of people who were about to become foreigners so far as the state is concerned, nor to absconding debtors. It is created by the state for the protection of her own citizens—her own residents and inhabitants.

Jones v. Albrook, 115 N. C. 46; *Lyon v. Callopy*, 87 Iowa, 567; *Ross v. Banta*, 140 Ind. 120; *Kingen v. Stroh*, 136 Ind. 610; *Schwartz v. Birnbaum*, 21 Colo. 21; *Freeman*, Executions, §§ 209, 220; *Mooney v. Union P. R. Co.* 60 Iowa, 346.

Messrs. Carter & Raley, for respondent:

The statute makes no discrimination between residents and nonresidents, nor does it purport to confine itself to residence at all.

Where the statutes do not make any distinction between residents and nonresidents, no such distinction exists, and if the statutes do not restrict the exemption of prop-

erty for the payment of debts to residents, the statutes will apply alike to nonresidents as well as residents.

Rood, Garnishment, § 92; *Missouri P. R. Co. v. Maltby*, 34 Kan. 125; *Bell v. Indian Live Stock Co.* (Tex.) 3 L. R. A. 642; *Hewett v. Allen*, 54 Wis. 583; *Lowe v. Stringham*, 14 Wis. 222; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747; *Kansas City, St. J. & C. B. R. Co. v. Gough*, 35 Kan. 1; *Pettit v. Muskegon Boom. Co.* 74 Mich. 214; *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Wabash R. Co. v. Dougan*, 142 Ill. 248; *Haskill v. Andros*, 4 Vt. 609, 24 Am. Dec. 645; *Hill v. Loomis*, 6 N. H. 263; *Sprout v. McCoy*, 26 Ohio St. 577.

The plaintiff was a resident householder within this state at the time of the levy of the execution.

To constitute a new domicile two things are indispensable, (1) residence in the new locality, and (2) the intention to remain there; the change cannot be made except *facto et animo*; both are alike necessary; either without the other is insufficient.

Mitchell v. United States, 21 Wall. 351, 22 L. ed. 587; *Ringgold v. Barley*, 5 Md. 186, 59 Am. Dec. 107; *Keller v. Carr*, 40 Minn. 428; *Darragh v. Bird*, 3 Or. 229; *People v. Platt*, 117 N. Y. 159.

Beam, J., delivered the opinion of the court:

This is an action commenced in the circuit court of Umatilla county to recover the possession of some household furniture seized by the defendant Turner on the 26th day of May, 1897, to satisfy an execution issued on a judgment recovered by the defendant Martin against the plaintiff in the justice's court for North Pendleton precinct. The facts are that for some time prior to the 17th day of May, 1897, the plaintiff had been a resident and householder within the city of Pendleton, engaged in keeping a boarding house; but, about the time mentioned, she closed her business, and concluded to move to Rossland, British Columbia, where her husband then was. Preparatory to such removal, she delivered her household furniture to a railway company at Pendleton, for shipment, expecting to follow it in three or four weeks. After the furniture had been received by the company, it was attached by Turner, under a writ of attachment issued in the action brought by Martin; and, on the

NOTE.—For discrimination against nonresident widow with respect to her claims against her husband's estate, see *Buffington v. Grosve*—44 L. R. A.

nor (Kan.) 13 L. R. A. 282; *Small v. Small* (Kan.) 30 L. R. A. 243; *Graham v. Stull* (Tenn.) 21 L. R. A. 241, and *note*.

19th of May, the plaintiff commenced an action against the defendants in the justice's court for East Pendleton precinct, to recover possession thereof, on the ground that the property in question was exempt from execution, and recovered judgment therein on the 26th. On the same day, Martin caused an execution to issue on the judgment which had in the meantime been recovered by him against the plaintiff in the action referred to, and caused the property in question to be again seized by the defendant Turner under such execution, whereupon this action was commenced in the circuit court to recover its possession. The defense to the action is (1) that such property was not exempt from execution at the time of its seizure, because the plaintiff was not then a resident and householder of the state; and (2) that the judgment in the action brought by her against the defendants on the 19th of May is a bar to this proceeding.

Upon the first point the court charged the jury that subdivision 4 of § 282 of the statute exempting from execution the goods, furniture, and utensils of a householder, could be taken advantage of only by residents of the state. It then proceeded to instruct them as to what would and would not constitute a "resident," within the meaning of this rule, and the errors assigned on this branch of the case are based upon the giving and refusal of instructions upon this point. But we do not deem it necessary to examine the errors so assigned, for, in our opinion, the judgment must be affirmed on the ground that the property was exempt from execution, whether plaintiff was a resident of the state or not. The statute provides that "household goods, furniture, and utensils to the value of \$300," shall be exempt from execution "if owned by a householder and in actual use or kept for use by and for his family, or when being removed from one habitation to another on a change of residence." Hill's Anno. Laws (Or.) § 282, subd. 4. It is not limited either in terms or by necessary implication to citizens or residents of the state, and the courts have no right to so restrict it by judicial interpolation. Exemption statutes are, of course, confined in their operation to the state in which they are enacted. They have no extraterritorial effect, nor do they constitute a part of the contract between the debtor and creditor which may be enforced in another jurisdiction. But they are a part of the law of the forum, and regarded as relating to and affecting the remedy only. It would therefore seem logically to follow that such a statute must extend its protection to all litigants in the courts of the state where it is enacted, whether residents or not, unless it is expressly or impliedly restricted to some designated class of persons; for, as said by Mr. Justice Williams in *Haskill v. Andros*, 4 Vt. 609, 24 Am. Dec. 645: "Whatever remedy our laws give to enforce the performance of a contract will equally avail the citizen or the foreigner; and they equally must be subject to any restraints which the law imposes upon them. Our inhabitants can have no greater rights in en-

forcing a claim against a foreigner than an alien can have in enforcing a similar claim against one of our own citizens. Whoever submits himself or his property to our jurisdiction must yield to all the requirements which are made of our citizens in relation to the collecting of debts or maintaining suits, and is clearly entitled to all the benefits, exemptions, and privileges to which other debtors or suitors belonging to our own state are subject or entitled. If the one can hold a cow, suitable wearing apparel, and necessary household furniture, without having the same taken from him by execution, so can the other. Nothing short of the express language of a statute would justify us in saying that a person may, by virtue of an execution, be stripped of his wearing apparel, his necessary household furniture, and his only cow, merely because he resides under another government, when a person residing here would not be subject to the same inconvenience and distress." And the great weight of authority is in favor of the rule thus laid down. It seems to be quite generally agreed that, where the statute does not restrict the exemption of property from execution to residents or some other designated class of persons, the courts have no authority to do so, and it must apply to all persons, litigant nonresidents as well as residents. Thus, in the case of *Love v. Stringham*, 14 Wis. 223, the debtor was a nonresident, and it was held that he was entitled to the benefit of the exemption laws of the state, the court saying: "The statute makes no discrimination between temporary and permanent residents, nor does it purport to confine its privileges to residents at all. It exempts certain articles of the debtor and his family. And we think it would be entirely inconsistent with the beneficent intentions of the statute, as well as with the dignity of a sovereign state, to say that the temporary sojourner, or even the stranger within our gates, was not entitled to its protection." And in *Mineral Point v. Barron*, 83 Ill. 365, the defendant in the original action was a resident of the state of Wisconsin, and claimed the benefit of the Illinois statute (Rev. Stat. 1874, chap. 62, § 14) which provided that "the wages and services of a defendant, being the head of a family and residing with the same, to an amount not exceeding \$25 shall be exempt from garnishment"; and it was held that he was entitled to the benefit of such statute. Again, in the case of *Sproul v. McCoy*, 26 Ohio St. 577, the court says: "Exemptions from execution or sale allowed to 'every person who has a family,' under the provisions of the act of April 16, 1893 (70 Ohio Laws, p. 132), may be claimed by any debtor against whom an action is prosecuted in the courts of this state whether such debtor be or be not a resident of this state." And to the same effect are the cases of *Missouri P. R. Co. v. Maltby*, 34 Kan. 125; *Kansas City, St. J. & C. B. R. Co. v. Gough*, 35 Kan. 1; *Bell v. Indian Live Stock Co.* (Tex.) 3 L. R. A. 642; *Wright v. Chicago B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747; *Menzie v. Kelly*, 8 Ill. App. 259; *Wabash R. Co. v. Dougan*, 142 Ill. 248; *Hill v. Loomis*,

6 N. H. 263. In some of the states the right of exemption is expressly limited to residents, and such are the provisions of the statutes under which the decisions cited by the appellant were made.

As to the other defense pleaded, it is suffi-

cient to say that the judgment in the justice's court was upon a separate and distinct cause of action from the case in hand, and is therefore no bar to this action.

The judgment of the court will therefore be affirmed.

PENNSYLVANIA SUPREME COURT.

Daniel H. KRAMER

v.

David H. KISTER, App't.

(187 Pa. 227.)

1. An agreement made openly in court, and participated in by the parties, their counsel, and the district attorney, has no element of confidential professional communication in it which will preclude testimony concerning it by one of the attorneys.
2. Evidence of an agreement to compound a prosecution for felony is not inadmissible because the agreement is void, when offered to contradict a party who has denied that there was such an agreement.
3. The dissent from a sealed verdict by one juror when the jury is polled, after sealing a verdict and separating, on the ground that he did not agree to it except because he thought he was obliged to, makes it necessary to discharge the jury, and, if they are sent out again and render a verdict, it will not be sustained.

(July 21, 1898.)

APPEAL by defendant from a judgment of the Court of Common Pleas for York County in favor of plaintiff in an action brought to recover damages for alleged false arrest and malicious prosecution. *Reversed.*

On August 13, 1894, Kister made information against Kramer before a justice of the peace charging him with larceny of certain cigars. He was held to bail, indicted by the grand jury for burglary and larceny, and pleaded not guilty. It being conceded that the offense did not amount to burglary, the counsel at the trial thought that upon the evidence a reasonable doubt would arise and result in an acquittal. It was finally agreed with consent of court to offer no evidence and allow a verdict of not guilty to be taken, which was accordingly done, and the prisoner discharged. Subsequently he brought this action for malicious prosecution. Defendant contended that as part of the agreement to dismiss the former action he had agreed not to institute such an action as the present one.

Further facts appear in the opinion.

Messrs. James G. Glessner, H. L. Fisher, and G. G. Fisher, for appellant:

The offer was erroneously rejected on the alleged incompetency of the witness to tes-

NOTE.—The unsettled state of the practice respecting sealed verdicts is shown by the opinion in the above case.

For amendment of sealed verdict see *Galther v. Willmer* (Md.) 5 L. R. A. 756.

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tify to the matter inquired into, because he was acting as counsel for Daniel Kramer.

Confidential implies privacy, secrecy; but where was the private, secret, or confidential "relation" or matter between counsel and client, that the offer proposed, or even tended, to expose?

Miller v. Weeks, 22 Pa. 89; *Livers v. Van Buskirk*, 4 Pa. 316; *Heaton v. Findlay*, 12 Pa. 304.

A party may call an attorney to prove an offer of compromise by him on the part of his client. So, agreements made in the presence of an attorney between his client and the opposite party are not privileged communications.

19 Am. & Eng. Enc. Law, p. 141; *Whiting v. Barney*, 30 N. Y. 330, 86 Am. Dec. 385.

As to collateral matters, the knowledge of which the attorney has acquired by personal conversation, and which was not communicated as a secret, or as to such collateral facts which may be material communications between them, the attorney may be compelled to answer.

19 Am. & Eng. Enc. Law, 1st ed. p. 143.

A verdict defective in form may be corrected at the request of the jury, or with their consent any time before they have separated.

Wright v. Phillips, 2 G. Greene, 191.

The jury were sent back at about half past nine o'clock, under a threat requiring a verdict or a week's confinement.

How could the result have been otherwise than that of intimidation and coercion?

16 Am. & Eng. Enc. Law, 1st ed. p. 519; 26 Am. & Eng. Enc. Law, 1st ed. p. 522 and note 4; *Green v. Telfair*, 11 How. Pr. 260; *Chesapeake, O. & S. R. Co. v. Barlow*, 86 Tenn. 537.

Though the parties, after the charge of the judge and before the jury have retired, agree that the jury may deliver a sealed verdict, yet, when they come into court to deliver in the sealed verdict, either party may have the jury polled; and any of the jurors may dissent from the verdict to which he had previously agreed.

Root v. Sherwood, 6 Johns. 68, 5 Am. Dec. 191; *Blackley v. Sheldon*, 7 Johns. 32; *Scott v. Scott*, 110 Pa. 387.

No juror should be induced to agree to a verdict by fear that a failure to so agree would be regarded by the public as reflecting on his intelligence or integrity.

16 Am. & Eng. Enc. Law, 1st ed. pp. 523, 524, note 4, citing *State v. Bybee*, 17 Kan. 462; *Hocker v. Jamison*, 2 Watts & S. 438; *Cranston v. New York C. & H. R. R. Co.* 103 N. Y. 614; *Green v. Telfair*, 11 How. Pr.

260; *Slater v. Mead*, 53 How. Pr. 57; *Pierce v. Pierce*, 38 Mich. 412.

The power of court and jury is restricted to the amendment of mere formal defects.

Wolfran v. Eyster, 7 Watts, 38; *M'Connell v. Linton*, 4 Watts, 357.

In no case can jurors who, as here, have failed to agree upon a verdict when being polled in open court, though all had signed an agreement to that effect, but having separated in the meantime, be sent back to reconsider, find, and return a lawful verdict.

Walters v. Jenkins, 16 Serg. & R. 414, 16 Am. Dec. 585; *M'Connell v. Linton*, 4 Watts, 357; *Reitenbaugh v. Ludwick*, 31 Pa. 132.

Messrs. N. M. Wanner and W. A. Miller for appellee.

Mitchell, J., delivered the opinion of the court:

The counsel for the present plaintiff at the trial in the criminal court was called by the defendant at the present trial to prove an arrangement by which the verdict in the former case was obtained; the purpose of the offer, as stated by defendant, being to contradict the plaintiff, who had testified that there was no such agreement to which he was party. The witness was rejected as incompetent. It was objected by plaintiff that the offer, as made, did not contradict his testimony; and, critically tested, it probably did not. We should not be disposed, therefore, to interfere with the ruling of the judge, had it been put on that ground; but it was not. The witness was excluded explicitly on the ground that he was incompetent to testify on the subject because he had been of counsel with the plaintiff at that time. This was error. What the witness was called to prove was an agreement alleged to have been made openly in court when the case was called for trial, and participated in by the parties, their counsel, and the district attorney. There was no element of confidential professional communication in it. In *Levers v. Van Buskirk*, 4 Pa. 309, counsel had been permitted to testify that the title on which a previous suit by his client was brought was the same as in the suit then trying. This was held to be proper; Bell, J., saying: "This kind of protection has never been carried so far as is now claimed. It is to be confined to confidential communications, and knowledge derived wholly or in part from private and professional intercourse, and does not embrace those facts which the counsel may become acquainted with collaterally, or those which were from necessity, and to subvert the interests of the client, publicly disclosed, by direction of the client himself, on the trial of his cause." This has been cited as a correct expression of the rule in *Beeson v. Beeson*, 9 Pa. 279, 301, and *Heaton v. Findlay*, 12 Pa. 304.

It was further objected that such an agreement, if made, was void, as compounding a prosecution for felony, and evidence of it therefore inadmissible, as against public policy. But, whether void or not as an agreement, evidence that it was made was admissible as a contradiction of plaintiff, going to his credibility with the jury.

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Whether such an agreement would be void or not must depend on its exact nature, and the circumstances under which it was made. Certainly a prosecutor who has begun maliciously and without probable cause cannot be permitted to use the uncertainty of a jury trial as a weapon to force his victim to release him from the consequences of his malicious act. But, on the other hand, a prosecutor who has made an honest mistake, or who finds, from any cause, that his expected proof is likely to fail him, is not bound to go on and press for a conviction of the accused, guilty or not guilty. What the commonwealth demands is justice, and the due punishment of crime; and its policy is not necessarily to force a duel to the end between prosecutor and prisoner, but to prevent the stifling of just prosecutions by illegal means or for illegal considerations.

The remaining assignments refer to the verdict. The jury, having agreed to a sealed verdict, separated, and the next morning the verdict was handed up, opened, and announced; but, on the jury being polled, one juror dissented, whereupon the judge sent them out again, with some strong remarks on keeping them until they had agreed. In a short time they returned with the same verdict as the one sealed, and it was received and recorded against the defendant's objection. The practice of allowing the jury to seal a verdict and then separate is very general throughout the United States. Seventy-five years ago, Chief Justice Gibson spoke of it as in common use in Pennsylvania; having grown out of and superseded the privy verdict known to the common law, which was delivered to the judge out of court. *Dornick v. Reichenback*, 10 Serg. & R. 84. Both forms were alike, in being without binding force as verdicts until delivered by the jury in court. All the authorities agree that the only verdict is that which the jury announce orally in court, and which alone is received and recorded as the jury's finding. *Dornick v. Reichenback*, 10 Serg. & R. 84; *Scott v. Scott*, 110 Pa. 387; *Com. v. Breyessee*, 160 Pa. 457. The authorities also agree that, as the only verdict is that announced by the jury in court, if, with or without a poll, any juror disagree, there is no verdict. *Scott v. Scott*, 110 Pa. 387. But the course to be pursued in such case is an open question, upon which we have no direct authority in this state. A verdict which is merely defective in form, whether sealed or not, and whether the jury have separated or not, may, before it is recorded, be recommitted to them for correction,—as, for example, to calculate the interest where they have found for plaintiff for a sum certain, "with interest." *Wolfran v. Eyster*, 7 Watts, 38; *Reitenbaugh v. Ludwick*, 31 Pa. 131. But for a defect in substance where the jury has separated, and *a fortiori* for a defect that prevents the jury's delivery from being a verdict at all, as where the dissent of one shows that it is not unanimous, whether the judge should treat it as a mistrial, and discharge the jury, or whether he may send them out to consider a verdict anew, is undetermined. A few collateral intimations and *dicta* seem to

point to the former as the proper course, but we have no decision. Thus, in *Wolfman v. Eyster*, 7 Watts, 38, the court expressly limited the decision to "amending mere defects of form and substantially changing the finding of the jury." And in *Scott v. Scott*, 110 Pa. 387, where the associate judges entered a sealed verdict notwithstanding the dissent of one juror on a poll, this court held it error, saying: "Of course had the learned president judge been present, the verdict of eleven jurors would not have been entered on the record. Unless all the jurors were agreed, he would have discharged them because of their disagreement." The authorities cited by appellees from our criminal cases (*Alexander v. Com.* 105 Pa. 1; *Moss v. Com.* 107 Pa. 267; *Hilands v. Com.* 111 Pa. 1; and *Com. v. Eisenhower*, 181 Pa. 470) refer to separation of the jury during the trial, and do not touch the present inquiry. Nor is there any settled rule in other states to which we may conform. In New York the imperfect verdict is treated as a nullity for all purposes, and the jury may be sent out to deliberate again. *Douglass v. Tousey*, 2 Wend. 352, 20 Am. Dec. 616. In Ohio this cannot be done. *Sutliff v. Gilbert*, 8 Ohio, 405. It would seem to be a question of practice, as to which there is no uniformity.

We are thus left to consider the subject on historical and general principles, as to the origin and proper extent of the practice. At common law the jury were kept together from the time they were sworn, as is still the general rule in criminal cases involving life. After they had retired to consider their verdict, they were kept without food, drink, fire, or light until they agreed; and Blackstone says: "It has been held that, if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit, from town to town, in a cart." 3 Bl. Com. p. 376. From the manner of this mention, it is to be inferred that this latter practice was at least unusual in Blackstone's day; and he says expressly that the deprivation of food, fire, and light was subject to the indulgence of the court. In relief of the jury, the privy verdict was recognized, though not often resorted to. "A privy verdict is when the judge hath left or adjourned the court, and the jury, being agreed, in order to be delivered from their confinement obtain leave to deliver their verdict privily to the judge out of court, which privy verdict is of no force unless afterwards affirmed by a public verdict given openly in court, wherein the jury may, if they please, vary from the privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged." 3 Bl. Com. p. 377. With the prolongation of trials in the more complicated issues of modern times, and especially with the amelioration of manners, the treatment of jurors has gradually be-

come less harsh, and changes of practice have been made in their relief. It is no longer the custom to keep them together and secluded during the whole trial, though I apprehend that the judge may do so in any case where public excitement or other exceptional reason may make it advisable, in the interest of the proper administration of justice, to do so; and it is firmly established that, in trials involving life, he must do so, unless in exceptional and very limited cases of necessity. After the retirement of the jury to consider their verdict, this indulgence terminates, and they are kept together and apart from others until verdict is rendered. But, if the adjournment of the court is to such time or under such circumstances as seem likely to lead to serious inconvenience to the jurors, the practice of allowing them to seal a verdict grew up, as said by Gibson, Ch. J., in *Dornick v. Reichenback*, 10 Serg. & R. 84, in place of the privy verdict. It had the same disadvantage of not being binding, and was therefore subject to the same dangers. By the recognized practice, however, it is within the discretion of the judge, which does not require any agreement of parties or counsel, and may be exercised without their consent. But it is part of the growth of modern practice, in relief of the hardships and inconvenience to which jurors are necessarily subjected, and cannot be carried beyond the point of reasonable safety to the administration of justice. No jury can demand it as a right in any case, and in certain cases no judge can grant it as a matter of grace. The necessity that the verdict shall not only be fair and unbiased, but beyond reasonable apprehension of danger that it is otherwise, must be the controlling element in determining the limits of the convenience of the jurors and the discretion of the judge. When a juror dissents from a sealed verdict, there is a necessary choice of evils,—a mistrial, or a verdict finally delivered under circumstances that justly subject it to suspicion of coercion or improper influences. We are of opinion that the former is the lesser evil. If one juror can dissent, so may all change their view, and render a new verdict exactly opposite to the one they first agreed upon and sealed. There could be no better illustration of the dangers of such a privilege than the present case. If the dissenting juror was honest in his declaration that he had not agreed to the first verdict, except because he thought he was obliged to, then his agreement to the second without having been instructed as to his rights cannot be freed from a well-founded appearance of coercion. If, on the other hand, the second verdict had been for the defendant, contrary to the first, the inference could hardly have been escaped that the change was produced by new evidence, or information illegally acquired by the dissenting juror, or by even more reprehensible means. The only safe way out of such a situation is to treat it as a mistrial, and discharge the jury.

Judgment reversed, and venire de novo awarded.

RHODE ISLAND SUPREME COURT.

Charles J. KELLEY
v.
George A. SCHUYLER.

SAME
v.
Joseph DONNELLEY.

(.....R. I.....)

1. Evidence of the value of articles belonging to plaintiff, but taken from his house by an officer who broke into it to execute a writ of replevin which did not cover those articles, is admissible in trespass against him.
2. To break and enter a dwelling house for the purpose of serving a writ of replevin after admittance has been demanded and refused constitutes the officer a trespasser.

(March 24, 1898.)

PETITION by defendants for a new trial of an action of trespass *quare clausum fregit* brought for breaking and entering plaintiff's dwelling house and carrying away property under a writ of replevin. *Denied*.

The facts are stated in the opinion.

Messrs. Thomas W. Robinson and C. J. Farnsworth, for defendants:

Under the old law there was no question about the right of the sheriff to break doors for the purpose of serving a writ of replevin.

Fitzherbert, *Natura Brevium*, 157, note b; Dalton, *Sheriffs*, 353.

Under the provisions of the statute of Westminster I. chap. 17, the sheriff was expressly directed to break and enter to make replevin.

In Hitchcock on New England Sheriffs and Constables, 2d ed. p. 120, it says that an officer may break the house after demand and refusal of admission to execute a writ of replevin.

See also 6 Comyns, Dig. *Pleader*, 3 K, 1; Bacon, Abr. *Replevin*, E, 7; 3 Bl. Com. p. 149; Gilbert, *Distress*, 78.

That an officer has a right to break and enter is also laid down by Cobbey, *Replevin*, § 647.

See also Wells, *Replevin*, § 287; 2 Freeman, *Executions*, § 468.

Replevin is the peculiar and proper remedy to recover personal property.

The whole purpose of the action is the taking of the goods. This process was never intended to be defeated by a man's shutting his door in the face of the law.

Gardner v. McDermott, 12 R. I. 206; *Keith v. Johnson*, 1 Dana, 604, 25 Am. Dec. 167; *Kneas v. Fittler*, 2 Serg. & R. 263.

The goods mentioned in the writ of replevin were not goods that the defendant in replevin claimed to own. There is no tes-

timony to the effect that they were his goods. Ownership of the goods of plaintiff's intestate is expressly denied by the plaintiff in replevin. He simply refused permission to the officer serving the writ of replevin to go into his house to get the goods described in the writ.

Howe's Pr. chap. 12, § 5, p. 148; 1 Backus, *Sheriffs*, 127; *Link v. Harrington*, 23 Mo. App. 429; *Semayne's Case*, 5 Coke, 91, 1 Smith, Lead. Cas. *39, and note.

It is expressly denied by the officer that he took any goods except what were mentioned in his writ. If the goods were mentioned his writ would protect him.

Shipman v. Clark, 4 Denio, 446, 47 Am. Dec. 264.

An officer may break outer doors when the goods of a person other than the owner are in the house.

2 Am. & Eng. Enc. Law, 2d ed. p. 852.

Mr. Joseph Osfield, Jr., for plaintiff.

Tillinghast, J., delivered the opinion of the court:

These are actions of trespass *quare clausum fregit*, for breaking and entering the plaintiff's dwelling house, and taking and carrying away certain articles of personal property of the plaintiff therefrom. The facts are substantially these: One Josephine Donnelley died at the plaintiff's house, leaving there certain articles of personal property. One Thomas O'Brien was appointed administrator on the estate of said Josephine, and he afterwards sued out of the district court of the tenth judicial district a writ of replevin against the plaintiff in the present suits, to obtain possession of said personal property, the plaintiff having refused to deliver the same. The defendant George H. Schuyler, who was a constable, went to plaintiff's house to serve said writ, but was refused admittance. After obtaining advice from his attorney, he went again, on the 12th day of February, 1897, and, being again refused admittance, he, with the assistance of the defendant Donnelley, broke and entered the house, by prying open the outside door, which was locked. They also forced an inner door, which was fastened, and then proceeded to take and carry away, by virtue of the authority contained in the writ of replevin, certain goods and chattels which the defendant Donnelley pointed out to the officer as the property of said O'Brien, administrator. The evidence is conflicting as to whether the defendants took and carried away certain other goods and chattels belonging to the defendant in addition to those described in the writ. The replevin suit was pending in said district court at the time of the trial of these cases, and, so far as appears, has not yet been tried, so that there has been no judicial determination as to the ownership of the goods and chattels

NOTE.—The authorities relating to the right to break and enter a dwelling house to execute a writ of replevin are quite fully presented in the above case. As to liability of officer for 44 L. R. A.

serving process generally, see *McLendon v. State*, *Kennedy* (Tenn.) 21 L. R. A. 738, and *Thompson v. Jackson* (Iowa) 27 L. R. A. 92.

replevied. At the trial of the cases in the common pleas division, the plaintiff recovered a verdict in each for the sum of \$100; and the defendants respectively have petitioned for a new trial on several grounds, two only of which are now relied on, viz.: (1) That the court erred in admitting evidence as to the value of the goods taken; and (2) that it refused to charge the jury that the officer charged with the service of said writ of replevin was justified in breaking and entering the plaintiff's house, after a demand and refusal of admittance, for the purpose of making service of said writ, and that said writ was a full and complete protection to the defendant. The court, on the contrary, charged the jury, in substance, that the officer had no right to break and enter the plaintiff's house for the purpose of serving said writ, and that both he and the defendant Donnelley committed a trespass in so doing. The defendants duly excepted to the rulings. The only question before us, therefore, is as to the correctness of said rulings.

We think the first ruling complained of was correct. The evidence offered as to the value of the articles taken away by the defendants, as we understand it, was finally limited to those articles which the plaintiff claimed belonged to him or his family, and which were not included in the replevin writ. As to such articles, of course the plaintiff had the right to prove their value.

We think the second ruling also was correct; for, while there seems to be some slight conflict in the authorities as to whether an officer who has broken into a dwelling house, and made an attachment or taken property found therein, in pursuance of his precept, may not lawfully hold the same, although the decided weight of authority is to the contrary (see the leading cases of *Isley v. Nichols*, 12 Pick. 270; *People v. Hubbard*, 24 Wend. 369, 35 Am. Dec. 628; *State v. Hooker*, 17 Vt. 670-673; 2 Freeman, Executions, 2d ed. § 255, and cases cited), yet it is almost universally conceded that the officer who breaks and enters a dwelling house for the purpose of serving any civil process therein, except perhaps as hereinafter mentioned, is a trespasser; this position being based on the ground that the law will not permit the sanctity of one's dwelling house, which from very ancient times has been regarded as his castle, to be violated in this way. In short, the law provides, and wisely, too, we think, that the means of obtaining possession of personal property in civil process must be in subordination to the common-law rights of the defendant. "Public policy," says Campbell, J., in *Bailey v. Wright*, 39 Mich. 96, "requires, above all things, that courts and officers executing their process shall respect the lawful rights of all persons. The practical permission which overzealous officers would receive to commit wrongs with substantial impunity, if their levies should be held good without regard to the manner of their enforcement, would remove every check on lawlessness. To hold that an act is lawful which may be lawfully resisted is absurd. 44 L. R. A.

Such misconduct should neither be justified nor winked at." Blackstone says a sheriff may not break open any outer doors to execute either a fieri facias or a capias ad satisfaciendum; but he must enter peaceably, and may then, after a request and refusal, break open any inner doors belonging to the defendant, in order to take the goods. 3 Bl. Com. p. 417. And in *Snyder v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551, the court says: It is believed that what is said by Blackstone regarding said writs is true of all civil process. Cases to the same general effect are numerous; but in view of the fact that in *Clark v. Wilson*, 14 R. I. 11, this court held the same doctrine, it is unnecessary to cite them. In that case, Durfee, Ch. J., said: "It is perfectly well settled that an officer ordinarily has no authority to break an outer door or window of a dwelling house in order to enter it for the purpose of executing a civil writ or process."

But the defendant's contention, as we understand it, is that, in serving a writ of replevin, at any rate, the officer has the right, after demanding admittance and being refused, to break into a dwelling house in order to execute his precept. Some authority for this distinction is to be found in a few of the cases cited by defendant's counsel, but it is too vague and unsatisfactory to be controlling. Thus, in *Keith v. Johnson*, 1 Dana. 605, 25 Am. Dec. 167, cited by defendants, it was held that the sheriff, having an execution under the statute of that state passed in 1823, had the right to make a forcible entry into the defendant's house, to levy it on a slave for which it had issued on a judgment in detinet. An examination of the case, however, shows that, while the court was of the opinion that such a right existed at common law, yet that the decision was based upon the statute. We do not therefore consider the case of much value as an authority for the defendants. *Kneas v. Fittler*, 2 Serg. & R. 263, while it was an action of replevin, is not only not an authority in support of the defendants' position, but rather to the contrary, as there it did not appear how the defendants got into the house and the court said it could not be presumed that they broke the outer door. The case of *Link v. Harrington*, 23 Mo. App. 429, is very blindly reported, and it is impossible to tell whether the officer entered a dwelling house or not, but probably not, as no dwelling house is mentioned; and the natural inference is that the premises referred to, which the officer entered for the purpose of levying a writ of attachment upon certain goods therein belonging to a third party, of which premises it is stated that he assumed exclusive control for twenty-four hours or more, consisted of some building other than a dwelling house. In *Wells, Replevin*, § 287, also cited by defendant, the author says: "Authorities in modern times upon this question are meager, but it has been held that the sheriff had a right to enter the defendant's house to search for goods described in a writ of replevin;" and, in support of this statement, he refers, among others, to *Semayne's Case*, 5 Coke, 91; also, 1 Smith,

Lead. Cas. p. 213. That case is not an authority in support of the proposition above enunciated, except to a limited extent, as will be presently shown, but is generally to the contrary, and was cited by Durfee, Ch. J., in support of his opinion in *Clark v. Wilson*, 14 R. I. 11. It was held in *Semayne's Case* that, in all cases where the King is party, the sheriff may break the house, either to arrest or do other execution of the King's process, if he cannot otherwise enter, and also that, where the door is open, the sheriff may enter and do execution at the suit of a subject, and so also may the lord, and distrain for his rent service. But it was also held that it was not lawful for the sheriff, on request made and denial, at the suit of a common person, to break the defendant's house, *scil.* to execute any process at the suit of a subject. The limited extent to which the case is an authority for the proposition above stated by Mr. Wells is in circumstances like the following, *viz.*: Where the goods of A are brought and conveyed into the dwelling house of B with his knowledge and consent, to prevent a lawful execution, or to escape the ordinary process of law, this amounts to fraud and covin on the part of B; and in such case the sheriff, after denial of admittance on request made, may break the house; "for the privilege of one's house," said the judges, "extends only to him and his family and to his own proper goods, or to those which are lawfully and without fraud and covin there." See cases cited on page 228 (*188) of 1 Smith, Lead. Cas., in a note to *Semayne's Case*. To the same effect are *Burdett v. Abbott*, 14 East, 157, and *De Graffenreid v. Mitchell*, 3 McCord, L. 506, 15 Am. Dec. 648. The statute of Westminster I. chap. 17, cited by defendant, even conceding it to be in force in this state, is but an affirmation of the common-law doctrine above enunciated. It declares, in effect, that the sheriff may break a house or castle to make replevin, when the goods of another which he has distrained are by him conveyed to his house or castle to prevent the owner to have a replevin of his goods, provided the sheriff first make demand for the goods. See also 8 Bacon, Abr. p. 547, § 7. The other cases cited by Mr. Wells in support of the text, *viz.*, *State v. Smith*, 1 N. H. 346, and the cases referred to in a note to *M'Gee v. Givan*, 4 Blackf. 18, go no further, at the most, than to sustain the ruling made in *Semayne's Case*, *supra*, and do not hold, generally, that an officer may break into a dwelling house to serve a writ of replevin. *Boggs v. Vandyke*, 3 Harr. (Del.) 288, is a case where the sheriff attempted to justify the breaking and entering the plaintiff's house and taking his goods, by showing that he did so in connection with the service of an execution against the plaintiff. The court ruled that the officer had no right to open an outer door, and sustained the plaintiff's action of trespass. See also *Haggerty v. Wilber*, 16 Johns. 287, 8 Am. Dec. 321. We have examined the other cases which are referred to in a general way by the defendants, *viz.*, those cited in 2 Am. & Eng. Enc. Law, 2d ed. p. 853, note 1, but 44 L. R. A.

do not find that they are controlling, or that they furnish much support for the defendants' claim in the case at bar. Indeed, most of the cases are directly to the contrary. See, for instance, *Calvert v. Stone*, 10 B. Mon. 152, decided by the same court as was *Keith v. Johnson*, 1 Dana, 605, 25 Am. Dec. 187, and nearly twenty years afterwards, and *State v. Hooker*, 17 Vt. 670-673, and *People v. Hubbard*, 24 Wend. 369, 35 Am. Dec. 628.

A somewhat careful investigation of the authorities independently of those cited by counsel confirms us in the opinion at which we have arrived. Murfree, Sheriffs, § 268, lays down the broad proposition that an officer cannot break the outer doors of a house to execute a *fi. fa.* or any other civil process against the owner, and, if he does so, he becomes a trespasser. Hitchcock on New England Sheriffs and Constables takes the same view, and cites with approval the Rhode Island case of *Clark v. Wilson*, 14 R. I. 11. See also Drake, Attachm. § 200; Cobbey, Replevin, § 647. In *Prettyman v. Dean*, 2 Harr. (Del.) 494, which was an ordinary case of replevin, Clayton, Ch. J., in delivering the opinion of the court, said: "The sheriff has a right to enter a house peaceably, where he finds the house open, for the purpose of executing a replevin. Being in, he has the right to execute his writ. If property be concealed, he has the right to break open inner doors, and generally to use such force as is necessary to enable him to obey the command of his writ." The late case of *State v. Beckner*, 132 Ind. 371, is clearly in point. There the officer was sued on his official bond, and the question which arose was whether he had the right to forcibly enter the dwelling house of the relator to serve a writ of replevin. The court decided that the writ was but a civil process, and did not authorize him to force the outer door of a dwelling house. Whether there is any sufficient reason, on principle, for making the distinction referred to in the books, between an ordinary case of replevin and a case where the goods and chattels sought to be obtained have been distrained or are fraudulently concealed by the defendant in his house, may be open to doubt. See 2 Freeman, Executions, 2d ed. p. 817, § 256. But conceding that in such circumstances an officer would be warranted in breaking into a dwelling house to make service of such writ, or of a writ of *fi. fa.* against a stranger whose goods are wrongfully withheld from the officer in the house, yet, as the cases at bar do not fall within either of those classes, the fact that the law may be as intimated by Mr. Freeman, and also in *Douglass v. State*, 6 Yerg. 529; 8 Bacon, Abr. p. 547; *Burton v. Wilkinson*, 18 Vt. 189, 46 Am. Dec. 145, and other cases hereinbefore cited,—cannot control our decision. The case out of which the present suits arise was a simple and ordinary case of replevin; and we are very clearly of the opinion that the defendants committed a trespass when they broke and entered the plaintiff's house to make service of said writ.

Petition for new trial denied, and cases remitted to the common pleas division, with direction to enter judgment on the verdicts.

SOUTH DAKOTA SUPREME COURT.

WESTERN TWINE COMPANY, *Appt.*,

v.

F. R. WRIGHT *et al.*, *Respts.*

(.....S. D.....)

1. The presumption is that a telegram properly addressed and deposited in the telegraph office, with charges prepaid, reached its destination and was delivered in accordance with the obligation which the law imposes upon telegraph companies.

2. A telegram received from a telegraph operator, which purports to be in reply to one which the recipient had previously deposited with the operator, with charges prepaid and properly addressed, is admissible in evidence against the person by whom it purports to have been sent, without any proof that he actually executed or authorized such despatch, or that it was ever transmitted.

3. A contract made by telegrams is a contract in writing, for which a consideration is presumed under Comp. Laws, § 3538.

NOTE.—*Admissibility of telegram on behalf of person receiving it in reply to another.*

While the authorities on this subject, though scarce, have taken both sides of the question, and seem to have been about equally balanced, the principal case, together with a late Delaware case, set forth below, may be deemed to have established a preponderance of authority in favor of the rule therein adopted.

Thus, a telegram purporting to have been received by a tenant from his landlord will be presumed to correspond with the copy sent, and where on its face as delivered it shows that it was in response to a letter from the landlord's attorney to the tenant asking for terms, it is prima facie admissible in evidence in an action for rent without the production of the original. *Thorp v. Philbin*, 18 N. Y. S. R. 1005.

And a telegram purporting to be a reply to one sent to a steamboat, which was delivered to her officers, is admissible in evidence in an action for breach of a contract of which the telegram constituted a part, without express proof that it was signed by the master or with his consent, where the answer was delivered in the same telegraph office from which the first telegram was delivered to the officers of the steamboat. *Taylor v. The Robert Campbell*, 20 Mo. 254.

So, telegrams which are germane to the subject to which other telegrams relate, the contents of which are clearly relevant as a connecting part of the correspondence, may be proved by secondary evidence after evidence is given excusing the production of the originals, where no exception is taken to the admission in evidence of the other telegrams. *Oregon S. S. Co. v. Otis*, 14 Abb. N. C. 388, Affirmed in 100 N. Y. 446, 53 Am. Rep. 221.

And a telegram accepting a bid made by letter is admissible in evidence in an action for breach of the contract thus made, after notice to produce the letter had been given and evidence was adduced that the telegram and letter were connected with the contract, and that the plaintiff had no copy, though the defendant stated in answer to the notice to produce that he had no such letter. *Rogers v. Fenimore* (Del. Super. Ct.) 41 Atl. 886.

And proof that a telegram was sent to a party asking at what price he would sell 100,000 Mexican dollars, and that an answer was received that he would deliver 50,000 at a designated price, and that a letter repeating the telegram was sent at the same date, is sufficient in an action for breach of contract for failure to furnish such dollars to take the case out of the statute of frauds. *Trevor v. Wood*, 36 N. Y. 807, 93 Am. Dec. 511.

So, a telegram accepting a bid made by letter will not be stricken from the record in an action for breach of the contract constituted by the letter and telegram because it was addressed

to J. W. F. & Co. when there was no such firm or party at the place to which it was sent, and it was delivered to J. W. F., Jr., the defendant, according to instructions. *Rogers v. Fenimore* (Del. Super. Ct.) 41 Atl. 886.

And in *Prosser v. Henderson*, 20 U. C. Q. B. 438, it was held in an action for rent that a telegram to the owner of the premises offering to pay a certain price, and an answer thereto by telegraph that the person making the offer might have the property for a designated time on the terms suggested, constitutes a perfect demise commencing at the time of the acceptance of the offer, and there was nothing in the case to show that any proof of the authenticity of the answer was made aside from the fact that it was an answer to the telegram sent.

Upon the other hand, it has been held that the usual course in establishing a contract made or closed by telegraph is to show the delivery of the original message of the parties sought to be charged at the office where it was to be transmitted, and that its authenticity must be established either by proof of handwriting or by other proof establishing its genuineness, and that evidence that a message was sent, and another purporting to be in answer to it was received, is insufficient where the proof wholly fails to show that it was sent by the person sought to be bound, or by his authority or direction. *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355.

So, where a contract is sought to be made out and proved through telegrams, the messages signed by the parties must be produced; the transcripts taken from the wire are not sufficient. And the production of transcripts of telegrams delivered to the parties addressed, by which one of them offered to give the other a certain price for rye and the other accepted his offer, does not establish a contract where the original messages signed by the parties are not produced. *Kinghorne v. Montreal Teleg. Co.* 18 U. C. Q. B. 60.

And what purports to be a reply to a telegram is not evidence in a criminal case, against the person by whom it purports to be sent, where there is no evidence that he sent it. *Chester v. State*, 23 Tex. App. 577.

And what purports to be a telegraphic answer coming from one to whom a telegram was sent is inadmissible in evidence to establish the fact that he was at the place where the telegram was sent and from which the answer appeared to come at the time. *Howley v. Whipple*, 48 N. H. 487.

In the above case, however, there was a dictum to the effect that where a man sends a proposition to another by telegraph, and gets a reply accepting it, the original message, so far as binding the acceptor is concerned, is the copy delivered to him, and is admissible in evidence as such.

F. H. B.

4. Evidence that farmers who purchased twine were troubled by its breaking is admissible on behalf of the dealer, as against the party from whom he bought it, in order to show the worthlessness of the twine, where there is no claim made for injury to the farmers.
5. The fact that a dealer has been fully paid for an article which he sold will not preclude a recovery by him from the party from whom he bought it, on breach of warranty, to the full extent of defects existing in it.
6. Entering separate judgments in favor of principal and sureties, who separately answered, and in whose favor separate verdicts were rendered, is not improper, when it does not injure the plaintiff.

(April 13, 1899.)

APPEAL by plaintiff from a judgment of the County Court for Minnehaha County in favor of defendant in an action to recover the amount of a promissory note given for the purchase price of binding twine in defense of which defendant set up breach of warranty of the twine. *Affirmed.*

The facts are stated in the opinion.

Messrs. Rockford & McMahon, for appellant:

When a party takes the initiative, and, for the purpose of contracting by telegraph, delivers a prepaid message, containing his offer, to the telegraph company, a telegraphic acceptance shortly thereafter received, purporting to be signed by his addressee, is not admissible to bind the latter without further proof of its authenticity.

Thompson, Electricity, §§ 498, 502; *Gray, Communication by Telegraph*, 242; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Howley v. Whipple*, 48 N. H. 487; *Burt v. Winona & St. P. R. Co.* 31 Minn. 472; *Bradner, Ev.* 135, 136; 25 Am. & Eng. Enc. Law, pp. 876, 883; *State v. Gritzer*, 134 Mo. 512; *Drexel v. True*, 38 U. S. App. 611, 74 Fed. Rep. 12, 20 C. C. A. 285; *Whilden v. Merchants' & P. Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1.

The circumstance which permits the introduction of secondary evidence in no case excuses the proof of all the facts, the same as are required in case primary evidence is obtainable.

Neither does the fact that primary evidence is not obtainable change the *onus probandi*.

Meagley v. Hoyt, 36 N. Y. S. R. 27; *Bradner, Ev.* 135.

Where a party takes the initiative for contracting by telegraph, the telegraph company is, throughout the whole transaction, his agent, as much so as would have been any other individual he might employ.

Wilson v. Minneapolis & N. W. R. Co. 31 Minn. 481; *Anheuser-Busch Brewing Assn. v. Hutmacher*, 127 Ill. 652, 4 L. R. A. 575; *Saveland v. Green*, 40 Wis. 431; *Morgan v. People*, 59 Ill. 58; 25 Am. & Eng. Enc. Law, p. 879.

When a party has entered into an absolute, irrevocable contract in writing for the purchase of personal property without warranty, 44 L. R. A.

a subsequent promise of warranty made to him, without further consideration, is not valid and binding.

White v. Oakes, 88 Me. 367, 32 L. R. A. 592; *Sherman v. Billings*, 90 Hun. 544; *Summers v. Vaughan*, 35 Ind. 323, 9 Am. Rep. 741; *Bloss v. Kittredge*, 5 Vt. 28.

When a dealer purchases personal property, such as binding twine, of a warranted quality, and in turn sells the same without warranty to farmers for use, he, in case of a breach of the warranty, is not entitled to show, as a measure of his damage, the loss of time and loss of crop suffered by these farmers.

A witness, called to tell the market value of an article, must state the market value generally, and not its value for a special purpose.

D. M. Osborne & Co. v. Carpenter, 37 Minn. 331; *Osborne v. Marks*, 33 Minn. 56.

Where a dealer purchases a car load of personal property, such as binding twine of a warranted quality, which he in turn sells or retails in small quantities to divers persons, the jury is not entitled to presume that all the twine is defective upon his showing that a small part of it, so retailed, does not comply with the warranty.

J. I. Case Plow Works v. Niles & S. Co. 90 Wis. 590; *Meagley v. Hoyt*, 36 N. Y. S. R. 27.

Messrs. Davis, Lyon, & Gates and A. B. Kittredge, for respondents:

It appearing that F. R. Wright sent the plaintiff the first telegram and prepaid the charges thereon, the presumption is that it reached its destination and was delivered to the party to whom it was addressed.

Oregon S. S. Co. v. Otis, 100 N. Y. 447, 53 Am. Rep. 221; *Eppinger v. Scott*, 112 Cal. 369; 2 Am. & Eng. Enc. Law, p. 881.

If a party addresses a letter to another at his place of residence, and receives by mail an answer purporting to come from the person so addressed, the fact that such an answer was so received makes a *prima facie* case in favor of the genuineness of the answer.

Armstrong v. Advance Thresher Co. 5 S. D. 12; 1 Wharton, Ev. § 1328; *Connecticut v. Bradish*, 14 Mass. 296; *Chaffee v. Taylor*, 3 Allen, 598.

The ordinary rule that the burden of proof is upon him who has peculiar knowledge should prevail.

Stephen, Digest of Ev. art. 98; *Harris v. White*, 81 N. Y. 532; 1 Wharton, Ev. § 367; *Reynolds, Ev.* § 75.

Wright's employment of the telegraph company ceased when his despatch was delivered. He did not require the company to go and get an answer, nor did he pay for that service.

Durkee v. Vermont C. R. Co. 29 Vt. 127; *Saveland v. Green*, 40 Wis. 431.

The reply message delivered to F. R. Wright at Rowena was sufficiently authenticated. That message so delivered to Wright was the original and was primary evidence, and the preliminary step taken for the introduction of secondary evidence was unnecessary.

Ibid.; *Anheuser-Busch Brewing Assn. v.*

Hutmacher, 127 Ill. 652, 4 L. R. A. 575; *Perry v. German-American Bank*, 53 Neb. 89; *State v. Sawtelle*, 66 N. H. 488.

The contract of guaranty being made by telegraphic messages was in writing and imported a consideration, and the burden of showing want of consideration was with the party seeking to invalidate it.

Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Comp. Laws, § 3538, subsecs. 2, 3; *Corbett v. Clough*, 8 S. D. 176.

No want of consideration was shown. It was not necessary that the consideration should be specified in writing.

3 Am. & Eng. Enc. Law, p. 831.

The fact that Wright sold some of this twine to purchasers without warranty, and received pay for it, does not impair his right to recover to the full extent of the defects in the twine without deducting anything on account of sums he may have received from parties to whom he sold portions of it.

Muller v. Eno, 14 N. Y. 597; *Wheelock v. Berkeley*, 138 Ill. 153.

The taking of separate judgments against parties who were jointly liable was an irregularity only, and, as it worked no injury, it was not reversible error.

Judd Linseed & Sperm Oil Co. v. Hubbell, 76 N. Y. 543; *Decker v. Trilling*, 24 Wis. 615.

Fuller, J., delivered the opinion of the court:

A breach of warranty as to the quality of certain binding twine, purchased by the defendant F. R. Wright, from the plaintiff, was the only defense relied upon in this action to recover the amount of a promissory note given in settlement therefor, and this appeal taken by plaintiff from judgments in favor of defendants presents some questions pertaining to the law of evidence which, on account of their importance, require most careful consideration.

It appeared at the trial that respondent F. R. Wright, a resident of Rowena, South Dakota, gave to appellant of 143-5 Monadnock Block, Chicago, Illinois, an order for 15,000 pounds of binding twine, and soon afterward sent from Sioux Falls a telegram of which the following is a copy:

June 29th, 1895.

To Western Twine Company, Chicago, Ill.

Do not ship twine unless guaranteed; answer at Rowena.

F. R. Wright.

As a part of the transaction, the following was offered and received in evidence:

Chicago, June 20th, 1895.

F. R. Wright, Rowena.

Twine guaranteed work as well as any other under same conditions.

Western Twine Company.

Although the possession of the message as written by appellant was denied on notice to produce, and it was shown that the sender of the former message received this promptly from the telegraph operator at Rowena, and "that all telegrams either received or sent 44 N. A.

at or from Sioux Falls or Chicago, more than six months prior to the date of the trial, had been destroyed" in compliance with a rule of the Western Union Telegraph Company, appellant's objection was that the same is "incompetent, immaterial, and irrelevant, no foundation laid for the introduction of such evidence, the plaintiff not being connected therewith, or shown to have executed or authorized any such despatch, and no proof of such despatch ever having been transmitted from Chicago, or ever received at Rowena, S. D. Hearsay in its nature."

When the message addressed to appellant was deposited in the office with the operator at Sioux Falls, all charges for transmission being prepaid, every inference that follows the posting of a letter with similar correctness to be sent by United States mail attached, and, in the absence of anything to the contrary, the presumption is that the same reached its destination and was delivered in accordance with the obligation which the law imposes upon telegraph companies. *Perry v. German-American Bank*, 53 Neb. 89; *Com. v. Jeffries*, 7 Allen, 548, 83 Am. Dec. 712; 2 Wharton, Ev. ¶ 1323; *Croswell, Electricity*, ¶ 674.

In *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221, the court says: "There is thus impressed upon the telegraph service something of a public character, and thrown around it the guard and the obligations of the public law, and it seems to us reasonable to assimilate the rules of evidence founded upon transmission by mail to that of transmission by telegraph."

As a rule, to which an exception is very rare, all letters and all telegrams with equal certainty reach their destination, and, the reasonable intendments with reference to each being identical, the same legal presumption may well be entertained as to both.

If the telegram which purports to come from appellant be considered as a copy, the original of which has been destroyed, its admission was authorized under the elementary principle that after the proper foundation has been laid resort may be had always to secondary evidence as the best within the power of the party to produce.

Unquestioned as it is, the presumption that the first message was transmitted to and received by appellant stands as ample proof of that fact, and if the purported reply was not sent by someone having authority to enter into a contract on its behalf, the matter was peculiarly within its knowledge, and might easily have been shown.

Unless forgery by someone or fraud upon the part of the telegraph company is to be presumed, the delivery of the message to respondent at Rowena by its operator is a proper circumstance tending strongly to show that on the very day respondent F. R. Wright sent his message to Chicago, appellant placed its reply thereto in transit over the wires. *Scott & Jarnagip, Telegraphs*, ¶ 380.

Were a doctrine to prevail contrary to that which applies to a letter in the hands of its recipient, and which purports to be an answer to one he has written, and which was

received by the party addressed, an agency by which the most important of human affairs are constantly transacted would be seriously impaired, and a distinction would be made to exist without a material difference.

This court has held that "a letter received by due course of mail from a party in reply to a letter addressed to such party is presumptively genuine, and admissible in evidence without further proof of the identity of the party purporting to write the reply," *Armstrong v. Advance Thresher Co.* 5 S. D. 12.

In a case relied upon by appellant, the proper foundation for the introduction of secondary evidence not being laid, a telegram received in reply purporting to be from a person apparently at a distant place was rejected as evidence of such fact on the ground that it was not original; and in passing upon the point the court says: "Telegraphic messages are instruments of evidence for various purposes, and are governed by the same general rules which are applied to other writings. If there be any difference, it results from the fact that messages are first written by the sender, and are again written by the operator at the other end of the line, thus causing the inquiry as to which is the original. The original message, whatever it may be, must be produced, it being the best evidence; and in case of its loss, or of inability to produce it from any other cause, the next best evidence the nature of the case will admit of must be furnished. If there was a copy of the message existing it should be produced, if not, then the contents of the message should be shown by parol testimony." *Howley v. Whipple*, 48 N. H. 487.

There being in this instance sufficient preliminary proof as a foundation for the introduction of a copy, we treat the telegram under consideration as such without determining whether it is the original as maintained by counsel for respondent. In our opinion all that took place between the parties pertaining to the warranty relied upon was shown by the best evidence that could under the circumstances be obtained, and we decline to follow courts that seem to take a different view.

No testimony being offered upon the point, it is urged by counsel for appellant that it was incumbent upon respondent to show a consideration for the alleged warranty, but as the telegrams constitute a contract in writing, which is presumptive evidence of a consideration, the burden was upon the party seeking to avoid it. *Comp. Laws*, § 3538.

The settled rule is that contracts required to be in writing may be made by telegram. *Hawley v. Whipple*, 48 N. H. 487; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *State v. Holmes*, 56 Iowa, 588, 41 Am. Rep. 121.

Another position taken by appellant is that there is nothing to indicate that the twine was warranted to consumers, and consequently it was error to allow a farmer who had purchased some of it from respondent F. R. Wright, and had paid for same, to testify to the effect that he was delayed in the harvest.

by having to stop the machine frequently on account of the breaking of twine, that grain enough shelled out to seed the ground because so many of the bundles had to be rebound by hand, and that the twine was absolutely worthless. It clearly appears from the undisputed testimony of numerous witnesses who had tried the twine that it was of poor quality, varying from much too large in size to five or six strands, causing it to break frequently, and making it impossible to adjust the tension so that more than three fourths of the grain could be bound, and requiring frequent stops for the purpose of pulling snarled twine out of the machine and re-threading the needle.

For the purpose of proving that the note in suit was without consideration every witness sworn at the trial stated that the twine in settlement for which it was given was of no value, and, there being no claim for injury to farmers, the foregoing was admitted to properly show their source of knowledge, and the means by which their final conclusion was reached. Nor does the fact that the twine purchased by the witness was fully paid for preclude a recovery to the full extent of the defects without regard to the amount received from persons to whom sales had been made. In cases like the present the actual difference between the real value of the property and what it would have been worth had it corresponded with the warranty is the proper amount to be recovered, although a part of it has been sold for cash, and no claim has been made by any of the purchasers on account of defects. *Muller v. Eno*, 14 N. Y. 597; *Wheelock v. Berkeley*, 138 Ill. 153.

The difference between what the property would have been worth if as warranted, and its actual value at the time to which the warranty refers, is the true measure of damages. *Comp. Laws*, § 4593.

While it does not affirmatively appear that all the twine was disposed of a quantity had been purchased by each of a large number of experienced farmers, all of whom testified that they had tried to use the same, which proved to be of no practical value, and the finding of the jury to that effect is abundantly sustained by the uncontroverted evidence.

The record discloses that F. R. Wright is the principal maker of the note, and that the two other respondents signed as sureties. The principal and sureties answered separately, and at the conclusion of the trial, two general verdicts against appellant, one in favor of F. R. Wright, and one in favor of the sureties, were returned into court, and separate judgments were accordingly entered. Of this appellant complains although no injury thereby is intimated. Since respondents might have been sued severally the practice adopted by the court is allowable. *Bank of Commerce v. Smith*, 57 Minn. 374; 11 Enc. Pl. & Pr. p. 857, and cases there collated.

Moreover, "the court shall, in every stage of action, disregard any error or defect in the pleadings or proceedings, which shall not

affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Comp. Laws, § 4941.

Considered as an irregularity it must be

disregarded because appellant is not injured. *Decker v. Trilling*, 24 Wis. 610.

For the reasons given in the foregoing opinion, the judgments appealed from are affirmed.

TENNESSEE SUPREME COURT.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY

v.

Linda Y. SPRATLEY, *Appt.*

(99 Tenn. 322.)

1. A statute authorizing service of process on an agent of a foreign corporation, "no matter what character of agent such person may be," if the corporation has any transaction with any person or concerning any property in the state through any agency whatever within the state, is not unconstitutional as authorizing judgment without due process of law,—at least when the service is on an agent who may be reasonably presumed to give notice thereof to the corporation.
2. An agent of a foreign life insurance company who comes into the state to examine the conditions under which a death occurred, and who submits a proposition to compromise the claim, is an agent on whom service of process may be made, under Shannon's New Code, §§ 4543-6.
3. The existence of a power of attorney by which a foreign insurance company authorized service of process to be made on the secretary of state does not preclude service on an agent as authorized by the act of 1887.
4. A foreign company executing a power of attorney to the secretary of state, in accordance with the act of 1875, authorizing him to accept service of process, does not thereby make a contract with the state which precludes the state from authorizing service to be made on agents of the company.

(September 20, 1897.)

APPEAL by defendant from a decree of the Chancery Court for Shelby County in favor of plaintiff in a suit brought to enjoin defendant from enforcing a judgment which had been recovered upon certain policies of life insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. Turley & Wright for appellant.

Messrs. Estes & Fentress, for complainant:

The act of 1887, under which the service of process in the circuit-court case was made, does not embrace this case, in which the insurance company had legally entered and done business in the state and had filed its power of attorney appointing the secretary of state its agent to accept service of process.

NOTE.—On the question, Who may be served with process in suit against a foreign corporation, see note to *Foster v. Charles Betcher* 44 L. R. A.

Fithian v. New York & E. R. Co. 31 Pa. 114.

Both the history and the intensive language of the act of 1887 clearly show that its provisions were not intended to cover cases like this, but to catch a class who were defrauding the state.

Cumberland Teleph. & Teleg. Co. v. Turner, 88 Tenn. 268.

If the act approved March 29, 1887, is held to embrace this case, the act as well as the process prescribed thereby and its service are not "due process of law" within the meaning of art. 5 of the Amendments to the Constitution of the United States and of the 14th Amendment of said Constitution.

The kind of representative and the scope of an agent's authority that will legally authorize the service of process upon one as the *alter ego* of a defendant in a suit are well settled, and it cannot for a moment be admitted that a state, by extreme legislation under the sanction of the Constitution of the United States, may arbitrarily provide that service of process "upon any agent," "no matter what character of agent he may be," shall be good, if, in fact, the agent on whom the service is made is not legally the proper representative of the defendant under the rules of law.

Notice to the agent to bind the principal must be within the scope of the agent's employment.

Notice to an agent of any fact outside of his agency will not affect the principal.

1 Am. & Eng. Enc. Law, p. 421; *Nashville & C. R. Co. v. Elliott*, 1 Coldw. 618, 78 Am. Dec. 506; *Lafayette Ins. Co. v. French*, 18 How. 407, 15 L. ed. 452; *Schmidlapp v. La Confiance Ins. Co.* 71 Ga. 246; *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. Rep. 286; *Trenton v. Pothén*, 46 Minn. 298; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699; *Philp v. Covenant Mut. Ben. Asso.* 62 Iowa, 633; *Mulhearn v. Press Pub. Co.* 53 N. J. L. 150; *St. Clair v. Cox*, 106 U. S. 356, 27 L. ed. 225.

Substituted service (of legal process) by publication or any other authorized form, is sufficient to inform a nonresident of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act; but when suit is brought to determine his personal rights or obligations, such service on him is ineffectual for any purpose.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed.

Lumber Co. (S. D.) 23 L. R. A. 490; also *Carstens v. Leldigh & H. Lumber Co. (Wash.)* 39 L. R. A. 548.

565; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 225; *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 17.

When the company accepted the terms proposed by the statute of filing the continuing power of attorney, the contract to this extent was executed, and executed contracts are protected by the constitutional provision.

Cooley, Const. Lim. p. 274; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162.

The contract was not subject to repeal or modification.

Cooley, Const. Lim. 5th ed. p. 345; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 874, 29 L. ed. 525; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587; *Green v. Biddle*, 8 Wheat. 84, 5 L. ed. 568.

Beard, J., delivered the opinion of the court:

The complainant is a corporation organized under the laws of the state of Connecticut to carry on a life insurance business, and has its principal situs in Hartford, in that state. For many years prior to the year 1894 it actively prosecuted its work in the state of Tennessee, soliciting applications for life insurance, and issuing policies upon such applications as were approved by its officers. In the year 1889, and afterwards in 1893, an agent of this company was in the state of Tennessee, and by his solicitations induced one B. R. Spratley, a citizen of this state, to apply for insurance on his own life, and upon these applications the complainant issued two policies, one of which was for \$5,000 and the other for \$3,000, payable, at his death, to his wife, the defendant, Linda Y. Spratley. Both policies were delivered in this state. In the year 1896, B. R. Spratley died, and proof of his death was forwarded to the company. Very soon thereafter complainant sent O. N. Chaffee, one of its employees, into the state, to investigate this claim, and the conditions under which this death occurred. He came, and had interviews with the beneficiary, Mrs. Spratley, her brother, and other parties, of all which he made report to his home company. Upon receiving this report, the complainant, through its vice president, wired the agent as follows: "We think case [referring to Spratley's death claim] should be settled for reserves or thereabouts." After receiving this telegram, Chaffee visited Mrs. Spratley, and submitted an offer to settle on the terms indicated in it. This offer, however, was rejected. While he was in this state on the business and occasion referred to, suit was instituted by the beneficiary against the insurance company for the amount alleged to be due on these policies in the circuit court of Shelby county, and process was served on Chaffee as the agent of the company. At the same time all the requirements of chapter 226 of the Session Acts of 1887, with regard to giving other and further notice of the bringing and pendency of this suit, were complied with. The insurance company ignoring this action, in due time judgment

by default was taken against it, upon which an execution was subsequently issued. Thereupon the bill in this cause attacking the judgment upon the ground that it was taken without valid service of process; the complainant alleging that it had not, at the time of the institution of the suit in the circuit court, nor had it had for several years prior thereto, any office or agency in Tennessee; that Chaffee, upon whom service was attempted, was a special agent, for a special purpose, only temporarily in Memphis, and that as such special agent he was not amenable to process issued against the complainant company; and, further, that chapter 226 of the acts of the legislature of 1887, upon which the circuit-court procedure rested, was void, because it violated article 5 of the Amendments to the Constitution of the United States, and also the 14th Amendment to the Constitution of the United States, in that, under the provisions of this act, a defendant was "deprived of property without due process of law"; and it also violated so much of § 17 of the 1st article of the Constitution of the state of Tennessee as provides that "every man . . . shall have remedy by due course of law." The first ground of attack will be hereafter noticed. We will at once examine the question raised upon the constitutionality of this act. Sections 2831-2834 of the Code (M. & V.), corresponding with §§ 4539-4542 of Shannon's New Code, regulate the mode of suing corporations, and apply equally to foreign and domestic corporations. *Chicago & A. R. Co. v. Walker*, 9 Lea, 475; *Peters v. Neely*, 16 Lea, 280. But they did not cover the case of a foreign corporation having no resident agent in the state. *Chicago & A. R. Co. v. Walker*, 9 Lea, 475. This defect in the law disclosed by this last-named case led to the passage of the act which is assailed for unconstitutionality by the complainant. The provisions of this act are embodied in §§ 4543-4546 of Shannon's New Code. By the 1st section it is provided that "any corporation claiming existence under the law of any other state, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are by the laws thereof liable to the same, so far as relates to any transaction had in whole or in part within this state, or any cause of action arising here but not otherwise." Section 2 defines what is meant by the term "found doing business in this state," in these words: "Any corporation having any transaction with persons, or having any transaction concerning any property situated in this state, through any agency whatever acting for it within this state shall be held to be doing business within the meaning of § 1." Section 3 provides that "process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be, and, in the absence of such an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of

which the suit arising took place," etc. In *Cumberland Teleph. & Teleg. Co. v. Turner*, 88 Tenn. 265, it is held that this act did not apply to any foreign corporation having resident agents in the county where the suit is brought; but that the case presented in this record is one within its provisions we think is clear. The question is, Is it constitutional? It may be said that in this legislation Tennessee is only following in the footsteps of many other states of the Union. So diversified and widespread have been the operations of corporations that possibly every state has, for the protection of its own citizens, found it necessary to adopt similar laws. In *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451, with regard to a judgment obtained in a court of Ohio against an Indiana corporation in a suit where service was had on a resident agent in Ohio, the Supreme Court of the United States said: "It cannot be deemed unreasonable that the state of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that state, and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the state, for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed." For a long period it has been settled that a corporation created in one state has no right, under the Constitution of the United States, to transact business in another state, save by the consent, expressed or implied, of that state; and this consent may be given on such terms as the state may see proper to impose, and the terms so imposed are binding on the corporation. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357. The only limitation upon this right is that the conditions imposed must not be repugnant to the Constitution or laws of the United States, or to that principle of natural justice which forbids condemnation without opportunity for defense. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451. So that, if a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done process shall be served upon its agent, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agent to waive service of process. *St. Clair v. Cow*, 106 U. S. 350, 27 L. ed. 225. Continuing in that case, the court said: "Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation." As illustrating the length to which the courts have gone in subjecting foreign corporations to actions or demands which arise in the state of the forum, by service of process on some repre-

sentative within its territorial limits, the cases of *Colorado Iron Works v. Sierra Grande Min. Co.* 15 Colo. 499; *Shickie, H. & H. Iron Co. v. S. L. Wiley Constr. Co.* 61 Mich. 226; and *Pope v. Terre Haute Car & Mfg. Co.* 87 N. Y. 137,—may be referred to. These cases carry the doctrine of representation far beyond the case presented in this record, and much beyond what is required of us in order to sustain the judgment here complained of. In *Pope v. Terre Haute Car & Mfg. Co.* 87 N. Y. 137, the foreign corporation, in a suit by a citizen of New York on a demand growing out of a transaction in that state, was brought into court by service on its president, who was passing through to a seaside resort, and was in no sense there in his official capacity, or upon any business connected with his corporation; and yet it was held that this service would sustain a judgment against a corporation. While not feeling it necessary to agree to the conclusion reached, yet the following paragraph taken from the opinion in that case does meet with our approval: "The object of all service of process for the commencement of a suit or any other legal proceeding is to give notice to the party proceeded against, and any service which reasonably accomplishes that end answers the requirements of natural justice and fundamental law. *Gibbs v. Queen Ins. Co.* 63 N. Y. 114, 20 Am. Rep. 513. And what service shall be deemed sufficient for that purpose is to be determined by the legislative power of the country in which the proceeding is instituted, subject only to the limitation that the service must be such as may reasonably be expected to give the notice aimed at." So, in that case, the supreme court of New York held that, while the president of the corporation was not within the state on the business of the corporation, yet as it was his duty to convey notice of the commencement of the suit to his company, "that he would do so could reasonably be presumed and expected." Mr. Murfree, in his recent work on *Foreign Corporations*, in section 215, after speaking of the great variety among the statutory provisions for bringing foreign corporations into the home forum, says: "The purpose of such provisions being to insure the giving of due notice to the corporation, that idea is given prominence in all the decisions interpreting them. Consequently the general rule . . . is that if the person served sustain sufficient character and rank to render it reasonably certain that the corporation would be apprised of the service, the requirement of the statute is answered." And it may be added that the demand of natural justice will be thereby satisfied. Perhaps no better statement of the doctrine of substituted service can be found than that of Lord Chancellor Craneforth in *Hope v. Hope*, 4 De G. M. & G. 328, which is as follows: "In cases where a defendant is abroad, the question is, whether there is any person here who may be fitly served, and service upon whom may be treated as equivalent to service upon the absent person himself. Now, this has been allowed in a variety of cases; for instance, where there has been an

agent in this country managing all the affairs of a defendant who is abroad and regularly communicating with him upon his affairs, or where he has an agent here specially managing the particular matter involved in the suit. In such cases, the court has felt that it might safely allow service upon the agent to be deemed good service upon the person abroad, because the inference is irresistible that service so made upon the agent is service on a person either impliedly authorized to accept that particular service, or who certainly will communicate the process so served to the party who is not in this country to receive it himself. The object of all service is, of course, only to give notice to the party on whom it is made, so that he may be made aware of, and may be able to resist, that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done that is required."

It will not be assumed by this court that in the act of 1887 the legislature intended to disregard this principle of natural justice, and provide for the service of process upon an agent of a foreign corporation found within the territorial limits of the state, without regard to whether he was here in a representative capacity on the business of his principal, but rather the contrary; and certainly this corporation cannot be heard to complain, whatever others might do, because the agent upon whom service was made in this case was at the time in this state as the representative of the complainant, examining for it into the conditions under which Spratley's death occurred, and finally, upon the authority of his employer, submitting a proposition of compromise of the claim now in controversy. Not only had complainant transactions in this state with regard to the policies before and at the time of their delivery, but, through its agent, was found doing business in respect to them at the time of the institution of this suit; and it cannot be otherwise than that this agent would be reasonably certain to inform his principal of the fact that it had been brought. Certainly, in a case where this reasonable presumption may be made, we do not feel constrained to overturn a beneficent statute upon the suggestion of a mere possibility that it might, in some supposititious cases, be perverted to an unjustifiable end. On this point we are satisfied that the complainant was not put to judgment without due process of law, and that the statute in question is not open to the attack made on it. It is proper to add that we have carefully examined *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. Rep. 286; *United States v. American Bell Teleph. Co.* 20 Fed. Rep. 17; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211,—relied on by complainant's counsel, and we find nothing in them in conflict with this conclusion.

But it is argued that the act of 1887 did not apply to this corporation, because it had filed, under the requirements of chapter 66 of the Acts of 1875 (§ 12), an irrevocable

power of attorney authorizing the secretary of state to accept service. To this it may be said: First. That this agreement is in the face of complainant's bill in which it alleges that it was a nonresident of this state, and had no office or agent in Tennessee, or had not had for some years preceding the institution of the suit on the policies; thus, by implication at least, negating its present proposition. Second. But, as a matter of law, is the contention sound? The legislation on this subject is as follows: Chapter 23 of the Acts of 1873 (§ 2) required foreign fire insurance companies to file with the treasurer of the state a written instrument authorizing any agent of such company in the state to acknowledge service of process, and chapter 66 of the Acts of 1875 (§ 12) required foreign life insurance companies to file with the insurance commissioner a power of attorney authorizing the secretary of state to accept service. Chapter 23 of the Acts of 1873 was repealed by chapter 47 of the Acts of 1891, and chapter 66 of the Acts of 1875, as well as chapter 47 of the Acts of 1891, was repealed by chapter 160, § 49, of the Acts of 1895. All these repeals were express. The suit brought by Mrs. Linda Y. Spratley in the circuit court was instituted on the 15th day of April, 1896. Chapter 160 of the Acts of 1895, repealing chapter 66 of the Acts of 1875, in § 9 contains a provision requiring every foreign insurance company, fire or life, as a prerequisite to admission into the state for the transaction of business, to constitute the insurance commissioner its attorney to accept service. It is not claimed that the complainant company had acted in accordance with this provision. From July 1, 1894, down to the time the suit in the circuit court was brought, complainant company was doing a limited business in Tennessee. It had a large number of policies in the state, from which it collected its premiums at stated periods, and when a death occurred it sent its agent into the state to make the necessary investigation, and report upon the circumstances under which the insured party died, as was done in this particular case. Ordinarily, the rule is that, where civil proceedings or jurisdiction in civil cases depend upon a statute, they fall with the repeal of that statute. Endlich, *Interpretation of Statutes*, § 470. Many illustrations of this rule will be found in the cases, among which are *State v. Brookover*, 22 W. Va. 214; *Stephenson v. Doe, Wait*, 8 Blackf. 508, 46 Am. Dec. 489; *Morgan v. Thorne*, 7 Mees. & W. 400; *Bailey v. Mason*, 4 Minn. 546; *Butler v. Palmer*, 1 Hill. 324; *Williams v. Lincoln County Comrs.* 35 Me. 345; *Tivey v. People*, 8 Mich. 128; *Lamb v. Schottler*, 54 Cal. 319; *Anding v. Levy*, 57 Miss. 58, 34 Am. Rep. 435. But we concede that this rule does not apply in this case, and that the power of attorney given by the complainant is irrevocable, and stands to-day as if the act of 1875 still existed; yet it does not follow that the service on Chaffee, as agent, in the circuit court, was ineffectual to bring complainant into that court. The continued existence of the power of attorney does not

preclude the complainant from being amenable to the operation of the act of 1887. The secretary of the state was not the agent of this corporation save in the most restricted sense; and he was located at the capital of the state, where the discharge of his official duties properly placed him. We may concede that Mrs. Spratley might have called upon him to accept service of her process; but, instituting her suit as she did, at her own home, in a remote part of the state, where there was no resident agent of complainant, but finding one there temporarily whose agency embraced the very subject of her controversy, she had a case within the purview, and she was entitled to avail herself, of the act of 1887. As this court said in *Cumberland Teleph. & Teleg. Co. v. Turner*, 88 Tenn. 265, this act was not one of "limitation," but of "enlargement"; and we are unable to discover why it should not be operative against complainant, while at the same time its power of attorney remains irrevocable. But we cannot accede to the proposition that by complying with the act of 1875, by the execution of its power of attorney to the secretary of state, that complainant thereby made a contract with the state of Tennessee which is protected by the contract provision of the Constitution of the United States; and that no subsequent legislation can make this corporation amenable to action in the courts of the state by service of process on any other agent. We are unable to discover any element of a contract which precluded the state thereafter from adopting

legislation which contemplated bringing this corporation into our courts by service on such other agents as reasonably represented it and were found carrying on its business, within our territorial limits. If the argument of complainant's counsel on this point is sound, then, if the office of secretary of state should be abolished, this result being the act of the state, for which complainant would in no wise be responsible, then our citizens could obtain no redress for their grievances, sustained at the hand of this company in their domestic courts, even if there was an agent with full power of representation residing in each county of the state. A position from which such a conclusion may be deduced we think necessarily unsound. We deem the act of 1875, in this regard, as simply imposing a condition for the state's permission to a foreign life insurance company to come within its borders and transact business with its citizens, and there was nothing in it, or in the acceptance of its terms by the complainant, precluding the legislature from thereafter making other provisions by which, through service upon other agents, either permanently residing or temporarily found here, this corporation might be made to answer in our courts for breach of its contracts made here.

The decree of the chancellor is reversed, and a decree will be entered against complainant and the surety on its injunction bond for the amount of the judgment of the circuit court, and interest upon it, and all costs of the two courts.

VERMONT SUPREME COURT.

STATE of Vermont, *ex rel.* J. W. GOODELL,
v.

J. W. McGEARY.

(69 Vt. 461.)

1. Building and furnishing a new house with the purpose of living in it does not render the owner an inhabitant of the ward in which it is situated for the purpose of becoming an elector therein so long as he continues, with his wife, the actual occupancy of leased premises in another ward.
2. The ineligibility of a person who received the majority of the votes cast for an office does not entitle the minority candidate to the office, at least when those who voted for the former did not know of his ineligibility.
3. An information in the nature of a quo warranto against a respondent for exercising the functions of an

office to which he has not been duly elected rests in sound judicial discretion, and may be denied if the office is of small importance or to continue for a short time only, but not when the office is that of an alderman in a large city, and is to continue for nearly two years.

(July 17, 1897.)

APPPLICATION for a writ of quo warranto to oust defendant from the office of alderman of the Fifth Ward of the City of Burlington, which he was alleged to have usurped. *Judgment of ouster.*

The facts are stated in the opinion.

Messrs. Roberts & Roberts and W. L. Burnap, for relator:

The qualifications for alderman are specified in § 2 of the charter which provides that "the legal voters in each ward shall annually elect one alderman, etc., from among

NOTE.—The above case very clearly presents the somewhat unusual question of the effect of voting for an ineligible candidate who receives a majority of the votes cast. The decision is in accord with the weight of authority on this question.

As to eligibility, see also *State, Perine, v. Van Beck* (Iowa) 19 L. R. A. 622; *State, Childs, v. 44 L. R. A.*

Sutton (Minn.) 30 L. R. A. 630; *Kirkpatrick v. Brownfield* (Ky.) 29 L. R. A. 703; *Demaree v. Scates* (Kan.) 20 L. R. A. 97; *State, Taylor, v. Sullivan* (Minn.) 11 L. R. A. 272; *State, Thompson, v. McCallister* (W. Va.) 24 L. R. A. 343; *Rathbone v. Wirth* (N. Y.) 84 L. R. A. 408.

the legal voters therein, and shall also vote for mayor and city judge,"—irrespective of local habitation.

This word "therein" refers grammatically to the antecedent term "ward" since "city" is not named in the sentence, and is equivalent to the expression, "of the ward."

Residence is a fact. Mere intention does not constitute a residence. There must be some local habitation or place which one can justly call home to return to.

Jamaica v. Townshend, 19 Vt. 267.

The election of the respondent, being a disqualified person, was a simple nullity, and the office is the relator's by reason of his having received the greatest number of lawful and effective votes.

Spear v. Robinson, 29 Me. 531; 2 Spelling, Extraordinary Relief, §§ 1786, 1789.

The choice of a disqualified person is ineffectual and void.

State, Hardwick, v. Swearingen, 12 Ga. 23; *State, Staes, v. Gastinel*, 20 La. Ann. 114.

In this state the court has exercised a discretion as to allowing a petition only in cases where the state was not a party, but a private person—as in *State, Murry, v. Mead*, 56 Vt. 353; *State, Roberts, v. McNaughton*, 56 Vt. 736. See Ang. & A. Priv. Corp. 701.

Where the prosecution was by the state's attorney, the court refused to exercise a discretion.

State v. Harris, 52 Vt. 216; *State v. Bradford*, 32 Vt. 50.

Leave to file is not necessary in such cases. Ang. & A. Priv. Corp. 687, 698.

Messrs. Seneca Haselton and W. B. C. Stickney, for respondent:

The only qualification for being elected to and holding the office of alderman was that one should be a legal voter in the city, and a resident of the ward for which he was chosen at the time of his election.

The qualifications of aldermen are incorporated into the section of the charter which provides for the territorial division of the city into wards, and the word "therein" can and must have a territorial signification only.

Previous to January 1, 1897, the house was dried and regularly heated, supplied with hot and cold water, with a kitchen stove, a sink and a bath room which were in use, with crockery and kitchen utensils, with potatoes, butter, flour, and apples. Previous to said 1st day of January, the rooms in the Woodbury & Walker block, which the defendant with his wife had for a considerable time occupied as lodging rooms, had been dismantled by the taking up of the carpets, the taking down of curtains and the removal therefrom of articles, and the lease under which these rooms had been occupied had been terminated.

From the 1st of January to the 6th of January, Mr. McGeary and his wife were regularly occupied at their new house in the fifth ward, remaining from morning till night.

If the defendant cannot hold the seat to 44 L. R. A.

which he was elected, Mr. Goodell certainly cannot take it.

McCrary, Elections, 3d ed. pp. 198–201; Cooley, Const. Lim. 6th ed. p. 780; Dill. Mun. Corp. 4th ed. § 196; *King v. Hawkins*, 10 East, 211; *King v. Parry*, 14 East, 549; *Queen v. Tewkesbury*, L. R. 3 Q. B. 628; *State, Dunning, v. Giles*, 2 Pinney, 166, 1 Chand. (Wis.) 112, 52 Am. Dec. 149; *Saunders v. Haynes*, 13 Cal. 145; *State, Off, v. Smith*, 14 Wis. 497; *People, Furman, v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508; *Com., McLaughlin, v. Cluley*, 56 Pa. 270, 94 Am. Dec. 75; *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304; *Sublett v. Bedwell*, 47 Miss. 266, 12 Am. Rep. 338; *Re Corlies*, 11 R. I. 638, 23 Am. Rep. 538; *People, Crawford, v. Moliter*, 23 Mich. 341.

The case is one which does not call for action by the court. The objection to the defendants holding the office is in any view a narrow and technical one.

The office itself is not a constitutional one and is one of comparatively small importance.

State v. Fisher, 28 Vt. 714; *State Murry, v. Mead*, 56 Vt. 353; *Com. v. Jones*, 12 Pa. 365; *King v. Sargent*, 5 T. R. 467.

Ross, Ch. J., delivered the opinion of the court:

The disposition of this case involves several inquiries. Was J. W. McGeary duly elected alderman of ward 5 in the city of Burlington at the annual meeting holden March 2, 1897? He received a majority of the votes cast for such officer at that meeting. Was he, then, eligible to the office? The answer to this question depends upon the ascertainment of the length of residence in ward 5 which the charter of the city then required to render him qualified to hold the office, and whether he had resided in that ward for the required length of time. There is no contention in regard to his qualifications for the office in other respects. The charter of the city, as it was March 2, 1897, divided the city into five wards. The same section of the charter which makes the division provides: "The legal voters in each ward shall annually elect one alderman, and the ward officers hereafter named, from among the legal voters therein, and shall also vote for mayor and city judge." We think that this requires a person, to be eligible to the office of alderman, to be a legal voter in the ward. This is the ordinary and natural meaning of the language "from among the legal voters therein." "Therein" means in the ward at the time of the annual election. That is the time the alderman is to be elected or selected out from among the legal voters in the ward. It does not mean, as contended by the counsel for Mr. McGeary, from among the legal voters for mayor or city judge, or other city officer, then resident in that ward. This would make the quoted clause read, "from among the legal voters of the city then resident in the ward." It would apply to the other ward officers as well. The ward officers, by other provisions of the charter, are to be chosen by the legal voters of the ward. Section 13 of the charter creates a

vacancy in the office of alderman if he removes from the ward, to commence from a certain specified time. We find no provision of the charter which changes the ordinary and natural meaning of the clause quoted, or allows the voters of a ward to select their alderman from any other class than their own number, or from the then legal voters in the ward. The charter prescribes the qualifications of voters at a city election, and also the qualifications of voters in a ward election. For the latter he must be a voter in a city election. The charter then further provides: "Every such voter shall vote only in the ward of which he is at the time an inhabitant, and he shall not vote for alderman, school commissioner, or ward officers, in any ward in which he has not resided for two months preceding any such election." Had Mr. McGeary resided in ward 5 for two months prior to the annual election of March 2, 1897, when he claims to have been elected alderman for that ward? He admits that for some years prior to January 1, 1897, he had resided in ward 4 of the city. There he had rooms, which he occupied with his wife. He continued to occupy these rooms, and pay rent therefor, until January 6, 1897. He paid rent by the month until January 1, 1897. Before that time he had arranged with his landlord that if he remained longer than until January 1, 1897, he should pay rent only for the time he remained. Hence, until January 6, 1897, he occupied these rooms with his wife, and slept in them, of right. In fact, he did not remove from them, and take up his abode or place of dwelling in his new house in ward 5, until January 6, 1897. All he had done in purchasing the lot in ward 5, in erecting a dwelling house thereon, in preparing it for occupancy, in moving into it the things necessary for occupying it for a home from his rooms in ward 4 and from other sources, was preparatory to making his abode therein January 6, 1897. For a year or more he had been intending to make the new house his home at some future time, but the intention alone, nor with the preparations added, did not make it his home. The final act which transferred his home from the rooms in ward 4 to the new house in ward 5 was when he ceased to occupy the rooms, with his wife, as a place of abode, on January 6, 1897, and took up his abode in his new house in ward 5. Hence, on March 2, 1897, he had not resided two full months in ward 5, was not therein a legal voter for ward officers and therefore not eligible to be elected alderman for that ward.

Was the relator duly elected alderman for ward 5 at this election? He did not receive a majority of the votes cast. It is not established that the legal voters of the ward who cast their votes for Mr. McGeary knew that the provisions of the then charter required them to elect an alderman from among the legal voters in the ward, nor that he was not then a legal voter in the ward. By all the decisions, English and American, such knowledge by the voter must be clearly established, to have his vote treated as know-

ingly and purposely cast for a person ineligible to the office, and for that reason not to be counted, but to be treated as thrown away. Hence, under the most liberal rule in regard to rejecting votes cast by legal voters at an election, the votes cast for Mr. McGeary are not to be treated as though they had not been cast, but under our system of government, where the will of the legal voters, as expressed by their ballots, controls, it has been almost universally held that to insure an election a majority or plurality, as may, by law, be required, of the legal votes cast, must be received. Votes cast by legal voters are not to be rejected, although by the voter cast for a person known to be ineligible to the office. *King v. Hawkins*, 10 East, 211; *King v. Parry*, 14 East, 549; *State, Dunning, v. Giles* [2 Pinney, 166] 52 Am. Dec. 149, and note; and other cases cited by the defendant. Hence the relator cannot be declared elected if Mr. McGeary is ousted.

It is conceded, as is held by our decisions, that the granting or withholding leave to file an information in the nature of a quo warranto against a respondent for exercising the functions of an office to which he has not been duly elected, either because he did not receive the required number of legal votes or was not then eligible to the office, rests in sound judicial discretion. If the office is of very small importance; if it is for a short term, or the term has nearly expired; if no other person complains of being deprived of the office; and if the objection taken to the respondent's holding the office is technical, and of no considerable practical importance, —the leave to file an information is refused. *State v. Fisher*, 28 Vt. 714, indorsed in *State, Murry, v. Mead*, 56 Vt. 353. But if it is an office of importance, the proper exercise of which may seriously affect public interests or private rights, like the management and control of great moneyed corporations, or the quiet and good government of a municipality, involving the interests of large numbers, leave is usually granted to file the information, and judgment of ouster from the office is rendered thereon, although no other person has been duly elected to the office. The office in contention is an important one, touching many interests of the largest city of the state and of its inhabitants, and is to continue for nearly two years. Under our form of government, "of the people, by the people, for the people," it is of importance that no one should be allowed to exercise the functions of an important municipal office unless duly elected thereto according to law. In no other way can a high respect for law be maintained. Without a general prevalence of high respect for the law among the people, the rights of the people become unstable and insecure. No one has been legally elected alderman for ward 5. It is an office of importance. It is the right of the legal voters of the ward to determine who shall serve them in that capacity.

Let the information be filed, and judgment of ouster against the respondent be entered thereon. No costs to either party.

VIRGINIA SUPREME COURT OF APPEALS.

CHESAPEAKE & OHIO RAILWAY COMPANY, *Plff. in Err.*,
v.

AMERICAN EXCHANGE BANK, for Use
of T. F. JAMISON & CO.

(92 Va. 495.)

1. A demurrer treated in the trial court as waived or withdrawn must be so considered on appeal.
2. Failure of a railroad company to provide suitable and safe facilities for loading and unloading stock, and also for watering and feeding them while being carried over its line of road, is negligence against which a common carrier is not permitted to contract.
3. Horses and mules as well as animals intended for food are within the provisions of U. S. Rev. Stat. § 4386, requiring "cattle, sheep, swine, or other animals," when carried from one state to another, to be unloaded for rest, water, and feeding if confined for twenty-eight hours.
4. A civil action against a railroad company by the owner of injured cat-

tle to recover damages for violation of U. S. Rev. Stat. § 4386, requiring cattle to be unloaded for rest, water, and feeding when confined for twenty-eight consecutive hours, can be maintained in a state court, and is not within the rule which prohibits one state from enforcing the penal laws of another state or country, although there is a penalty provided for violating the statute, which is payable to the United States.

5. The safety and suitability of a platform used by a railroad company for unloading horses from a car is a question for the jury when the evidence is conflicting.
6. "Other accidental causes" within the meaning of U. S. Rev. Stat. § 4386, making a railroad company liable for failure to unload cattle when confined for twenty-eight hours unless prevented by "storm or other accidental causes," must be taken to mean other inevitable accidental causes.

(January 18, 1896.)

ERROR to the Circuit Court of the City of Lynchburg to review a judgment in favor of plaintiff in an action brought to recover damages for injuries to horses and

NOTE.—Statutory duties of carriers of live stock with reference to care of stock during transportation.

- I. Scope of note.
- II. The United States statute.
- III. The South Carolina statute.
- IV. The Texas statute.
- V. Miscellaneous statutory provisions.

I. Scope of note.

This note is limited to the statutory duties of carriers of live stock with reference to care of stock during transportation. The somewhat wider, though very similar, field of common-law duties growing out of the nature of the employment is left untouched. It is to be observed, however, that, aside from the act of Congress on the subject, probably enacted to meet the exigencies of interstate and foreign commerce, the common-law rules have been relied upon there being but few of the states that have adopted any statutory provisions on the subject, and the statutes enacted would appear to be little else than an adoption of common-law rules.

II. The United States statute.

The United States Revised Statutes provide as follows:

"§ 4386. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description, for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the in-

tent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated.

"§ 4387. Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or, in case of his default in so doing, then by the railroad company or owners or masters of boats or vessels transporting the same, at the expense of the owner or person in custody thereof; and such company, owners, or masters shall in such case have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals.

"§ 4388. Any company, owner, or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

"§ 4389. The penalty created by the preceding sections shall be recovered by civil action in the name of the United States, in the circuit or district court of the United States, holden within the district where the violation may have been committed, or the person or corporation resides or carries on its business; and it shall be the duty of the United States marshals, their deputies and subordinates, to prosecute all violations which come to their notice or knowledge."

This prohibition against the confinement of stock transported for more than twenty-eight consecutive hours without unloading for feed, water, and rest, and prescribing of a penalty therefor and for the recovery of damages, is directly within the terms of the clause of the Federal Constitution authorizing Congress to regulate commerce among the several states. *United States v. Boston & A. R. Co.* 15 Fed. Rep. 209.

But it is intended only to affect companies whose roads form a part of a line of roads over

mules while in defendant's possession for transportation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Kirkpatrick & Blackford and William J. Robertson, for plaintiff in error:

Plaintiff in the court below had no right to sue for damages sustained by it by reason of a failure on the part of the defendant to comply with the requirement of § 4386, U. S. Rev. Stat.

18 Am. & Eng. Enc. Law, pp. 272, 273; *Atkinson v. Newcastle & G. Waterworks Co.* L. R. 2 Exch. Div. 441; *The Antelope*, 10 Wheat. 123, 6 L. ed. 282; *United States v. Lathrop*, 17 Johns. 4; *Ex parte Dock Bridges*, 2 Woods, 428; *Com. v. Feely*, 1 Va. Cas. 321; *Jackson v. Rose*, 2 Va. Cas. 34; *Nelson v. Chesapeake & O. R. Co.* 88 Va. 974, 15 L. R. A. 583; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239; *Huntington v. Attrill*, 140 U. S. 657, 36 L. ed. 1123.

Messrs. H. T. Wickham and Henry Taylor also for plaintiff in error.

Messrs. Keen & Lile, for defendant in error:

The court below ought to have disposed of

the plea to the jurisdiction on the demurrer. Dilatory pleas are not favored because they obstruct justice and hinder the merits of the cause. Hence it is that the liberality extended by statute and practice as to pleadings to the merits is denied to them, and they are expressly excepted in § 3272 of the Code. "Great precision is required."

5 Rob. New Prac. 106; *Foxvist v. Tremaine*, 3 Wms. Saund. 209 b, note 1; *Horton v. Townes*, 6 Leigh, 58; *Lloyd v. Williams*, 2 Maule & S. 485.

A material part of the cause of action arose in the city of Lynchburg. "An action may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein."

Code, § 3215.

A cause of action is said to accrue to any person, when that person first comes to a right to bring an action.

Bouvier, Law Dict., *Cause of Action*; *Howell v. Young*, 5 Barn. & C. 260; *Thorpe v. Coombe*, 8 Dowl. & R. 347; *Douglas v. Forrest*, 4 Bing. 686; 3 Am. & Eng. Enc. Law, p. 46, note; *Douglas v. Beasley*, 40 Ala.

which animals are conveyed extending from one state to another, and does not apply where the line lies wholly within the territorial limits of one state. *United States v. Louisville & N. R. Co.* 18 Fed. Rep. 480; *United States v. East Tennessee, V. & G. R. Co.* 13 Fed. Rep. 642, 9 Am. & Eng. R. Cas. 259.

And it is intended to prevent cruelty in interstate commerce, as well as danger to the public health from inducing disease in animals which are to be used for food. *Brockway v. American Exp. Co.* 168 Mass. 257.

And it was designed to prohibit the confinement of stock on cars longer than the time named, and to fix penalties for the violation thereof, and not to fix a period during which a railroad company could without incurring liability hold cattle on its cars without unloading for the purposes named; and the question of negligence for failing to so unload though the twenty-eight hours had not elapsed is left as at common law. *Missouri P. R. Co. v. Ivy*, 79 Tex. 444.

So, the term "other animals" employed in U. S. Rev. Stat. § 4387, imposing a penalty upon a railroad company for keeping cattle, sheep, swine, or other animals confined in the same car for a longer period than twenty-eight consecutive hours, includes mules and horses. *United States v. Louisville & N. R. Co.* 18 Fed. Rep. 480. And see *CHESAPEAKE & O. R. Co. v. AMERICAN EXCH. BANK*.

And an accident to a train transporting stock, caused by negligence of the persons in charge, will not excuse delay, and exonerate the railroad company from the penalty imposed by U. S. Rev. Stat. § 4386, for detention of stock in cars for more than twenty-eight consecutive hours without unloading, unless prevented from so unloading by storm or other accidental causes. *Newport News & M. Valley Co. v. United States*, 22 U. S. App. 145, 61 Fed. Rep. 488, 9 C. C. A. 579.

And the fact that stock yards of a railroad company at a station were on fire when the train arrived is not a sufficient excuse for not furnishing to a person in charge of animals being transported thereon proper facilities for unloading the same for food, rest, and water, and for not stopping the car for five hours in

accordance with the provision of that act. *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210.

So, a railroad company is not excused from liability where it violates U. S. Rev. Stat. § 4386, providing that live stock shall not be kept more than twenty-eight consecutive hours without unloading the same for rest, water, and food, by the fact that the person in charge of the stock does not urge compliance with the statute, as it is the duty of the company's servants and agents to select the place for stopping without his request. *Ibid.*

United States Rev. Stat. § 4388, imposing a penalty and forfeiture upon any company, owner, or custodian of animals for failure to feed and water them while being transported as provided for in that act, however, does not apply to receivers who are simply the court's officers appointed to execute its orders, the property being in the custody of the court. *United States v. Harris*, 78 Fed. Rep. 290.

And the penalty imposed by U. S. Rev. Stat. § 4386, for the confinement of animals during transportation for a longer period than twenty-eight consecutive hours without unloading applies to the confinement of the entire number of animals, and the unlawful confinement of each separate animal does not constitute a separate offense. *United States v. Boston & A. R. Co.* 15 Fed. Rep. 209.

And a railroad company is not liable to the penalty imposed by that act, where twenty-eight hours had not elapsed after the stock was loaded before it was delivered to the first connecting carrier. *United States v. Louisville & N. R. Co.* 18 Fed. Rep. 480.

But in estimating the twenty-eight hours longer than which a carrier is prohibited from confining stock in the same cars by that act, the time during which stock was confined without rest previously on connecting roads must be included, and the company having possession at the expiration of the twenty-eight hours is responsible, though a part of such confinement was by a previous connecting carrier. *Ibid.*

So, a railroad company transporting a car load of cattle, which takes out the car containing them and leaves it at a station so that it may be unloaded and rested for five hours as

148; *Carker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *Cooke v. Gill*, L. R. 8 C. P. 107; *Borthwick v. Walton*, 15 C. B. 501.

It was distinctly negligence not to have better facilities, and defendant was not relieved of this obligation by the contract of shipment, however stringent.

Taylor, B. & H. R. Co. v. Montgomery (Tex. Civ. App.) 16 S. W. 178.

Whenever the law, either the common law or a statute, imposes a duty and creates an obligation, and such duty and obligation are violated, any person injured thereby has a right of action for redress.

Burnett v. Lynch, 5 Barn. & C. 589, 595; 3 Rob. New Pr. 425; *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210; *Taylor, B. & H. R. Co. v. Montgomery* (Tex. Civ. App.) 16 S. W. 178; *Taylor, B. & H. R. Co. v. Sublett* (Tex. Civ. App.) 16 S. W. 182.

Messrs. Ford & Ford also for defendant in error.

Buchanan, J., delivered the opinion of the court:

This is a writ of error to the judgment of the circuit court of the city of Lynchburg

required by U. S. Rev. Stat. art. 4386, will not be held liable for delay in transportation where the car is forwarded by the first regular freight train passing afterwards, which passes about seven hours after the expiration of the five hours. *Galveston, H. & S. A. R. Co. v. Warnken*, 12 Tex. Civ. App. 645.

But an instruction in an action against a railroad company for damages resulting from delay in transportation of stock, based upon the assumption that there was evidence from which the jurors might find that the stock were not in fact delayed longer than was necessary to comply with the Federal statute with relation to feeding and watering, is erroneous and misleading where it appears that the cattle were detained about eleven hours, while the statute only contemplates a detention of five hours, and that they had been *en route* only fourteen hours and were loaded in cars in which they could be fed and watered without unloading. *Missouri P. R. Co. v. Hall*, 66 Fed. Rep. 868.

The stoppage of a car load of stock at a station for the purpose of unloading and resting the stock, as required by U. S. Rev. Stat. art. 4386, will be presumed, however, to have been made in a proper endeavor to comply with the law, in an action by the shipper against the carrier for delay, though it is shown that the stock was provided with food and water in the cars, where it is not shown that they had space and opportunity for rest. *Galveston, H. & S. A. R. Co. v. Warnken*, 12 Tex. Civ. App. 645.

A special contract between the shipper and a carrier of live stock that the shipper should send someone with the stock to attend to feeding, watering, loading, and unloading during the trip, and the act of Congress imposing upon the person in charge of the stock the duty of feeding and watering it, relieve the carrier of the duty in the first instance where it furnishes reasonable facilities to the shipper to do so, but in the absence of such facilities at any point the contract would be held unreasonable as to such point, and the carrier would be liable for any damage resulting from failure to feed and water at that point. *Fort Worth & D. C. R. Co. v. Daggett*, 87 Tex. 322, 61 Am. & Eng. R. Cas. 322. And see *CHESAPEAKE & O R. Co. v. AMERICAN EXCH. BANK.*
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in an action on the case instituted by the American Exchange Bank for the benefit of T. F. Jamison & Co. against the Chesapeake & Ohio Railway Company for damages alleged to have been done to two car loads of horses and mules while being transported over the defendant's line of road.

The defendant filed a plea to the jurisdiction of the court. To this plea the plaintiff demurred, but the court overruled its demurrer, and it then filed a special replication to the plea, upon which issue was joined, and a trial was had by a jury impaneled to try that issue, and a verdict rendered in favor of the plaintiff.

After overruling a motion of the defendant to set aside this verdict, because contrary to the evidence, the court rendered judgment upon it, and proceeded to try the case upon its merits. Upon that trial a verdict and judgment were rendered in favor of the plaintiff.

The first assignment of error is based upon the action of the court in overruling the motion to set aside the verdict and grant a new trial on the issue raised by the plea in abatement to the jurisdiction of the court, because

And a contract between a shipper of stock and a railroad company by which the company is relieved from all liability beyond its own line does not relieve the railroad company from liability for retaining the stock in its cars more than twenty-eight consecutive hours without being fed or watered in violation of the Federal statute, though a part of the period of confinement was after a connecting carrier had refused to take the cars, where it failed to comply with a reasonable request of the owner to place the cars where he could unload them, and it is immaterial that he might have had a remedy against the connecting carrier for the refusal to accept and unload the stock. *Texas & P. R. Co. v. Birchfield* (Tex. Civ. App.) 46 S. W. 900.

So, where stock is delivered to a railroad company upon a verbal contract for shipment the company upon such delivery becomes bound to transport the stock with care, diligence, and despatch, and without unreasonable delay, at the price agreed on, and to unload them for rest, water, and feeding every twenty-eight hours as required by U. S. Rev. Stat., and failure to do so renders it liable in damages; and a contract subsequently entered into by which its liability is limited is without consideration and invalid. *Texas & P. R. Co. v. Avery* (Tex. Civ. App.) 46 S. W. 897.

But no recovery can be had in an action by a shipper against a carrier for violation of U. S. Rev. Stat. § 4386, prohibiting the confinement of cattle in the same cars for a longer period than twenty-eight hours without unloading for rest, water, and feeding, where there was a special contract between the parties that the shipper was to take care of, feed, water, and attend to the stock, and the evidence is not sufficiently specific to enable the court to assess the damages arising from failure to feed and water. *Missouri P. R. Co. v. Texas & P. R. Co.* 41 Fed. Rep. 913.

And U. S. Rev. Stat. § 4387, imposes upon the person in charge of stock under transportation the duty of feeding and watering it independent of any contract, and he cannot divest himself of such duty by attempting a rescission of the contract of carriage because of delay in shipping and transportation when reasonable facilities for such feeding and watering were

the verdict was contrary to the evidence. The plaintiff, by his counsel, insists that the verdict is sustained by the evidence, but whether it is or not, he contends, is immaterial, as the defendant's plea to the jurisdiction is fatally defective, and the demurrer to it should have been sustained.

We do not think that the demurrer to the plea can be considered here. The plaintiff had the right to demur or reply to the plea, but he had no right to do both. The common law did not allow a party to demur and plead to the same matter. This rule has been changed by the statute so as to allow a defendant to "plead as many several matters whether of law or fact, as he shall think necessary." Code 1887, § 3264.

But, as to subsequent stages of the pleading, there has been no change in the common law. The plaintiff can make one answer, either of law or of fact, but no more to each plea. *Lang v. Lewis*, 1 Rand. (Va.) 277; 4 Minor, Inst. 3d ed. 166, 167. To escape this inconvenience in the replication and subsequent stages of the pleading, the practice is to demur, if the party desires to do so, and,

if the demurrer be overruled, to obtain leave from the court (which is granted as a matter of course) to withdraw the demurrer, and then to answer in point of fact; but, if the demurrer is not withdrawn, no further answer can be made, and the court must give judgment in favor of the defendant on the issue raised by the plea. *Maggott v. Hansbarger*, 8 Leigh, 532; 4 Minor, Inst. 1167.

In this case, although the record does not show that the demurrer was withdrawn, the court and parties must have so considered it: otherwise, the replication could not have been filed, and a trial had upon the issue of fact raised by it. The demurrer having been treated in the trial court as waived or withdrawn, it must be so considered here.

The question raised by the plea to the jurisdiction was whether the cause of action sued on, or any part thereof, arose within the jurisdiction of the circuit court of the city of Lynchburg.

The evidence introduced upon that issue shows that the injury to the horses complained of was chiefly done between the city of Covington, in the state of Kentucky, and

furnished by the carrier. *Fort Worth & D. C. R. Co. v. Daggett*, 87 Tex. 322, 61 Am. & Eng. R. Cas. 322.

So, a petition in an action against a railroad company for damages for injuries caused by keeping stock in the cars more than twenty-eight consecutive hours, against the prohibition of U. S. Rev. Stat. § 4386, must show that the case is not within the exception of the statute where animals have proper food, water, space, and opportunity to rest on the cars. *Hale v. Missouri P. R. Co.* 86 Neb. 266.

The rule has been laid down that U. S. Rev. Stat. § 4386, laying down a definite rule for the transportation of animals with reference to the length of time they may be kept in a car, and prescribing penalties for a disregard of the rule, and providing in a subsequent section for the recovery of the penalty in a civil action in the proper Federal court, in no way concerns the state courts, and they have nothing to do with its enforcement. *Illinois C. R. Co. v. Peterson*, 68 Miss. 454, 14 L. R. A. 550.

A railway company failing to comply with the requirements of U. S. Rev. Stat. § 4386, imposing a penalty upon carriers which transport live stock if the animals are kept in the cars more than twenty-eight consecutive hours unless prevented from unloading by storm or other accidental causes, however, is liable in damages to the owner of the stock as well as for penalties. *Hale v. Missouri P. R. Co.* 86 Neb. 266. And see *CHESAPEAKE & O. R. Co. v. AMERICAN EXCH. BANK*.

And this theory seems to have been acted upon to some extent, that a violation of the statute is negligence *per se*, or at least evidence of negligence, and that as such it may be considered in state as well as Federal courts.

Thus, under U. S. Rev. Stat. § 4386, providing that no railroad company transporting animals from one state to another shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, where a railroad company keeps live stock upon its cars more than twenty-eight consecutive hours, it constitutes negligence *per se*, and such railroad company is liable, not only for the penalty 44 L. R. A.

prescribed in the statute, but also for any damage or injury that may thereby be sustained by the owner of the stock. *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210.

And though that statute does not apply expressly to an express company hiring its accommodations from railroad companies, and though it does not subject the company itself to a penalty, its existence is strong evidence of the company's duty to give a reasonable opportunity to the custodian who accompanies stock on the train to provide it with food and drink on the journey. *Brockway v. American Exn. Co.* 168 Mass. 257.

Where horses are transported by an express company from one state to another upon railroads of which it hires accommodations, and the horses are kept in the car without food, drink, and rest for forty-nine hours in violation of that act, and the agent of the railroad company and the express company, who knows that the car will be delayed for several hours at an intermediate point, refuses a request by the custodian of the horses to unload and feed and water them upon the plea that they will soon arrive at their destination, the express company is guilty of gross negligence, and is liable in an action by the owner for injuries caused by such refusal to unload. *Ibid.*

Attention is also called to the other cases in state courts above set forth in which the Federal statute is applied and enforced.

III. The South Carolina statute.

The South Carolina statute (Rev. Stat. § 1675) is substantially the same as the Federal statute, in that it also prescribes twenty-eight hours as the period beyond which stock must not be confined without feeding.

A connecting carrier is bound to take notice of the length of time a shipment of animals has been confined by the carrier from which it received it under that act. *Comer v. Columbia, N. & L. R. Co.* 52 S. C. 36.

And it includes within the prohibition the time during which the animals have been confined without rest on connecting roads from which they are received, and the question is not how long the animals have been confined in the cars without rest or water by one particular company, but how long they have been so con-

the city of Lynchburg, in this state; but we think there was evidence before the jury showing that a part of the injury was done after the horses arrived at Lynchburg.

It appears that, when the train upon which the horses were shipped reached that point, they were in such condition that it was agreed between the parties that they might be taken from the train, although they were billed to Danville, Virginia. In unloading them, the evidence tends to show that one of the horses was crowded or pushed off of a narrow platform over which they had to pass in going from the cars to the street, and one of its knee joints so fractured that it caused lockjaw, from which the horse died.

The jury were justified in believing that the injury to this horse was caused in Lynchburg. Whether the injury was caused, as the plaintiff contends, by reason of the failure of the defendant to provide suitable and safe facilities for unloading the horses there, or whether, as the defendant insists, the facilities for unloading were suitable and safe, or, if they were not, the plaintiff was guilty of contributory negligence, so as to

finely by that company and its connecting roads. *Ibid.*

And a carrier is not relieved from liability thereunder for keeping cattle confined during transportation for more than twenty-eight hours without food, by the fact that a special contract existed under which the shipper assumed the duty of loading, unloading, feeding, and watering. *Ibid.*

So, a nonsuit will not be granted in an action by a shipper against a carrier of live stock under the statute where there is some testimony tending to show that the stock in question was confined in cars for a longer period than twenty-eight hours. *Ibid.*

And the failure on the part of a railroad company to furnish the necessary facilities to a shipper to enable him to feed and water his stock renders it liable thereunder, though under the contract of shipment the shipper assumed the duty of loading, unloading, feeding, and watering. *Ibid.*

And the failure of a railroad company to furnish facilities to a shipper of stock for loading, unloading, feeding, and watering, which the shipper had contracted to do, need not be wanted to render it liable. *Ibid.*

IV. The Texas statute.

Texas Rev. Stat. art. 284, provides that it shall be the duty of a common carrier who conveys live stock of any kind to feed and water the same during the time of conveyance and until the same is delivered to the consignee or disposed of as provided by law, unless otherwise provided by special contract, imposing a liability to the owner for damages and a penalty.

This statute, as applied to a shipment of stock from one state to another is a legitimate exercise of the state's police power, and not an attempt to regulate interstate commerce in such a sense as to infringe upon the exclusive constitutional right of Congress, where the initial points of the shipment and the matter complained of under the statute were both within the state. *Gulf, C. & S. F. R. Co. v. Gray* (Tex. Civ. App.) 24 S. W. 837.

And it is not invalid as applied to an interstate shipment of live stock as in conflict with U. S. Rev. Stat. §§ 4386, 4388, 4389, prohibiting the confinement of stock in cars for a longer than

prevent his recovery, were questions to be tried upon the merits of the case, and not upon the plea to the jurisdiction of the court.

The court, we think, properly overruled the motion of the defendant to set aside the verdict of the jury in favor of the plaintiff upon the plea to the jurisdiction.

The second assignment of error is that the court erred in not setting aside the verdict of the jury upon the merits.

The evidence of the plaintiff (and it is upon that evidence the case must be considered here where there is any conflict) shows that the horses were seriously injured while they were being carried over the defendant's line of road, and that the damages which were recovered are not more than the plaintiff was entitled to recover if the defendant was liable for the injuries complained of.

The contract under which the horses and mules were shipped provided that, in consideration of a reduced rate of freight, the defendant was not to be held responsible for any loss or damage which might occur in loading, forwarding, or unloading the stock,

period than twenty-eight consecutive hours without unloading on transportation from one state to another, where the shipment had its initial point in the state, and the matter complained of for which the penalty is asked occurred within it. *Ibid.*

And it is not invalid on the ground that it is too vague and indefinite to support a penalty. *Ibid.*

And an instruction in an action by a shipper of cattle against a railway company alleging that it failed to deliver the cattle according to contract, in which it appeared that thirty-one hours elapsed between the times of feeding and watering such cattle, that it is the duty of a carrier to feed and water live stock during the time of conveyance and until delivery unless provided by special contract, and that it is liable to the party injured for damages for failure to do so, is not subject to the objection that it leaves it discretionary with the jury to find damages upon an issue not made by the pleadings. *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) 16 S. W. 178; *Taylor, B. & H. R. Co. v. Sublett* (Tex. App.) 16 S. W. 182.

A carrier is primarily bound to provide food and water for stock shipped over its line of railroad, and it is its duty to provide suitable places for feeding and watering stock transported, and if this is not done it is responsible for any loss occurring from such neglect. *Gulf, C. & S. F. R. Co. v. Wilhelm* (Tex. App.) 16 S. W. 109.

And under Tex. Rev. Stat. art. 284, making it the duty of all common carriers conveying live stock of any kind to feed and water the same during the time of conveyance unless otherwise provided by special contract, if the cars in which it is transported be not so constructed that this may be done without unloading it, it becomes the duty of a railroad company carrying such stock to provide places where it may be unloaded, watered, and fed without injury, and it is not enough that the places so prepared may be suitable in good weather; and it would be liable for an injury resulting from the fact that a pen maintained by it was muddy by reason of recent rains. *International & G. N. R. Co. v. McRae*, 82 Tex. 614.

And a railroad company transporting live

for the want of feed or water, or for any other cause incident to railroad transportation, except for fraud or gross negligence in forwarding the particular cars in which the stock was loaded. It further provided that the plaintiff should load and unload the stock, and feed and water them at its own risk and expense.

Although the contract by which the plaintiff undertook to load, feed, water, and unload its stock at its own risk and expense may have been a valid and binding contract, it was the duty of the defendant to provide suitable and safe facilities for loading and unloading the stock, and also for watering and feeding them while being carried over its line of road. *Norfolk & W. R. Co. v. Harman*, 91 Va. 601; *Hutchinson, Car.* § 322a.

A failure to provide such facilities is negligence, against which a common carrier is not permitted to contract. Code, § 1296; *Norfolk & W. R. Co. v. Harman*, 91 Va. 601; *Virginia & T. R. Co. v. Sayers*, 26 Gratt. 328.

The evidence of the plaintiff shows that

stock should not only have proper machinery and facilities for unloading such stock whenever in the course of transit it may be necessary to unload it for necessary exercise and refreshment, but also to unload, feed, and water it at the journey's end if there be delay in making delivery and discharging the carrier from liability where the health of the animals requires it. *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) 16 S. W. 178; *Taylor, B. & H. R. Co. v. Sublett* (Tex. App.) 16 S. W. 182.

And a carrier under a contract with a shipper of cattle providing that its liability shall cease upon delivery to a connecting carrier, which does not make an immediate delivery upon arrival at the end of the route, is liable for any injury resulting from a refusal of a request by the shipper for an opportunity to feed and water the cattle. *Texas & P. R. Co. v. Stribling* (Tex. Civ. App.) 34 S. W. 1003.

And a railroad company carrying stock to be delivered to a connecting carrier, which falls and neglects to feed and water it or allow the shipper to do so for more than thirty hours while *en route*, is liable for the damages resulting though the effect of such failure does not appear or become developed until later during the trip, and after the stock has passed from its possession. *Galveston, H. & S. A. R. Co. v. Herring* (Tex. Civ. App.) 24 S. W. 939.

The question whether a carrier under contract with a shipper of cattle releasing it from liability upon delivery of the cattle to a connecting carrier held them a sufficient length of time after arrival at the end of its route to afford the shipper opportunity to feed and water them, and if so held what injury resulted therefrom, are questions for the jury. *Texas & P. R. Co. v. Stribling* (Tex. Civ. App.) 34 S. W. 1003.

But a railroad company is not bound to feed cattle *en route* or afford the shipper opportunity to do so, where by the contract its liability is to cease upon delivery of the stock to a connecting carrier, and the run upon its road is but little over three hours. *Ibid.*

And no penalty can be recovered under the Texas statute for failure of a carrier to feed and water stock where the distance it was to be carried was such that it would require such a short time to carry it that an ordinarily prudent person would not under similar circum-

stances have fed and watered cattle that were in proper condition for shipment. *Ibid.*

It is the duty of a shipper of cattle to properly feed and water them before starting them on their journey, and the carrier is authorized to presume, in the absence of knowledge to the contrary, that the cattle have been properly fed and watered before they are tendered for shipment. *Ibid.*

A shipper cannot tender his cattle in a starved and famished condition to a carrier for a short haul of a few hours, and compel the carrier to feed and water them during the trip or incur a penalty for the refusal so to do. *Ibid.*

So, a railroad company cannot bind the shipper by contract to load, unload, and reload his stock at his own risk, and feed, water, and attend it at his own risk while in the stock yards, and relieve itself from responsibility for such feeding, watering, and attention. *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314.

A carrier is liable for injuries to cattle shipped, though the shipper agrees to accompany them and feed and water them at his own risk, where it fails to furnish him with proper facilities for so doing. *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) 16 S. W. 178; *Taylor, B. & H. R. Co. v. Sublett* (Tex. App.) 16 S. W. 182.

Thus, a railroad company carrying stock which is not fed or watered for thirty hours is just as liable therefor where the duty under the contract of carriage devolved upon the shipper, and it fails to give him opportunities or facilities for feeding and watering, as it would be if the duty of feeding and watering rested with it. *Galveston, H. & S. A. R. Co. v. Thompson* (Tex. Civ. App.) 23 S. W. 930.

And a railroad company carrying stock cannot escape liability for failure to feed and water it for thirty-one hours, upon the ground that the contract of carriage provided that the shipper should feed and water the stock in transit and release the carrier from all damages on account thereof, without showing that it afforded the shipper sufficient and reasonable facilities and necessary opportunities to feed and water such stock during the trip. *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) 16 S. W. 178; *Taylor, B. & H. R. Co. v. Sublett* (Tex. App.) 16 S. W. 182.

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with the express promise that they would be taken to the stock yards the next morning, where they would be unloaded and fed. This was not done, and the horses had neither food nor water until they reached Greenbrier, on Wednesday evening, about sundown.

In addition to the duty imposed upon a common carrier of live stock by the common law, § 4386 of the Revised Statutes of the United States provides that "no railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description, for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confine-

ment the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated."

The counsel of the defendant contends that the statute of the United States has no application to this case, and that no damages can be recovered for its violation, even if damages resulted therefrom:

First. Because the statute does not embrace horses and mules, but applies only to cattle, sheep, swine, and such other animals as are intended for food; that the statute was intended to secure the people of the country from consuming diseased animal food; and that the statute is restricted to animals used for that purpose. It is true that the words "horses" and "mules" are not named in the statute, but the words "other animals" are used, and they are sufficiently comprehensive to embrace horses and mules.

So, a railroad company carrying stock may be held responsible for consequences resulting from a failure to feed and water it, though the shipper is under a contract to load and unload and feed and water, after a reasonable time has elapsed, where the train is detained for an unreasonable time through the negligence of the carrier. *Fort Worth & D. C. R. Co. v. Daggett* (Tex. Civ. App.) 27 S. W. 186.

And a railroad company carrying stock is liable for injury thereto from failure to feed and water the same for thirty-one hours, though it was carried under special contract that the shipper was to feed and water it, and though the carrier had watering stations at convenient points along its line, where it failed and neglected to notify the shipper of the location of such feeding and watering places and of the time when the trains conveying the cattle arrived at such stations, and the cattle were damaged by reason of such failure. *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) 16 S. W. 178; *Taylor, B. & H. R. Co. v. Sublett* (Tex. App.) 16 S. W. 182.

But a railroad company is exonerated from responsibility under Tex. Rev. Stat. art. 284, providing that it shall be the duty of a common carrier who conveys live stock of any kind to feed and water it during the time of conveyance and until delivered to the consignee or otherwise disposed of, unless otherwise provided by special contract, where there was a special contract that the shipper was to take care of, feed, and water and attend to the stock, and that it was to be fed and watered at a designated place, and it does not appear that the carrier was requested to stop for feed and water at any other place. *Missouri P. R. Co. v. Texas & P. R. Co.* 41 Fed. Rep. 913.

And an instruction in an action by a shipper of horses for damages from failure of the carrier to feed and water them, and for the statutory penalty therefor confining the negligence in feeding and watering to a particular place, is not reversible error where the proof shows that the only attempt and the only opportunity given to water and feed was at that place. *Galveston, H. & S. A. R. Co. v. Thompson* (Tex. Civ. App.) 23 S. W. 980.

So, while the consent of a shipper of cattle to the omission to feed and water them at a 44 L. R. A.

particular place would estop him from claiming negligence on the part of the carrier for not feeding and watering them at that place where the only delay was such as resulted in the extra time required to make the next feeding station in the absence of negligence on the part of the carrier, it would have no effect on an unusual delay by its negligence in not making the customary time. *St. Louis, A. & T. R. Co. v. Turner*, 1 Tex. Civ. App. 625.

But a railroad company is not liable for a penalty imposed by statute for failure to feed animals shipped over its road when the failure occurred while the road was in the hands of a receiver. And statutory penalties incurred while a railroad is in the hands of a receiver do not constitute such a claim against the company as would be included within the equitable rule that to the extent of the income used by the receiver in improvement of the property the company would afterwards be liable for claims arising under and not paid by the receiver. *Texas & P. R. Co. v. Barnhart*, 5 Tex. Civ. App. 601.

In order to recover the penalty or forfeiture prescribed by art. 284, Tex. Rev. Stat., for not properly feeding and watering cattle shipped the statutory grounds must be particularly set forth and fairly established by proof. *Good v. Galveston, H. & S. A. R. Co.* (Tex.) 4 L. R. A. 801.

But the location of feeding and watering stations for the purpose of feeding and watering stock that might be transported over lines of railway is a fact peculiarly within the knowledge of the railway companies and owners of transporting lines, and is not a matter to be pleaded by the shipper in bringing action for damage accruing from negligence in failing to properly feed and water such stock. *Gulf, C. & S. F. R. Co. v. Wilhelm* (Tex. App.) 16 S. W. 109.

The question in an action against a railway company for failure to feed and water stock for thirty hours, as to whether the plaintiff is entitled to recover a penalty under Tex. Rev. Stat. art. 284, in addition to his damages, is one of fact for the jury. *Galveston, H. & S. A. R. Co. v. Thompson* (Tex. Civ. App.) 23 S. W. 980.

And an infraction of the law by a carrier, which will justify the recovery of a penalty by

The object of the statute, we think, was to prevent cruelty and injury to animals that were shipped long distances upon cars or boats, by requiring that they should be unloaded, watered, fed, and allowed to rest at stated intervals. It is a humane rather than a sanitary regulation. As cattle, sheep, and swine were more generally shipped upon the cars than horses and mules, they were doubtless named, while the words "other animals" were added to include all animals that might be shipped in crowded cars or boats, and which would suffer also for the want of food, water, or rest.

There is nothing in the language of the statute in question which would indicate that only animals used for food were intended to be embraced within its provisions. On the contrary, we think it is clear that all animals which would suffer in like manner with cattle, sheep, and swine for want of food, water, or rest, while being shipped long distances, are within its provisions.

The second ground assigned why this statute is not applicable to this case is that one state cannot enforce the penal laws of another state or country.

No principle of law is better settled than this, but we do not think it is in any way involved in this case. In order to come within the scope of that principle, the action or suit must be in the nature of a proceeding in favor of the state whose laws have been violated. The Supreme Court of the United States, in the case of *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239,

a shipper of stock for failure to feed and water under that act, must be shown by stronger proof than a mere preponderance. *Ibid.*

The statutory penalty inflicted by that act is independent of the contract of carriage and the damages arising from its breach, and is not governed by a clause in such contract barring right of recovery for a claim thereunder unless suit therefor is brought within a designated number of days after the damages shall accrue. *Gulf, C. & S. F. R. Co. v. Gray* (Tex. Civ. App.) 24 S. W. 837.

V. Miscellaneous statutory provisions.

There are various other statutory provisions bearing upon the subject of the duties of carriers of live stock with reference to care during transportation, which have been judicially construed.

Thus, a railroad company transporting stock is liable under Kan. Gen. Stat. 1889, § 1250, imposing liability for all damages done to personal property in consequence of neglect on its part when caused by a failure to give that ordinary care which a man of ordinary prudence similarly situated would have given to stock under the same circumstances. *Atchison, T. & S. F. R. Co. v. Dittmars*, 8 Kan. App. 459.

And evidence that a railroad company transporting stock took about forty-two hours to come less than 400 miles, and that the motive power was poor and the train a heavy one, and that the stock was kept at one time about twenty-nine hours, and at another about twenty-four or twenty-five hours without being watered, fed, or unloaded, and was finally unloaded into a muddy yard at night and re-shipped the next morning, and of many other things which a prudent man would not do, is sufficient to warrant a recovery under Kan. 44 L. R. A.

Mr. Justice Gray delivering the opinion of the court, said: "The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." This statement of the rule was approved by the privy council in the case of *Huntington v. Attrill* [1893] A. C. 150, 157, in the following language: "Their lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding in order to come within the scope of the rule, must be in the nature of a suit in favor of the state whose law has been infringed." *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123.

Tested by this rule, this is not a penal action, nor is it in the nature of a penal action in favor of the United States. It is merely a civil action to recover damages for injuries done the plaintiff in part, by reason of the defendant's failure to perform a duty imposed upon it by an act of Congress. The fact that there is a penalty provided for the violation of the statute payable to the United States does not prevent those who have been specially injured by its violation from recovering damages therefor. For where a duty imposed, says Mr. Cooley in his work

Gen. Stat. 1889, § 1250, making railroads liable for damages done to personal property in consequence of neglect on their part. *Ibid.*

And the railroad company cannot avoid the charge of negligence in transporting stock on the ground that the stock was in charge of an employee of the owner, where it merely appears that an employee accompanied the stock, but it does not appear that he was in charge. *Ibid.*

But the plaintiff in an action under that act must allege and prove negligence of the company and the damages resulting therefrom. *Ibid.*

So, Wis. Laws 1887, chap. 487, requires every railroad corporation operating a road within the state to receive and carry live stock during eight months of the year including March and April, prescribing the conditions upon which such stock is to be carried, and declares that railroad companies transporting cars of live stock shall feed and water such stock as shall be unloaded under the provisions of that act at the expense of the railroad company, where such stock shall be detained by them for a longer period than six hours. *Abrams v. Milwaukee, L. S. & W. R. Co.* 87 Wis. 485.

And a contract between a carrier and a shipper by which the shipper agrees to feed and water his own stock during transportation is ineffectual to relieve the railroad company from responsibility for keeping stock confined for more than thirty-four hours without food or drink, so far as it attempts to exempt the company from liability by reason of its own negligence or the negligence of its employees. *Ibid.*

So, under Tex. Rev. Stat. 1895, arts. 4494, 4496, providing that railroad companies shall furnish sufficient accommodation for transportation, and discharge such passengers and proper-

on Torts, 1st ed. p. 664, is obviously meant to be a public duty, and the penalty for its violation is made payable to the state or to an informer, the right of an individual injured to maintain an action on the case for a breach of the duty owing to him is unquestionable.

Shearman & Redfield, in their work on Negligence (§ 13), say that "the violation of a statute or ordinance regulating the speed of vehicles, horses, or trains, or requiring special signals or warnings to be given upon their approach, or lights to be shown, is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such a regulation, provided he is specially injured thereby. The violation of such a statute of the United States may be made the basis of an action for negligence in a state court. These principles apply, not only where the statute or ordinance declares that persons violating it shall be liable for any damage sustained by reason of its breach, but also where it contains no such provisions, and simply imposes a penalty by way of fine or otherwise, for disobedience." Bishop, Noncont. L.; Comyns, Dig. *Action on Statutes*, F; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410.

We have no doubt that one of the objects of § 4386 of the Revised Statutes of the United States was to prevent loss to the owners of live stock which would result from its being carried long distances by com-

mon carriers without food, water, and rest. The plaintiff belongs to the class intended to be protected thereby, and has the right to recover from the defendant the damages which were caused, if any, by its violation of the statute, and, having such right, he could bring his action in the state court. "It is difficult," said Mr. Justice Miller in *Den-nick v. Central R. Co.* 103 U. S. 11, 17, 18, 26 L. ed. 439, 441, 442, "to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory or a common-law right. Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

In the case of *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210, it was held that, under § 4386 of the Revised Statutes (the section now under consideration), if a railroad company kept horses on its cars for more than twenty-eight hours without unloading them for rest, water, and food, it was negligence *per se*; and that such company was not only liable for the penalty prescribed by the statute, but also for any damage or injury thereby sustained by the owner of the horses.

In *Grey v. Mobile Trade Co.* 55 Ala. 387, 28 Am. Rep. 729, it was held that where a

ty as shall be offered at their places of destination, making them liable to the party aggrieved for damages sustained by any failure in performance of such duty as soon as reasonable time has elapsed after cattle are offered for transportation, it becomes the duty of a railroad company to furnish accommodations for their transportation, and it is liable in damages for a breach thereof. *Davis v. Texas & P. R. Co.* 91 Tex. 505.

And the object and intention of Tex. Rev. Stat. art. 4227, providing that where there is a delay in shipping the corporation shall pay to the party aggrieved all damages which shall be sustained thereby with costs of the suit, are to furnish full compensation for the injury inflicted by the failure of the carrier to perform its duty. *International & G. N. R. Co. v. Ritchie* (Tex. Civ. App.) 26 S. W. 840.

A railroad company is not relieved from liability for delay in shipping under that act by the fact that the shipper put his cattle in the carrier's pens voluntarily, where that was the place provided for them and cars were expected at any hour, and he exercised the best care he could and attempted to feed and water them in the meantime, but was prevented from properly caring for them by insufficient accommodations. *Ibid.*

And the estimate of damages to cattle shipped under the provisions of that act, that the carrier shall pay to the party aggrieved all damages which shall be sustained from delay in shipping, with costs of suit, made at their destination, is not subject to objection that the cattle were not shipped to market and that the measure of damages was therefore the injury done to the cattle themselves and not the difference in market value, where such estimate was the same as the estimate at the place of shipment. *Ibid.*

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So, the common-law liability of a carrier, beginning when goods were delivered to him for immediate transportation, is not affected by Tex. Rev. Stat. art. 283, providing that the trip or voyage shall be considered to have commenced from the time of the signing of the bill of lading and the liability of the common carrier shall attach as at common law from and after such signing so as to relieve a railroad company from liability for injury caused by placing cattle in its shipping pens and locking them up and not shipping them until the next day. *International & G. N. R. Co. v. Dimmit County Pasture Co.* 5 Tex. Civ. App. 186.

So, where it is the custom of a railroad company to feed animals consigned to it for carriage at the expense of the consignor during delay in transit, a request under the contagious diseases of animals act of 1878, § 33, will be implied, and the company will incur liability for any losses occasioned by leaving the animals unfed. *Curran v. Midland G. W. R. Co.* [1896] 2 Ir. Rep. 183.

And under an order of council made pursuant to the contagious diseases of animals act of 1878, § 32, subd. 21, requiring that a vessel used for carrying animals by sea should after landing the animals therefrom and before taking on board any other animals or cargo be cleansed and disinfected by having all parts of the vessel with which animals had come in contact scraped and washed, the part of the vessel with which animals had come in contact must be cleansed and disinfected according to the requirements of the order before a new cargo is placed on board, though the new cargo is not loaded in a place with which the animals had come in contact. *Ismay v. Blake*, 7 Asp. Mar. L. Cas. 189, 66 L. T. N. S. 530, 56 J. P. 486.

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cargo of cotton was received by a carrier for transportation, and was destroyed by fire on the boat, the carrier could not avail himself of an exemption from liability for loss by fire if he neglected to protect the cotton on the deck of the vessel by a complete and suitable covering of canvas or other suitable material to prevent ignition by sparks, as required under penalty by act of Congress, and this, too, although the act of Congress had been repealed before the case was tried. *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 17 Am. Rep. 221; *Fort Worth & D. C. R. Co. v. Daggett*, 87 Tex. 322.

In addition to the claim for damages caused by and resulting from the failure of the defendant to perform its duty in allowing the stock to be unloaded, fed, watered, and permitted to rest, the plaintiff claims that the defendant did not furnish suitable and safe facilities for unloading the stock at Lynchburg, and for its failure to do so one of the horses had a knee joint so fractured that it produced lockjaw, from which the horse died. The defendant seems not to have had, in the language of its agent at Lynchburg, "the usual gangway for loading and unloading stock leading from the car to the ground." Its arrangement for unloading stock there was to take them out of the cars on the platform of the depot next to the railroad track, thence through the depot to the opposite side of the depot to a platform, which, according to the plaintiff's evidence, was from 3 to 4 feet wide. This platform extended along the side of the depot, sloping gradually down from the door of the depot to the street. The platform, at the highest point, is from 2 to 2½ feet from the ground. One side of the platform was against the depot, so that stock could not get off of it on that side, but the other side had no railing to prevent stock from stepping or being crowded off of it. The horse which died of lockjaw, together with a mule, the evidence tended to show, was crowded or jumped off of the platform on its unprotected side, and received the injury referred to.

The defendant's evidence tends to prove that this platform had long been used by it for loading and unloading horses, and no injury had theretofore resulted from its use, and that it was safe and suitable for that purpose; that the plaintiff's agent did not lead his horses and mules out of the car, as he ought to have done, but allowed some of them to go out without anyone holding them, and was thus guilty of such contributory negligence as would prevent a recovery, even if the facilities for unloading were not suitable and safe. The facilities for unloading were not such as are usually provided. The evidence is conflicting. This was peculiarly a question for the determination of a jury, and we cannot say that its verdict upon this point, which was approved by the trial court, was not supported by the evidence.

The next and last assignment of error is that the court failed to instruct the jury that § 4386 of the Revised Statutes of the United States did not embrace or refer to horses and mules, but did embrace and refer only to cattle and other animals intended for

food and erred in giving in lieu thereof the following instruction, to wit:

"That if the jury should find for the plaintiff, in estimating its damages, they will exclude all such injuries as the said horses and mules received before they came into the charge of the defendant company at Covington, Kentucky, and should estimate and allow such damages to said horses and mules as they shall find from the evidence to be due to their confinement for a period (if such there was) greater than that prescribed in § 4386 of the Revised Statutes of the United States, in the cars in which they were brought by the defendant from Covington, Kentucky, to Lynchburg, Virginia."

From what has heretofore been said in this opinion, it is clear that the court properly refused to give an instruction that horses and mules were not embraced within the provisions of § 4386 of the Revised Statutes of the United States.

The objection urged to the instruction which was given is that "the court ought to have left it to the jury to decide upon the evidence in the case whether or not the unloading was prevented by 'accidental causes,' and whether or not the horses and mules were carried in cars in which they did and could have proper food, water, space, and opportunity to rest, 'inasmuch as there would be no liability on the defendant under the statute if the unloading was prevented from accidental cause, or if the animals were carried in the manner set forth in § 4388 of the Revised Statutes.'"

There was no evidence whatever tending to show that the horses and mules of the plaintiff were not unloaded as required by § 4386 because of "a storm or other accidental cause," as these words have been construed by the courts of the United States. In the case of *Newport News & M. Valley Co. v. United States*, decided by the circuit court of appeals, and reported in 22 U. S. App. 145, 61 Fed. Rep. 488, 9 C. C. A. 579, it was held that the carrier in a criminal prosecution under that statute for failure to unload stock must show, in order to escape the penalty imposed by the statute, not only that there was in fact a storm, but that with due care he was prevented, as an unavoidable result of the storm, from complying with the law. If the storm is no excuse, said the court, unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes would be an excuse, unless the cause and its effect would be likewise unavoidable. The meaning of the general words "other accidental causes" must be ascertained by referring to the preceding special words. The rule *noscitur a sociis* is clearly applicable. A storm is unavoidable in the sense that it cannot be prevented. "Other accidental causes" must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause.

There is evidence showing that the defendant's train was delayed for some hours west of the Ohio river on account of high water and a washout, but there is no evidence tend-

ing to show that for this cause, or because of a storm or other accidental cause, the defendant was prevented from unloading the stock for more than sixty hours, and until it had reached Greenbriar, West Virginia. In the case of *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210, cited above, it was held that the fact that the stock yards of the railroad company in that case were on fire when the train passed Nashville was no sufficient excuse for not stopping the car five hours there, or at some other station, as provided for in the statute, so that the stock, after they had been in the cars twenty-eight consecutive hours, might be unloaded, fed, and watered.

Section 4388 of the Revised Statutes of the United States provides, among other things, that "when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply."

There was evidence tending to show that the cars upon which the stock was carried from Covington, Kentucky, were a superior kind of stock cars, 2 feet longer than the cars in which they were carried to Covington, and provided with racks and troughs in which to feed and water.

If § 4388 rendered it unnecessary to unload stock where they can and do have proper food and water upon the cars, the objection to the instruction would have been valid; but the statute does away with the requirement to unload only when the stock is carried in cars, etc., and in which they can and do "have proper food, water, space and opportunity for rest." There is no evidence tending to show that there was space and opportunity for rest in the cars in which the plaintiff's stock was shipped. In fact, it is evident that forty-three horses and mules, carried in two cars, which were only 2 feet longer than ordinary stock cars, had neither space nor opportunity for rest on the cars.

The instruction under the evidence of the case, we think, was plainly right.

We are of opinion, therefore, that there is no error in the proceedings of the Circuit Court, and that its judgment should be affirmed.

James B. PACE, Appt.,
v.

W. G. PACE, Admr., etc., of John R. Pace,
Deceased, et al.

(95 Va. 792.)

A surety who has been obliged to pay the obligation can prove the entire debt against the insolvent estate of his cosurety, and receive dividends upon the entire debt until reimbursed that half of the common burden belonging to the cosurety.

(April 7, 1898.)

NOTE.—For contribution between cosureties in general, see note to *Bushnell v. Bushnell* (Wis.) 9 L. R. A. 411.

For rights of surety on payment of judgment see *Frank v. Fraylor* (Ind.) 16 L. R. A. 115, and note.

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APPEAL by petitioner from a decree of the Corporation Court of Danville allowing him to prove for only half instead of the whole liability which petitioner and decedent had sustained on a surety bond and which petitioner had been compelled to pay in full. *Reversed.*

The facts are stated in the opinion.

Messrs. Christian & Christian, for appellant:

When James B. Pace paid the note, he became entitled to two things, namely: Contribution from John R. Pace's estate, which was a claim *in personam*, for one half of the debt, and subrogation to all the rights, remedies, and means of payment of William F. Cheek, the creditor, against John R. Pace's estate, which right of subrogation was a right *in rem*. He had the right to require William F. Cheek to avail himself of all means he had for collecting the debt of John R. Pace to his relief beyond the moiety of the debt, or, if he paid it, to be subrogated to those means of indemnity and protection.

Brandt, Suretyship, § 269; Sheldon, Subrogation, § 140; *Lidderdale v. Robinson*, 2 Brock. 159; *Robertson v. Trigg*, 32 Gratt. 76.

This doctrine will not be denied as between principal and surety. It applies in precisely the same manner between cosureties.

Lidderdale v. Robinson, 2 Brock. 167; *Robertson v. Trigg*, 32 Gratt. 85; *Powell v. White*, 11 Leigh, 309; *Watts v. Kinney*, 3 Leigh, 272, 23 Am. Dec. 266; *Miller's Appeal*, 35 Pa. 481.

While J. B. Pace, when he paid the debt after the death of John R. Pace, became entitled by contribution to a personal claim against John R. Pace's estate for only one half of the debt, he became entitled by subrogation to be substituted to the creditor's right to this ascertainable proportion of John R. Pace's estate, which the creditor held for his relief and indemnity.

Enders v. Brune, 4 Rand. (Va.) 444; *Watts v. Kinney*, 3 Leigh, 272, 23 Am. Dec. 266; *Powell v. White*, 11 Leigh, 309; *Hess's Estate*, 69 Pa. 272.

A creditor holding collaterals, is not bound to apply them before enforcing his direct remedies against the debtor.

Lewis v. United States, 92 U. S. 618, 23 L. ed. 513.

Even though the creditor realizes upon the collaterals, he can, when he comes to prove the claim, notwithstanding, prove for the entire debt.

McClintock's Appeal, 20 Pa. 360; *People v. E. Remington & Sons*, 121 N. Y. 328, 8 L. R. A. 458; *Allen v. Danielson*, 15 R. I. 480; *Logan v. Anderson*, 18 B. Mon. 114; *Citizens' Bank v. Patterson*, 78 Ky. 291; *Brown v. Merchants & F. Nat. Bank*, 79 N. C. 244; *Kellogg v. Miller*, 22 Or. 406; *Miller's Estate*, 82 Pa. 113, 22 Am. Rep. 754; *Graeff's Appeal*, 79 Pa. 146; *Patten's Appeal*, 45 Pa. 151, 84 Am. Dec. 479; *Miller's Appeal*, 35 Pa. 481; *Southern Michigan Nat. Bank v. Byles*, 67 Mich. 296; *Citizens' Bank v. Kendrick*, 92 Tenn. 437; *Brough's Estate*, 71 Pa. 460; *Eastern Twps. Bank v.*

Vermont Nat. Bank, 22 Fed. Rep. 186; *Chemical Nat. Bank v. Armstrong*, 16 U. S. App. 465, 59 Fed. Rep. 372, 8 C. C. A. 155, 28 L. R. A. 231; *Merrill v. National Bank*, 41 U. S. App. 529, 75 Fed. Rep. 148, 21 C. C. A. 282; *London & S. F. Bank v. Williamette Steam-Mill, Lumbering & Mfg. Co.* 80 Fed. Rep. 226; *Re Bates*, 118 Ill. 524, 59 Am. Rep. 383; *Findlay v. Hosmer*, 2 Conn. 350; *Moses v. Ranlet*, 2 N. H. 488.

Where there are two debtors jointly bound, and they die insolvent, or where there are two debtors jointly bound, and they make an assignment for the benefit of creditors, in either case, the rights of the creditors to their just proportion of the estates become fixed as of the date of the death, or the assignment; and all the creditors are entitled to prove for their entire debts as they existed at that date, although they may have in the meantime realized from the other debtor's estate, or assigned property, a portion of their claim.

Morton v. Caldwell, 3 Strobb. Eq. 166; *Wilson v. McConnell*, 9 Rich. Eq. 500; *Ex parte Stokes*, De G. Bankr. Cas. 618; *Re Parker* [1894] 3 Ch. 400; *Brown v. Merchants' & F. Nat. Bank*, 79 N. C. 244; *Citizens' Bank v. Kendrick*, 92 Tenn. 437; *Greene v. Jackson Bank*, 18 R. I. 779; *Winston v. Biggs*, 117 N. C. 206.

The question involved here has been presented in at least two cases decided in England, and in both cases was decided conformably with our contention.

Ex parte Stokes, De G. Bankr. Cas. 618; *Re Parker* [1894] 3 Ch. 400; *Sheldon, Subrogation*, § 135.

It is supported by the direct decision of the supreme court of Pennsylvania in *Hess's Estate*, 69 Pa. 212; *Watts v. Kinney*, 3 Leigh, 272, 23 Am. Dec. 266.

The entire debt is considered, not for the purpose of making a personal decree in favor of the solvent surety against the deceased surety's estate, but for the purpose of ascertaining the true amount of the fund which the creditor had in his hands or under his control, in the eyes of a court of equity, which stood in his hands as a security to him and indemnification to the cosurety, and it is to this fund or security or means of payment that the solvent surety is entitled to resort upon the payment of the entire debt, as a security, for the purpose of securing to him the repayment of the contributory share of the debt to which his cosurety was justly liable.

See 3 Minor, Inst. pt. 1, p. 427.

Mr. E. E. Bouldin, for appellees:

The right of contribution arises between sureties where one has been called on to make good the principal's default, and has paid more than his share of the entire liability.

Lamplough v. Brathewait, 1 Smith, Lead. Cas. in Eq. 5th Am. ed. Hare & W.'s notes, *71; *Enders v. Brune*, 4 Rand. (Va.) 438; *Douglass v. Fagg*, 8 Leigh, 588.

But he can only call for contribution when he has paid more than his proportion of the debt, and then for no more than the excess.

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Lytle v. Pope, 11 B. Mon. 309; *Rutherford v. Branch Bank*, 14 Ala. 92; *Story, Eq. Jur.* § 492; 1 *Parsons, Contr.* p. 32.

J. B. Pace has simply paid half of this debt to which, as between him and John R. Pace, the latter was bound, and therefore must contribute as under a promise to do so. This is not a superior claim to the other creditors of John R. Pace, and the law gives him no priority. As John R. Pace's estate is insolvent, and his creditors will not be paid in full, J. B. Pace desires to receive on this claim more than other creditors whose debts are as large.

As between J. B. and John R. Pace, John R. Pace never did owe and never could be made to pay more than his half.

If the creditors had sued both in a court of equity, and it was no prejudice to him, the court would have ordered each to pay half.

Sheldon, Subrogation, § 149.

J. B. Pace should not receive more than his *pro rata* on the debt John R. Pace owed him.

On petition for rehearing.

If Cheek had had a lien or priority he could have collected all John R. Pace owed before other creditors could collect any. But Cheek had no lien or priority. So, J. B. Pace's right and remedy are contribution, not substitution. John R. Pace must contribute his part of that debt.

Enders v. Brune, 4 Rand. (Va.) 438; *Douglass v. Fagg*, 8 Leigh, 588.

But he can only call for contribution when he has paid more than his proportion of the debt, and then for no more than the excess.

Adams, Eq. *269.

When J. B. Pace was not allowed, by the commissioners, to prove for no more than the excess, he complained that he was not allowed to prove that John R. Pace owed him more than his very statement on its face showed.

Watts v. Kinney, 3 Leigh, 272, 23 Am. Dec. 266.

If there had been a suit by Cheek against J. B. Pace, heard with this suit, and it appeared that he would not have been prejudiced thereby, the court would have made him get a decree for only half against John R. Pace and the other against J. B. Pace, because that would have been justice as to other creditors.

Winston v. Biggs, 117 N. C. 206; 2 Am. & Eng. Dec. in Equity, 420.

Mr. George C. Cabell also for appellees.

Harrison, J., delivered the opinion of the court:

The facts of this case, in brief, are that on April 7, 1893, one T. J. Talbott (under the name of Pace, Talbott, & Co.), John R. Pace, and James B. Pace made a note for \$16,000, payable to William F. Cheek or order, one hundred and twenty days after date. T. J. Talbott was the principal in the note, and John R. Pace and James B. Pace cosureties. T. J. Talbott died in the fall of 1894, entirely insolvent. Prior to his death, to wit, on October 9, 1893, John R. Pace died, leaving an

estate not sufficient to pay more than 50 cents on the dollar of his debts. In May, 1894, this suit was brought to administer John R. Pace's estate, and a decree of reference was entered in July, 1894. On the 19th of September, 1895, being pressed by the executors of the creditor, William F. Cheek, James B. Pace took up the note in question by paying \$16,551.57, the entire amount, principal and unpaid interest, to that time. Thereupon James B. Pace tendered proof of these facts to the commissioner in this suit, and claimed to rank in the distribution of John R. Pace's estate for the whole of the debt so paid by him, until he had received one half of the amount paid by him; but the commissioner reported that he could only rank for one half the debt, and an exception made by James B. Pace on that ground was overruled by the court below, from which ruling this appeal was taken.

The contention of the appellee is that J. B. Pace could not rank against the estate of his cosurety for the whole debt when the cosurety only owed him one half of the debt; in other words, that appellant had no right to prove for the one half of the debt which he himself was primarily bound to pay.

The question presented is an important one in the administration of insolvent estates, and there is some conflict of opinion in respect thereto. We are, however, satisfied that the view taken by the learned counsel for the appellant is sustained by the best reason and the weight of authority.

In *Enders v. Brune*, 4 Rand. (Va.) 447, Judge Carr, in discussing the doctrine of substitution, says: "It has nothing of form, nothing of technicality, about it; and he who, in administering it, would stick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object."

The doctrine is well settled that the surety has the right of substitution against the estate of his principal, where payment of a preferred debt has been made by such surety after the death of the principal; and the rule of substitution for the purpose of enforcing contribution among cosureties is not different. One surety who pays the common debt is entitled to be subrogated to all the rights and remedies of the creditor, as against his cosureties, in precisely the same manner as against the principal debtor. *Robertson v. Trigg*, 32 Gratt. 76; *Dering v. Winchelsea*, 1 White & T. Lead. Cas. in Eq. 3d Am. ed. p. 131, and notes.

In *Ex parte Stokes*, De G. Bankr. Cas. 618, Stokes, the creditor, held a bond executed by a principal and three sureties. Two of the sureties, Clark and Philips, became bankrupts, and Stokes, the creditor, proved against their estates. Thereafter the principal debtor compounded with his creditors; and the other surety, Thomas Charles Ord, executed an assignment for the benefit of his. Stokes, the creditor, by dividends, received from the principal debtor, from the estate of Clark, one of the sureties, and from Thomas Charles Ord, realized his whole debt to the payment whereof the re-

maining surety, Philips, contributed nothing. The creditor realized from the estate of Thomas Charles Ord 10s in the pound, whereas the just proportion payable by each surety was only 4s 10d in the pound. Thereupon the assignees of Thomas Charles Ord petitioned for leave to stand in the place of the creditor for his entire debt as against the estate of Philips, which had paid nothing, so as to realize from that estate its just proportion, viz. 4s 10d in the pound. The petition was allowed, Sir J. L. Knight Bruce saying: "The question then substantially is whether, as between the estates of the two sureties, when (one of them having become bankrupt) the creditor has proved the debt under the fiat, and has afterwards been paid in full, partly by the principal debtor, and partly by the surety, not a bankrupt,—the latter has the right to use the proof for the purpose of obtaining from the bankrupt's estate that amount of contribution to which the bankrupt is, or but for the bankruptcy would have been, liable, so far as the proof can furnish means for that end; and I think that he has. Where several persons are liable, each *in solido*, to a debt, the creditor may enforce payment in a manner which, as between the debtors themselves, is unjust. This must sometimes happen; but in such cases it is not the function and the duty of a court of justice, at least of a court of equity, to place them in the same situation, between themselves, as if the creditor had enforced his rights against them in a manner conformable to their rights against each other so far as it can be done? Generally speaking, the law of the country, as I apprehend, answers that question in the affirmative. Now, in the present case, had Mr. Stokes regulated his proceedings in such a manner, a portion of what he has received from Mr. Thomas Charles Ord's estate would have been taken by Mr. Stokes from Mr. Philips's estate, if available for the purpose. The mere circumstance that it has not until the present time become practically available for the purpose is, I conceive, nothing. This has not been done; but justice requires, I apprehend, that the nearest possible approach to that state of things shall take place, which must, I suppose, be effected by allowing the claim intended to be made by the present petition. Mr. Clark's estate, unless I mistake, has paid 5s in the pound, but not more; while, I collect, that Mr. Thomas Charles Ord's estate has paid 10s in the pound, and Mr. Philips's estate as yet nothing. . . . I repeat, that it was originally equitable between these sureties, or their estates, that the benefit of the proof, or some portion of it, should go in diminution of Mr. T. Charles Ord's burden; that, in my view, it was not competent to Mr. Stokes, by any election upon his part, to deprive Mr. Thomas Charles Ord's estate of that right; that it could not, I think, be defeated by delays and difficulties occurring in the liquidation or collection of Mr. Philips's assets; and that the right appears to me substantially to have continued and now to exist."

In the case of *Morgan v. Hill* [1894] 3

Ch. 400, a debt was owing by a principal debtor and five sureties. Nothing could be realized from the principal debtor, or from one of the sureties, and only a very insignificant sum from another of the sureties. So, three of the sureties were left to bear the liability. One of these three made an assignment, which, after the payment of specified prior claims, provided for the payment of his remaining debts ratably. The creditor presented his claim for payment to the trustees in the assignment, but, before the trustees paid anything thereon, the debt was paid by the other two sureties, who subsequently also took from the creditor an assignment of his debt and securities. These two sureties then claimed the right to receive a dividend from the assigned estate of their cosurety on the whole amount of the debt paid by them, until they had received one third thereof, that being the just proportion payable by each surety; and this claim was allowed by Kekewich, J., and on appeal his order was affirmed.

Kekewich, J., who decided the case in the lower court, said: "Two out of three sureties paid the whole debt, and, having so done, they are entitled to stand in the shoes of the creditor whose whole debt they have paid. That would seem to be according to natural justice; but, whether it be so or not, at all events it is strictly in accordance with the provisions of the mercantile law amendment act of 1856 (19 & 20 Vict. chap. 97).

"A surety in such a case is to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name, of the creditor in any action to obtain indemnification."

The reference of the learned judge to the mercantile law amendment act, as justifying his conclusion, if not justified by its conformity to "natural justice," is a circumstance that does not detract from the weight of this case as an authority in this state, because that act was passed to do away with the doctrine laid down in *Copis v. Middleton* [Turn. & R. 224], which was disapproved by this court in *Powell v. White*, 11 Leigh, 309, in a learned opinion by Judge Tucker, and the act referred to simply declared the law in England to be what it had theretofore been under our decisions.

In *Hess's Estate*, 69 Pa. 272, the precise question involved here was presented, and the supreme court of Pennsylvania held that the surety paying the debt, after the death of his cosurety, was entitled to prove against his estate for the entire amount of the debt. The court says:

"The debts paid by Christian Lintner, and transferred to him, stand exactly in the same position to the assets of the decedent, Henry Hess, as if presented by the creditors themselves; their status being fixed by his death, and nothing having occurred to change or reduce the amount. So far as they existed as debts payable out of the estate, no part of them is paid or extinguished, for the effect of subrogation is to consider them in full life, and enjoying all the rights of the original creditors.

"We regard the administrators of the

decedent as trustees, and the creditors *cestuis que trust* owners of their share of the assets, and which, applying the principle in *Miller's Appeal*, 35 Pa. 481, and *Patten's Appeal*, 45 Pa. 151, 84 Am. Dec. 479, passed to the cosurety, who stepped into their shoes when he paid the amount due on such claims."

In the case of *Miller's Appeal*, 35 Pa. 481, an insolvent debtor had executed a general assignment for the benefit of all his creditors. Subsequently, the assignor became entitled to a legacy which was attached by one of the creditors; and from that attachment he realized a portion of his debt. It was held that such creditor was, notwithstanding, entitled to a dividend of the assigned estate on the whole amount of his claim as it stood at the time the assignment was made.

In this case, Judge Strong (afterwards of the Supreme Court of the United States) said: "By the deed of assignment the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors; and each creditor owned such a proportionate part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but, whatever it was, he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made. . . . It amounts to very little to argue that Miller's recovery of the . . . [legacy] operated with precisely the same effect as if a voluntary payment had been made by the assignor after his assignment; that is, that it extinguished the debt to the amount recovered. No doubt, it did. But it is not as a creditor that he is entitled to a distributive share of the trust fund. His rights are those of an owner, by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after creation of the trust, and after his ownership had become vested, it would seem, must be immaterial."

There are many cases holding that where a creditor of an insolvent person, who is dead, or has made an assignment for the general benefit of creditors, holds collateral security for his debt, and, after the death or the assignment of his debtor, realizes on the collaterals, he may, notwithstanding, prove against the decedent's estate or the assigned estate for the full amount of his debt as it stood at the time of the death or assignment. The grounds upon which these cases proceed are ably set forth in the opinion of Judge Taft in *Chemical Nat. Bank v. Armstrong*, 16 U. S. App. 465, 59 Fed. Rep. 380, 8 C. C. A. 163, 28 L. R. A. 231, in which he reviews all the authorities.

The only case involving the question here presented, cited by appellee, is that of *New Bedford Inst. for Sav. Bank v. Hathaway*, 134 Mass. 69, 45 Am. Rep. 289. In this case the holder of a note, by an arrangement with a solvent surety thereon, proved the note against the insolvent estate of another

surety, and then assigned the note with his claim against the estate to the solvent surety, who paid the holder in full. The court held that this amounted to a payment of the note, ordered the proof to be expunged, and only allowed the surety to prove one half of the claim. In this conclusion we cannot concur. There are three authorities cited in its support, which are not, in our judgment, entitled to the weight given them. The one chiefly relied on is *Maxwell v. Heron* [3 Ross, Lead. Cas. 129], a Scotch case, which, if applicable, has been overruled in England, and the law there settled, as we have seen, to the contrary.

It further appears that the decisions of the Massachusetts court upon analogous questions have not been in accord with the views of this and other courts upon like questions.

An important, if not vital, objection to the Massachusetts view of this question, is that the rights of the surety, instead of being fixed and certain, are made to depend upon accident, or upon the caprice of the creditor. It encourages a policy of obstruction in the administration of estates; for, if those interested in the insolvent estate can delay its settlement until the creditor demands his debt from the solvent surety, they reap the advantage by having a smaller debt to share with them in its distribution. On the other hand, temptation is held out for a corresponding effort on the part of the solvent surety to avoid paying, until the creditor has received such dividends as the insolvent estate will pay, because the amount for which he is liable is thereby reduced. It gives opportunity to the creditor, by collusion or otherwise, to further the interest of one surety at the expense of the just and equal rights of the cosurety.

Results like these, which depend, not upon the rights of the parties fixed by law, but upon the superior skill of one over the other in maneuvering for position, or upon the will and caprice of the creditor, or upon mere accident, cannot be founded upon sound principles.

In *Watts v. Kinney*, 3 Leigh, 272, 23 Am. Dec. 266, Judge Tucker, speaking for this court, says: The surety, in paying the debt, "is governed by the law of this court. Even on entering into his engagement as surety, he looks to its well-established principles. He knows, if he pays the debt to the obligee, he will stand in the obligee's shoes. He knows he will be subrogated to all the rights of the obligee, as they subsist at the time he makes his payment. He knows that a court of equity looks not to form, but to substance; that it looks to the debt which is to be paid, not to the hand which may happen to hold it; that the fund charged with its payment shall be so applied, whosoever may be the person entitled; and that it considers a debt as never discharged until it is discharged by payment to the proper

person, and by the proper person. He knows that that court, which permits no act of a trustee to prejudice the *cestui que trust*, will not permit one who stands in the relation of the creditor or obligee to the surety to bar him of those rights which the principles of equity have secured to him. He is conscious that his rights do not depend upon the caprice of the creditor, or the whim of an executor, or the sense of right of other creditors, but rest upon the immutable principles of justice and equity; and, in making his payment, he does it in the confidence that he will be entitled to be indemnified to the full amount to which his creditor could have charged the assets of the principal."

These considerations bring us, in the case at bar, to the conclusion that John R. Pace's estate and James B. Pace were each bound *in solido* to their common creditor William F. Cheek for the entire amount of the debt in question; that, at the death of John R. Pace, the rights of his creditors became fixed, the assets of the estate passing, as a trust fund, into the hands of his representatives charged with the payment of his debts; that, subject to costs of administration and preferred debts, William F. Cheek then became entitled to an interest in said estate, not then ascertained, but capable of being made certain, bearing such proportion to the entire assets as his debt bore to the entire indebtedness; that when James B. Pace, the surety, paid his debt, he became at once subrogated to all the rights, remedies, and means of payment, in respect thereto, that were possessed by the creditor, and had the right to prove, as the creditor could have done, the entire debt against the estate of his cosurety, John R. Pace, and to receive dividends upon the basis of the entire debt until reimbursed that half of the common burden belonging to the cosurety. This conclusion works no injustice to the other creditors of John R. Pace. Their rights, which became fixed at the death of the debtor, remain unimpaired. They had no interest in that proportion of the assets belonging to William F. Cheek. That interest was as distinct and separate from theirs as if it had been already segregated and set apart for the benefit of William F. Cheek. They could not add to or take from it while it was the property of Cheek; nor can they do so now that it stands, in equity, as indemnity for the surety who has paid it.

For these reasons, the decree appealed from must be reversed, and the cause remanded, to be proceeded with in accordance with the views expressed in this opinion.

Cardwell, J., absent. Buchanan, J., absent, interested in case involving same question.

Rehearing denied.

KANSAS SUPREME COURT.

Hugh P. FARRELLY

v.

George E. COLE, State Auditor.

(.....Kan.....)

- *1. The Constitution of this state confers the supreme executive power upon the governor, and provides that he may, on extraordinary occasions, convene the legislature by proclamation. Such proclamation was issued, calling the members of the legislature together in extra session nineteen days before the time fixed by law for a meeting of the regular session. The proclamation did not expressly state that an extraordinary occasion had arisen, but it referred to the power vested in the governor by the Constitution to make such call. This was followed by a message to the members convened, suggesting that legislation was demanded by the people respecting freight rates to be charged by railroad companies. *Held*, that an extraordinary occasion was presented, within the meaning of the Constitution.
2. The question of the existence of an extraordinary occasion of sufficient gravity to justify a call for an extra session of the legislature is to be determined by the governor alone, in the exercise of his discretion as a sworn officer, and this discretion is not subject to challenge or review by the courts.
3. Chapter 171 of the Laws of 1897, apportioning the state into representative districts (which went into effect on June 1, 1898, and repealed all acts in conflict with it), did not terminate the existence of the house of representatives of 1897, nor shorten the term of office of its members. A member of the legislature, unlike a county or township officer, has no official functions to perform within the district or territory from which he is elected. The division of the state into legislative districts is only a provision for future elections, and is not designed to affect the title to office or tenure of the members making the apportionment.
4. The Constitution fixes the term of office of members of the legislature for two years, but does not expressly provide when their terms shall begin. In the absence of such a provision, it is competent for the legislature to fix the commencement of the term. This has been done by statute, which provides that the regular term of office for members of the senate and house of representatives shall commence on the second Tuesday of January next succeeding their election.

(March 11, 1899.)

PETITION for a writ of mandamus to compel defendant to audit and allow the amount of a voucher for services as legislator at a special session of the state legislature. *Granted*.

*Headnotes by SMITH, J.

NOTE.—As to extra sessions of the legislature, see also *Wells v. Missouri P. R. Co.* (Mo.) 15 L. R. A. 847, and *note*; also *People, Carter, v. Rice* (N. Y.) 16 L. R. A. 836.
44 L. R. A.

Statement by Smith, J.:

On February 2, 1899, the plaintiff, Hugh P. Farrelly, filed in this court his petition and affidavit praying for an alternative writ of mandamus against the defendant, George E. Cole, auditor, alleging that at the regular general election in November, 1896, plaintiff was duly elected state senator for the thirteenth senatorial district of the state of Kansas, and duly qualified as such; that as such state senator he attended and performed the duties of his office at a legal session of the legislature of the state of Kansas commencing on the 21st day of December, 1898, and concluding on the 9th day of January, 1899, and that as said state senator he performed the duties of his office in the said session of the legislature from the 31st day of December, 1898, to the 7th day of January, 1899, inclusive, and by reason of said services became entitled to compensation, payable out of the treasury of the state of Kansas, in the sum of \$24, and that on the 7th day of January, 1899, he received from the secretary of the senate of the state of Kansas a voucher for the said sum of \$24 due him, which voucher was duly attested according to law by the secretary of the senate; that afterwards, on the 10th day of January, 1899, he presented the said voucher, duly sworn to and attested, to George E. Cole, auditor of the state of Kansas, and demanded that he draw his warrant upon the treasurer of the state to the amount of said voucher, payable to the plaintiff; and that said George E. Cole refused, and still refuses, to comply with said demand. An alternative writ was issued, conformable to the prayer of said petition; and thereafter, and on February 8, 1899, the defendant filed his answer and return thereto, setting forth his reasons for refusing to comply with the commands of said writ, in substance as follows: That the only attempted appropriation by which it is claimed that moneys mentioned in said writ could be withdrawn from the treasury of the state of Kansas, and the only authority under which it is claimed that the defendant should audit and allow the claim of the plaintiff, were conditioned upon the provisions of two certain pretended acts of the legislature claimed to have been passed at a pretended session of said legislature held at Topeka, Kansas, commencing on the 21st day of December, 1898, the same being house bill No. 72, entitled "An Act Making an Appropriation for the Legislative Department and General Expenses Incidental to the Special Session of 1898," and house bill No. 90, entitled "An Act Making an Appropriation for the Legislative Department and General Expenses Incidental to the Special Session of 1898 and 1899;" that each of said pretended acts of said pretended legislature were null and void, and of no force and effect whatever, and constitute no authority, in law or otherwise, by which the defendant could proceed to audit and allow the said claim, or any part thereof, for the following

reasons, to wit: "That on the 15th day of December, 1898, the Honorable John W. Leedy, as governor of the state of Kansas, issued his proclamation in the words and figures as follows, to wit:

**Proclamation. Executive Department.
Topeka, Kan., December 15, 1898.**

Whereas, assurances have reached me to the effect that, if the legislature shall be convened, suitable legislation for the regulation of railroad charges can be enacted, and deeming such matter of sufficient importance to justify the convening of the legislature in special session: Now, therefore, I, J. W. Leedy, governor of the state of Kansas, by virtue of the authority vested in me by the Constitution of the state, do hereby convene the legislature of the state of Kansas to meet at the capital of the state, at the hour of four o'clock p. m., on the 21st day of December, 1898. In testimony whereof, I have hereunto subscribed my name, and caused to be affixed the great seal of the state of Kansas. Done at the city of Topeka on the day and year first above written.

J. W. Leedy, Governor.

Attest: W. E. Bush, Secretary of State.

"That no material changes had been made in the charges of railroad companies doing business within the state of Kansas, for the transportation of persons or property, within two years prior to the issuing of said proclamation, and none were threatened or impending at the time said proclamation was issued, and no unusual or material change had taken place, affecting the nature of such traffic and transportation, with regard to the reasonableness or unreasonableness of the prices charged therefor by said corporations, nor were any such changes threatened at the time said proclamation was issued. That no extraordinary occasion existed on or about the 15th day of December, 1898, or the 21st day of December, 1898, authorizing the governor of the state of Kansas to convene the legislature of said state in special session, and no sufficient reason or excuse existed for the issuing of the proclamation hereinbefore set forth, and for the convening of the legislature of said state in special session. That on the 21st day of December, 1898, in pursuance of the proclamation above set forth, and without any other warrant or authority of law or otherwise, and without any reason or excuse for so doing, the members of the house of representatives elected at the general election held in 1896, with the exception of Hon. I. E. Lambert, of the 47th representative district, Hon. Frank T. Patten, of the 74th representative district, Hon. John Heckman, of the 105th representative district, Hon. Chas. E. Lobdell, of the 115th representative district, and Hon. C. A. Maxwell, of the 120th representative district, met in a pretended special session at the city of Topeka, Shawnee county, Kansas, and in lieu of the parties above mentioned there were present, attending and taking part in said pretended special session, Hon. Chas. Harris, claiming to represent said 47th representative district, Hon. W. C. Miller, claim-

ing to represent said 74th representative district, Hon. James Sutcliffe, claiming to represent said 105th representative district, Hon. S. L. Fillson, claiming to represent said 115th representative district, and Hon. Frank Byers, claiming to represent said 120th representative district; and at the same time the members of the state senate of the state of Kansas also met at the state house in the city of Topeka, Shawnee county, Kansas, in pursuance of said proclamation pretending to convene as a special session of the senate of the state of Kansas. That all the members of said house of representatives so convened at Topeka on the 21st day of December, 1898, with the exception of said Chas. Harris, W. C. Miller, James Sutcliffe, S. L. Fillson, and Frank Byers, were chosen at the general election of 1896, and that all the members of said house, except those last above mentioned, and except John Seaton, J. M. Goodno, E. Loomis, A. L. Brooke, E. D. McKeever, H. A. Smith, R. B. Moore, Geo. T. Polson, Ed. Jaquins, F. P. Gillispie, E. R. Burkholder, S. S. Longley, Lot Ravenscraft, Alfred Lawson, Josiah Crosby, and H. F. Geissler, who had at the general election held in November, 1898, been elected members of the house of representatives of the state of Kansas from the representative districts in which they were then respectively residing, had no title or claim to their respective offices as members of the house of representatives of the state of Kansas, save and except that conferred upon them by, through, and under the said election of November, 1896, and the proceedings had in pursuance thereof." The answer and return then sets out the names of the members of said pretended house of representatives, and the numbers of the respective districts from which they were elected, being the districts created by chapter 4 of the Session Laws of 1891. It next sets out the names of the members of the house of representatives chosen at the general election held in November, 1898, with the numbers of the respective representative districts from which they were chosen, being the districts mentioned in the apportionment act of 1897 (chapter 171 of the Laws of 1897). And further that, on the final passage of said pretended house bill No. 72 in said pretended house of representatives eighty-six persons, pretending to be members thereof (naming them), voted for said pretended bill, and that, on the final passage of said pretended house bill No. 90 in said pretended house of representatives, seventy-three persons, pretending to be members thereof (naming them), and pretending that said legislature was in legal session, voted for said pretended house bill. The answer and return specially denies that any act of the legislature of the state of Kansas directed or authorized the auditor of state to draw his warrant for the sum mentioned, in favor of said plaintiff, on account of or for the services or claim mentioned in said alternative writ. The matter was presented to this court upon a motion made by the plaintiff for the issuance of a peremptory writ of mandamus notwithstanding the answer and return of the auditor of state. The

said motion was in legal effect a demurrer to the answer and return upon the ground that it did not state facts sufficient to constitute a defense to the petition and demand of the plaintiff.

Messrs. A. M. Harvey, Hungate & Thompson, and G. C. Clemens, for plaintiff:

The terms of members begin on the second Tuesday of January next after election.

People v. Fancher, 50 N. Y. 288.

The Constitution itself fixes the second Tuesday in January next after election as the beginning of legislative terms.

Section 6, art. 1.

The apportionment act did not abolish the house of 1897.

The proclamation was lawful. This court has no power to say it was not lawful.

Cooley, Const. Lim. § 41; *Whiteman v. Wilmington & S. R. Co.* 2 Harr. (Del.) 525, 33 Am. Dec. 411; *Veto Power*, 9 Colo. 642; *People v. Rice*, 65 Hun, 236, Affirmed in 135 N. Y. 473, 16 L. R. A. 836; *Re Legislative Adjournment*, 18 R. I. 825, 22 L. R. A. 716; *Vanderheyden v. Young*, 11 Johns. 157; *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537; *State, Martin, v. Farwell*, 3 Pinney, 439; *United States v. Arredondo*, 6 Pet. 729, 8 L. ed. 561; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *People, McCauley, v. Brooks*, 16 Cal. 39; *Weyand v. Stover*, 35 Kan. 545; *State, Johnson, v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *Beach v. Leahy*, 11 Kan. 23; *Noffziger v. McAllister*, 12 Kan. 315; *Keyes v. Snyder*, 15 Kan. 143; *Knowles v. Topeka Bd. of Edu.* 33 Kan. 692; *Norton County Comrs. v. Shoemaker*, 27 Kan. 77; *State, Kellogg, v. Sanders*, 42 Kan. 232; *Hughes v. Milligan*, 42 Kan. 396; *State, Little, v. Lewelling*, 51 Kan. 562.

The governor of Kansas, as governor, is in no sense inferior to this court.

Householder v. Morrill, 55 Kan. 317.

Whether the recited occasion was extraordinary is not a judicial question.

The Constitution does not require that the proclamation shall recite the occasion, any more than it requires that the journals shall recite a legislative emergency.

Broom, Legal Maxims, *559; *Lothrop v. Stedman*, 42 Conn. 584.

When the legislature of this state convenes in special session it is a legislature for all purposes, as fully as a regular session.

State v. Majors, 16 Kan. 443.

The recited occasion was extraordinary.

Wells v. Missouri P. R. Co. 110 Mo. 286, 15 L. R. A. 847.

An issue of fact cannot be framed and tried by a jury or otherwise with a view of determining by its result the validity of an act of the legislature, but the court is to be confined to matters of which it may take judicial notice.

State, Atty. Gen., v. Cunningham, 81 Wis. 510, 15 L. R. A. 561.

The special session was the legislature *de facto*, and its acts are valid.

Hughes v. Felton, 11 Colo. 489; *Parker v. State, Powell*, 133 Ind. 200, 18 L. R. A. 567; *State, Atty. Gen., v. Cunningham*, 81 Wis. 44 L. R. A.

516, 15 L. R. A. 561; *Riley v. Garfield Twp.* 58 Kan. 299.

Mr. D. R. Hite, with Mr. A. A. Godard, Attorney General, for defendant:

The terms of the Constitution contain enumerated powers, and not restrictions upon inherent power.

Leavenworth County Comrs. v. Miller, 7 Kan. 479, 12 Am. Rep. 425.

Power to convene the legislature at all, conferred as it is in the grant containing the limitation, can only be exerted when the limitation exists.

There is a class of cases, which seems to support the view that the language employed by the framers of the Constitution confers uncontrollable, unreviewable discretion upon the governor.

Whiteman v. Wilmington & S. R. Co. 2 Harr. (Del.) 514, 33 Am. Dec. 411; *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537; *Marbury v. Madison*, 1 Cranch, 157, 2 L. ed. 67; *Veto Power*, 9 Colo. 642; *Re Legislative Adjournment*, 18 R. I. 827, 22 L. R. A. 716.

But an almost unbroken line of authoritative decisions of courts whose respectability and learning are the pride of American jurisprudence held that the constitutional grant of judicial power to the courts gives to the judiciary, not only the right to examine the exercise by the legislature of legislative discretion, but also the power to declare acts in excess of such discretion absolutely void. 78 Federalist, ed. of Albert Scott & Co. vol. 1, p. 426; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Ames v. Union P. R. Co.* 64 Fed. Rep. 165, 4 Inters. Com. Rep. 835; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819; *Re Gunn*, 50 Kan. 187, 19 L. R. A. 519; *State, Lamb, v. Cunningham*, 83 Wis. 90, 17 L. R. A. 145; *Giddings v. Blocker*, 93 Mich. 1, 16 L. R. A. 402; *State, Guthrie, v. School Fund Comrs.* 4 Kan. 262; *Graham v. Horton*, 6 Kan. 343; *Bond Debt Cases*, 12 S. C. 200; *Martin v. Ingham*, 38 Kan. 641; *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128.

The question as to what constitutes an extraordinary occasion, like the question as to what constitutes an extraordinary expense, is one that may be governed and determined largely by circumstances.

The word "extraordinary" is not used in the Constitution in its popular sense, but used in contradistinction of "ordinary;" that is, it refers to cases which do not ordinarily occur in the transaction of human affairs.

Cox v. Hillyer, 65 Ga. 57; *Bond Debt Cases*, 12 S. C. 281.

The proclamation of the governor shows conclusively that the reason which induced him to convene the legislature in special session was the assurances which he had received from members of the legislature he intended to convene, and his message further shows affirmatively that no unusual or even special occasion existed.

Cooley, Const. Lim. 5th ed. pp. 54-56; *Re Gunn*, 50 Kan. 157, 19 L. R. A. 519.

The Constitution provides, § 29, at the general election held in 1876 and thereafter, members of the house of representatives shall

be elected for two years, and members of the senate shall be elected for four years.

The word "year" in the Constitution was intended to express its ordinary meaning—calendar year.

State, Crawford, v. Robinson, 1 Kan. 17; *Howard v. State, Vawter*, 10 Ind. 99.

The legislature can neither extend nor abridge the term of office fixed by the Constitution.

19 Am. & Eng. Enc. Law, 562, note; *People, Davidson, v. Perry*, 79 Cal. 105; *Griebel v. State, Niezer*, 111 Ind. 369; *Pursel v. State, Roney*, 111 Ind. 519; *Howard v. State, Vawter*, 10 Ind. 99; *Fant v. Gibbs*, 54 Miss. 396; *State, Atty. Gen., v. Brewster*, 44 Ohio St. 589; *People, Fowler, v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302; *State, Goodin, v. Thoman*, 10 Kan. 193.

An extraordinary session of the legislature called by the governor is not a part of the regular session of the same legislature which has been adjourned without day and so terminated.

People, Carter, v. Rice, 135 N. Y. 473, 16 L. R. A. 836.

Smith, J., delivered the opinion of the court:

The questions involved are: (1) Did an extraordinary occasion exist, within the meaning of the constitutional provision providing for the call of an extra session of the legislature, on December 15, 1898, when the proclamation was issued? (2) Were the members of the house of representatives elected at the general election in November, 1896, who assembled in obedience to the proclamation of the governor, entitled to act as members of said house, and to vote upon the final passage of said appropriation bills? Section 3 of article 1 of the Constitution is as follows: "The supreme executive power of the state shall be vested in a governor, who shall see that the laws are faithfully executed." Section 5, art. 1, reads: "He may, on extraordinary occasions, convene the legislature by proclamation, and shall, at the commencement of every session, communicate in writing such information as he may possess in reference to the condition of the state, and recommend such measures as he may deem expedient." The sole power is thus deposited in the governor to convene the legislature on extraordinary occasions; and it has been uniformly held that he cannot be compelled by mandamus to act, should he refuse for any reason to exercise the power, nor be restrained by injunction in an attempt to exercise it. On the argument it was conceded by the defendant's counsel that in the trial of the issues raised by the return the court could only consider such matters as under the law it can take notice of judicially. While the return makes certain allegations which it would require evidence to establish, the consideration of such matters was, under the admission of counsel above stated, eliminated from the case. These averments are as follows: "(2) That no material changes had been made in the charges of railroad companies doing business within the state of Kansas, for the 44 L. R. A.

transportation of persons or property, within two (2) years prior to the issuing of said proclamation, and none were threatened or impending at the time such proclamation was issued, and no unusual or material change had taken place, affecting the nature of such traffic and transportation, with regard to the reasonableness or unreasonableness of the prices charged therefor by said corporations; nor were any such changes threatened at the time said proclamation was issued." The admission made is significant. It goes to the proposition that a trial of the question of the existence of an extraordinary occasion cannot be had on evidence commonly resorted to in ordinary cases. We are not convinced, notwithstanding the admission of counsel, that the court ought to be thus restricted in the consideration of the case, if jurisdiction is retained; and the admission that, outside of its judicial knowledge, the court could not properly, by the hearing of evidence, gain further information of the matters in issue, tends to fortify the position of the plaintiff that no investigation of the constitutional question involved ought to be had in any court on evidence of any sort.

It is not contended that the proclamation of the governor need contain a statement that the occasion was extraordinary. It does state that, "by virtue of the authority vested in me [the governor] by the Constitution of the state, I do hereby convene the legislature of the state of Kansas to meet," etc. As the governor is wholly wanting in power to convene the legislature, except on extraordinary occasions, the language above quoted made it certain, by its reference to the Constitution, that an extraordinary occasion was meant. We are led to believe that, if the governor could have stopped with the proclamation, there would have been no contention over the legality of the call, and the subsequent acts of the legislature when assembled; but it is said that the message sent by him to the senate and house of representatives on December 21st conclusively shows that no extraordinary occasion existed. The message reads: "To the Senate and House of Representatives: Although the present executive and a majority of each house of the present legislature were elected under a pledge to the people to enact a maximum rate law, when the time arrived for fulfilling that pledge the menace of a judicial decision by the highest tribunal in the land, which would make legislative regulation of railroad charges practically impossible, caused many to doubt the wisdom of attempting the promised legislation; and such difference of opinion prevailed that the executive felt called upon to withhold his approval from the compromise measure finally passed. There was then pending undetermined in the Supreme Court of the United States a case which involved the question whether, as to railroad legislation, the legislatures of theoretically sovereign states should be reduced to the level of city councils or school-district boards, upon the reasonableness as well as the authority of whose acts courts may sit in judgment. The decision of that case, announced soon after the

adjournment of the legislature, fully justified the fears and anticipations of those who deemed it futile to pass a maximum rate bill; for it rendered such an enactment a mere proposal of legislation, not a law, which must be submitted to the Federal court for approval or rejection. That decision declared that whether the rates of transportation prescribed by a legislature are reasonable is a judicial question, and that first a single Federal judge, and finally five Federal justices, may upon that question reverse and hold null the deliberate judgment of an entire legislature, with its numerous membership, acting under the same oath as the judges, and calmly deliberating for days in separate chambers; that the courts may sit in judgment, not merely upon the constitutional power of the legislature to legislate concerning the particular subject-matter, but upon the reasonableness of its acts, the power to act being conceded. At the same time the court declined, though urged, to lay down any definite rule by which, in advance of its judgment in each particular case, a legislature might be able to say whether suggested rates would be held reasonable or not; so that whether rates are reasonable can be determined only by a standard which must remain unknown to every human being but the justices of that court, save as they may vouchsafe to reveal it anew as each successive law comes before them to be destroyed. It follows that you can only suggest maximum rates; you cannot prescribe them. You can submit for approval a maximum rate proposition; you cannot enact a maximum rate law. However, while the people of Kansas have for years been demanding a maximum rate law, the real essence of their demand has been the regulation of railroad charges; and although we have been deprived of the power to redeem our pledge according to its very letter, it is still our duty to do what we can to redeem it according to its spirit, and, that this may be done, I have exercised the power given me by the Constitution to convene you in special session."

Being permitted to resort only to our judicial knowledge (the proclamation being conceded to be sufficient in its recitals), the evidence of a lack of power in the governor to do what he did is confined to the message. On this we are called upon to decide whether it discloses such an ordinary and commonplace occasion for the call as to compel a conclusion that no emergency existed. The question is thus narrowed down to whether the statements in the message convict the governor of a violation of the constitutional provision mentioned. It must be remembered that what may seem extraordinary in the estimation of one man or official may be deemed commonplace and ordinary by another. Members of different political parties look at men and measures from different standpoints. One party "points with pride" to a line of political policy and legislation, while another, in estimating the same conduct and policy, "views it with alarm." The suggestions contained in the message, from our knowledge of the doctrines

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of the political party to which the governor belonged, were but the reiteration of a persistent demand by that party for legislation in respect to freight rates. In its platforms it had before this made this question conspicuous, and, when in control of both branches of the legislature, had passed a freight-rate bill, which was, however, vetoed by the governor. Clear, palpable, and unquestioned violation of the constitutional grant of power to the executive, admitting of no debate, must be apparent, before the courts will be justified, if at all, in nullifying his acts. The fact that a majority or a large proportion of the people of the state may regard proposed legislation as useless, destructive of property rights, or vicious, will not stamp the subject-matter of such legislation, when demanded by the executive of the lawmaking power, as ordinary or frivolous, warranting the courts in saying that such request or demand by the governor is violative of the constitutional provision under discussion.

That clause of our Constitution relating to extra sessions of the legislature was adopted from a very similar provision found in the Constitution of the United States, which reads: . . . He [the President] may, on extraordinary occasions, convene both houses [of Congress] or either of them." Const. art. 2, § 3. While the President may convene both Houses of Congress, or either of them, the governor can only call together the legislature, which includes both the senate and house of representatives. Commenting on this power of the President, the late Mr. Justice Miller, in his Lectures on the Constitution, says: "The principal exercise of this power has been in proclamations by which the President has called the Senate together at the close of a session of Congress for the purpose of considering appointments to office, and sometimes treaties." The first call for a session of the Senate was made on March 1, 1791, as follows:

The President of the United States to the President of the Senate:

Certain matters touching the public good requiring that the Senate shall be convened on Friday, the 4th instant, I have desired their attendance, as I do yours, by these presents, at the Senate chamber, in Philadelphia, on that day, then and there to receive and deliberate on such communications as shall be made to you on my part.

Geo. Washington.

After this the Senate was convened by Gen. Washington on three occasions,—March 4, 1793, June 8, 1795, and March 4, 1797. The last call reads:

To the Vice President and Senators of the United States, Respectively:

Sir: It appearing to me proper that the Senate of the United States should be convened on Saturday, the 4th of March, instant, you are desired to attend in the chamber of the Senate on that day, at 10 o'clock in the forenoon, to receive any communica-

tions which the President of the United States may then lay before you touching their interests.

Geo. Washington.

Under proclamation substantially like the above, the United States Senate was convened twice by John Adams, and once each by Jefferson, Madison, Monroe, John Quincy Adams, Jackson, Van Buren, Tyler, and Polk. The proclamations of Presidents Tyler and Polk commence: "Objects interesting to the United States requiring that the Senate should be in session," etc. From the adoption of the Constitution to the year 1851,—a time when the most distinguished judges and lawyers adorned the bench and bar,—there is no suggestion in any such proclamations of the existence of an emergency or extraordinary occasion. Commencing, however, with Fillmore, all the Presidents have recited in their proclamations convening the Senate the existence of an extraordinary occasion, and all or them have so proclaimed when calling together both Houses of Congress. Messages of the Presidents, vols. 1 to 9. If the proclamation of Gov. Leedy was defective, it seems to have been much less so than those issued by the Presidents for more than fifty years. As before stated, the most usual purpose for which the Senate of the United States is convened is for the confirmation of the appointment of officers. The Constitution (art. 2, § 2) provides: ". . . And he [the President] shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." The President is devoid of power to convene the Senate of the United States except upon an extraordinary occasion. If he is empowered under the Constitution to call that dignified body together for the confirmation of several appointees, it follows logically that he has no less authority to convene it for the confirmation of one. Take, for example, the case of a postmaster. The lowest salary attached to what is known as a "presidential postoffice" is \$1,000 per year. Yet, who, with the possible exception of the prospective postmaster himself, would consider that an extraordinary occasion had arisen, should the President call the Senate together for the sole purpose of confirming such an officer. Yet the legality of the act cannot be questioned, and, after confirmation, who would contend that there were any flaws in the title of the incumbent to the office? Again, the necessity for confirmation of Federal officers can hardly be considered urgent, since the statutes of the United States confer authority on the President to make appointments during a recess of the Senate: such appointments to be submitted to the Senate at a subsequent session. U. S. Rev. Stat. 1878, § 1769. If we were scrutinizing the conduct of a President in such matters, prior to 1851, we would find repeated calls to the Senate for a meeting, making no

mention of an extraordinary occasion, with no message from the executive to that body following it, more than a list of appointees which he desired to have confirmed. Yet all persons—constitutional lawyers, judges, and legislators—have acquiesced in the constitutional right of the President thus to convene the Senate for the purpose named. There being no doubt or question of the power of the President to convene the Senate of the United States in extraordinary session to consider appointments made by him, by what process of differentiation is the authority withheld from the governor of Kansas, under the Constitution, to convene both branches of the legislature (for he cannot convene the senate alone) in extraordinary session, in order that the presence of the senate may be had to consider and confirm his appointments. If an extraordinary occasion is presented in the desire of the President to have his appointment of a \$1,000 a year postmaster confirmed by the United States Senate, the occasion cannot be said to be less extraordinary, should the governor desire the appointment of a regent of the state university, or other officer of less consequence, confirmed by the senate of Kansas, and should call the legislature together for that purpose. These illustrations show that the words "extraordinary occasion," employed in the two Constitutions, have been construed, by long-continued custom and practical usage, not to be synonymous with "overpowering and urgent necessity." The practice has prevailed, with few exceptions, in recent years, for the retiring President, by proclamation, to convene the Senate to meet on the 4th of March ensuing for the sole purpose of acting on appointments to be made by the incoming executive. It might well be the subject of debate, when such a call was made by President Cleveland during the expiring days of his first term of office, convening the Senate on March 4, 1889, whether he considered it of supreme importance that an extra session should be held in order that his political friends and adherents might be expeditiously turned out of office, and his enemies installed. Yet what court would have entertained a controversy, involving an attack on his constitutional power, to try the fact of the existence of an extraordinary occasion at that time? It will be noted that in such cases the President making the call does not further communicate with the Senate by message or otherwise, and it is not supposable, when he is succeeded by a political opponent, that he is advised in advance of the appointments to be made, which the Senate is called upon to consider.

Thus, we have seen that extra sessions of the Senate of the United States have been and may be called and held for purposes common and ordinary, and for cause so slight and inconsequential as to be wholly at variance with the idea of extraordinary necessity, under the constitutional grant of power above referred to. While the purpose of the framers of the fundamental law may have been that the executive authority now under discussion should be used only in the

event of imperative necessity, yet departure from this intent was begun early in the nation's history, and, continuing until now, custom has become fixed law, ingrafting itself upon the Constitution, compelling the courts to recognize and respect it. Are we not then driven to the conclusion that whether a condition exists which is uncommon and out of the ordinary course of things is to be determined by the President or governor in the exercise of discretion which (after being sworn as officers) has been reposed in them by the people, and from which, when once exercised, there can be no appeal to the courts? It would be an unseemly and unprecedented proceeding for this court, or any court, to entertain a controversy wherein, by proof obtained from witnesses sworn in the cause, it sought to ascertain judicially whether an extraordinary occasion existed, of sufficient gravity to authorize the governor to convene the legislature in extra session. If jurisdiction is retained of such a cause, what is the rule as to the *quantum* of evidence necessary to establish that there was no emergency? This is a civil action. In such cases the party having the preponderance of evidence on his side must prevail. The utter absurdity of such an inquiry, wherein a judgment either way is made to depend upon the slightest preponderance of the evidence, no doubt furnished the reasons why the counsel for the defendant took the position that judicial knowledge alone could be employed, abandoning the second paragraph of the return above set out; the truth of its averments necessarily depending upon proof derived from the testimony of witnesses. "Discretion" is defined, when applied to public functionaries, to be "a power of right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others." *Oneida Common Pleas Judges v. People, Savage*, 18 Wend. 99. It perverts and destroys the meaning of the word to hold that exercise of discretion may be reviewed or controlled by some other person or tribunal than the person on whom it is conferred. Ministerial duties resting on an executive officer have frequently been enforced by the courts. Ministerial acts do not flow from the exercise of discretion, but involve a simple, definite duty imposed by law. *Martin v. Ingham*, 38 Kan. 641. The case of *State, Guthrie, v. School Fund Comrs.* 4 Kan. 261, is cited as an authority that this court will review the discretionary acts of a co-ordinate branch of the state government, *viz.*, the legislature.

Sections 3 and 5 of article 11 of the Constitution read:

"Sec. 3. The legislature shall provide, at each regular session, for raising sufficient revenue to defray the current expenses of the state for two years."

"Sec. 5. For the purpose of defraying extraordinary expenses and making public improvements, the state may contract public debts."

In 1868 an act was passed by the legislature entitled, "An Act Providing for the Is-44 L. R. A.

suance and Sale of Bonds of the State, for the Purpose of Paying the Officers and Members of the State Legislature and Current Expenses of the State." Gen. Stat. 1868, p. 957. Bonds were issued under this act. They were decided to be void, as being issued in violation of said section 5 of the Constitution above quoted. The control of discretion was not involved. Chief Justice Kingman says: "There is no pretense in the law that the expenses were extraordinary in their character." The question decided was as to the character of the expense. This the legislature had before decided, both in the title and body of the act, and this court merely affirmed its decision. The court said: "The legislature has not even pretended to declare the expenses extraordinary in their character, or in the circumstances attending them." In *Martin v. Ingham*, 38 Kan. 641, Mr. Justice Valentine, in the opinion, says: "No court ever attempts, by either injunction or mandamus, or by any other action or proceeding, to control legislative, judicial, executive, or political discretion; and never, indeed, attempts to control any purely legislative, judicial, or executive act of any kind, nor pure discretion of any kind, except when a superior court on appeal reviews a decision of an inferior court; . . . The only acts of public functionaries which the courts ever attempt to control by either injunction or mandamus are such acts only as are in their nature strictly ministerial; and a ministerial act is one which a public officer or agent is required to perform, upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." Cases might be imagined, however, where the courts would be justified in declaring void the acts of a legislative body assembled at the call of a governor in extra session. For instance, if the declared object of the meeting appeared to be obviously irrelevant or utterly frivolous and trifling, showing a rampant and revolutionary purpose on the part of the executive to subvert his prescribed powers in defiance of all lawful restraint, convincing the meanest understanding that all constitutional limits of authority had been disregarded, thus bringing scandal upon the state,—in such case it might well be held that judgment and discretion had fled, and that the act was done through a blind, unreasoning resort to what might be likened to physical force. Or if it should appear from the official declarations of the governor or that he resented the limitations set by the Constitution upon his authority, contending that no extraordinary occasion existed or emergency had arisen, or that he denied that any check whatever was imposed upon his power to act, and proclaimed that the special session was called to pass laws of a general nature, no particular legislation being mentioned (the declared object being merely to shorten the work of the regular session, showing a deliberate and studied design to ignore the Constitution), a legal in-

ference would at once arise that he had not used any discretion whatever, for discretion necessarily implies the exercise of a certain degree of common sense. However, it could hardly be presumed that, in either event mentioned, the members of the legislature would give heed to a call so grossly violative of the Constitution, which each of them is required on oath to support and defend. This being a republican form of government, the people are on guard. They have made a Constitution for the guidance of their servants in the discharge of official duties. If a governor transgress, by abuse of discretion or otherwise, they have made provision for his impeachment and deposition. Should he escape this punishment, the sovereign power resides with the people to condemn his acts at the polls by removing him from a place of power after a brief term of office. This court has repeatedly decided that it cannot review legislative discretion. In the early case of *State, Johnson, v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503, § 17 of art. 2 of the Constitution was under consideration. It provides: "In all cases where a general law can be made applicable, no special law shall be enacted." It was held that the language used leaves discretion to the legislature, recognizing the necessity of some special legislation, and that it seeks only to limit, not to prohibit, it. The legislature must determine whether its purpose can or cannot be expediently accomplished by a general law. *Knowles v. Topeka Bd. of Edu.* 33 Kan. 692.

The adjudicated cases are few in which the precise question before us has been considered. However, there are authorities directly in point. In *Whiteman v. Wilmington & S. R. Co.* 2 Harr. (Del.) 514, 33 Am. Dec. 411, it is said: "Another objection to the validity of this supplement is founded upon the assumption that the general assembly which passed it was not constitutionally convened, and that consequently not only this, but all its acts at that session, are absolutely void. In the Constitution of this state (art. 3, § 12) the governor is authorized to convene the general assembly on extraordinary occasions. This is a power the exercise of which the framers of the Constitution have seen fit to entrust to the chief executive officer of the state alone. As they have not defined what shall be deemed an extraordinary occasion for this purpose, nor referred the settlement of the question to any other department or branch of the government, the governor must necessarily be himself the judge, or he cannot exercise the power. He may err, but this court has no jurisdiction to review his decision or correct his error. If he act corruptly, he is liable to impeachment; but the doctrine that a mistake, or even corruption, on the part of the governor in convening the general assembly, invalidates the act of that body, would be productive of incalculable mischief." In Colorado the legislature is authorized to submit to the judges of the supreme court important questions involving public interests. The judges are then required to decide the same, although no case is pending before the court. 44 L. R. A.

In *Veto Power*, 9 Colo. 642, the supreme court was asked by the legislature to give an opinion whether the decision of the governor in convening the legislature in special session was conclusive or not. The court said: "Whether or not an occasion exists of such extraordinary character as demands a convention of the general assembly in special session, under the provisions of § 9, art. 4, of the Constitution, is a matter resting entirely in the judgment of the executive." Again this question was before the supreme court of Colorado, and their opinion (19 Colo. 333) contains the following language: "The governor is thus invested with extraordinary powers. He alone is to determine when there is an extraordinary occasion for convening the legislature." In *People, Carter, v. Rice*, 65 Hun, 245, the supreme court of New York, in deciding this question, uses the following language: "The governor by his proclamation assumed to convene the legislature in extra session under the provision of § 4 of article 4 of the Constitution. This article gave the governor power to convene the legislature in extraordinary session, and, from the very nature of the provision, he must be the judge as to what constitutes the extraordinary occasion." In Rhode Island there seems to be the same provision which is found in Colorado, authorizing the house of representatives to propound questions to the supreme court for an opinion. In 1893 the house of representatives propounded to the supreme court of Rhode Island certain questions touching the duties and powers of the governor. The supreme court rendered their opinion, as found in *Re Legislative Adjournment*, 18 R. I. 830, 22 L. R. A. 716. Among other things, the court says: "The powers vested in the executive department are to be exercised by the governor under his oath of office, and under the express constitutional injunction that he 'shall take care that the laws be faithfully executed,' and he is responsible to the people alone for the manner in which he discharges the duties of his high office. If he violates the Constitution or the laws which he is sworn to support, he may be impeached and removed from office, and may also be indicted and punished like any other person. . . . But for the exercise of his powers and prerogatives as governor neither the legislative nor the judicial department of the government has any power to call him to account, nor can they, or either of them, review his action in connection therewith. In short, it cannot be questioned that the governor is supreme and independent in the executive department, as is the legislature in the legislative, and the court in the judicial, department of the government. . . . Moreover, this is a case in which the executive department of the state government has the power and duty to finally pass upon a question of constitutional construction. . . . The power of the executive, which we are considering, is a political power, 'in the exercise of which,' in the language of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch. 137, 2 L. ed. 60, 'he is to use his own discretion, and is accountable only to his country,

in his political character, and to his own conscience; and, whatever opinion may be entertained of the manner in which the executive discretion may be used, still there exists no power to control that discretion.' 'The subject is political.' " The supreme court of Wisconsin, in *State, Martin, v. Farwell*, 3 Pinney, 439, in speaking of this question, says: "But if the right is contingent, and is made to depend upon the discretion of the executive, in such case, until that discretion be exercised, no right can vest; and if, in the exercise of that discretion, the governor deny the right, then all claim of right is gone. His determination is final upon the question of right,—as much as that of a court of competent jurisdiction." In *United States v. Arredondo*, 6 Pet. 729, 8 L. ed. 561, the Supreme Court of the United States uses the following language: "It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confined to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal officer; whether executive, . . . legislative, . . . or judicial." The late Judge Cooley, regarded everywhere as one of the greatest of our constitutional lawyers, and the highest authority on constitutional questions, in p. 41 of his *Constitutional Limitations*, says: "Sometimes the case will be such that the decision, when made, must, from the nature of things, be conclusive, and subject to no appeal or review, however erroneous it may be in the opinion of other departments or other officers: but in other cases the same question may be required to be passed upon again before the duty is completely performed. The first of these classes is where, by Constitution, a particular question is plainly addressed to the discretion or judgment of some department or officer, so that the interference of any other department or officer, with a view to the substitution of its own discretion or judgment in the place of that to which the Constitution has confined the decision, would be impertinent and intrusive. Under every Constitution, cases of this description are to be met with; and, though it will sometimes be found difficult to classify them, there can be no doubt, when the case is properly determined to be one of this character, that the rule must prevail which makes the decision final. We will suppose, again, that the Constitution empowers the executive to convene the legislature on extraordinary occasions, and does not in terms authorize the intervention of anyone else in determining what is and what is not such an occasion in the constitutional sense: it is obvious that the question is addressed exclusively to the executive judg-

ment, and neither the legislative nor the judicial department can intervene to compel action, if he [the executive] decide against it, or to enjoin action, if, in his opinion, the proper occasion has arisen. . . . But there are cases where the question of construction is equally addressed to two or more departments of the government, and it then becomes important to know whether the decision by one is binding upon the others, or whether each is to act upon its own judgment. Let us suppose, once more, that the governor, being empowered by the Constitution to convene the legislature upon extraordinary occasions, has regarded a particular event as being such an occasion, and has issued his proclamation calling them together with a view to the enactment of some particular legislation which the event seems to call for, and which he specifies in his proclamation. Now, the legislature are to enact laws upon their own view of necessity and expediency; and they will refuse to pass the desired statute, if they regard it as unwise or unimportant. But in so doing they indirectly review the governor's decision [especially if] in refusing to pass the law, they . . . [do so on the ground that the] specific event was not one calling for action on their part. In such a case it is clear that while the decision of the governor is final, so far as to require the legislature to meet, it is not final in any sense that would bind the legislative department to accept and act upon it when they are called to enter upon the performance of their duty in the making of laws." As stated by Judge Cooley, the legislature, in this state, when convened, could wholly ignore the reasons given by the governor calling it together, and disregard entirely all suggestions made by him touching the necessity of proposed legislation. Not being restricted by the Constitution to the consideration of matters within the limits of the governor's proclamation, it might proceed to enact laws having no relevancy to the object for which it was convened. The fact that the railroad law creating a court of visitation does not take effect until March 15 cannot affect the question of the necessity of convening the legislature in December for the enacting of laws affecting freight rates. The acts of the executive cannot be judged by the action of the legislature. If no railroad legislation had been enacted, that fact would have been no proof that the governor's proclamation and message were unauthorized.

We come now to the consideration of the second question in the case. to wit: Did the house of representatives which united with the senate on December 21, 1898, in special session of the legislature, constitute a legal organization? The contention is that chapter 171 of the Laws of 1897, apportioning the state into representative districts (which by its terms went into effect on June 1, 1898, and repealed all acts in conflict with it), terminated the existence of the house of 1897, the members of which it was supposed had been elected for a term of two years; and there is the further claim that, if any house existed when the special session convened, it

was the one elected in November, 1898. This proposition has at least the merit of novelty. It has been the generally accepted opinion that the terms of members of the legislature began on the second Tuesday of January; that the representatives held their offices for two years, and senators for four years, from that time; and that their terms, as fixed by the Constitution, were not, and could not be, shortened by the passage of an apportionment act. This view of the Constitution and statutes has been acquiesced in by the executive, legislative, and judicial departments of the state government since its organization; and such an interpretation, adopted, as it has been, by the people for about a third of a century, is entitled to much force. In our opinion, the passing of an apportionment act does not shorten or affect the term of office of members of the legislature then serving, nor was it intended that it should have such effect. The Constitution plainly fixes the term of a representative at two years, but does not expressly provide when the legislative term shall begin. In the absence of such provision, it is competent for the legislature to fix the commencement of the term. That the legislature possesses this power was determined in an early day, in *State, Crawford, v. Robinson*, 1 Kan. 17, and at the same time the court rejected the theory that the terms began when the members were elected, or declared to be so. Since that time, and in accordance with that decision, the legislature fixed the commencement of the term by providing as follows: "The regular term of office for members of the Senate and House of Representatives shall commence on the second Tuesday of January next succeeding their election." Gen. Stat. 1889, § 2721. This statute is in harmony with the constitutional provisions on the same subject, which manifestly contemplate that the term shall begin at that time. In § 25 of article 2 of the Constitution it is provided that the regular sessions of the legislature shall commence on the second Tuesday of January, and in § 6 of article 1, where provision is made for adjournment in case of a disagreement between the two houses, the governor is expressly authorized to adjourn the legislature to such a time as he may think proper, "not beyond its regular meeting." The clear implication of this provision is that each house of representatives shall continue to exist until the beginning of the next regular session. Whatever force may be given to this implication, it is clear that these provisions, together with the act of 1868, fix the second Tuesday in January next after the election as the time for the beginning of legislative terms, and each representative elected is entitled to hold his office for two years. The law fixing the commencement of the term was passed in 1868, and since then the terms of representatives and senators have been extended in length, and the sessions of the legislature have been made biennial, by the amendment of 1877. This amendment does not in terms repeal the act, nor does it contain anything that would operate as a repeal by implication. The act is prospective in character, and is just as ap-

propriate and applicable under the amendment as it was under the original provision of the Constitution. The act was not repealed by the amendment, but is still effective in fixing the commencement of the terms of members of the legislature. *Prouty v. Stover*, 11 Kan. 235. The legislature may provide when the terms of members shall begin, but it cannot abridge or extend the terms fixed by the Constitution. As the second Tuesday in January, 1897, must be held to be the commencement of the term of members of the house in question, and as the Constitution fixes the duration of the term at two years, is it not a violent assumption that the legislature intended, or had authority, to abridge the terms of the members to about seventeen months, thus completely abolishing one branch of the legislature? Did it by apportioning the state, and providing for the election of the succeeding legislature, constitutionally destroy the house of representatives, and practically legislate itself out of existence? Nothing in the language of the act indicates such a purpose, if, indeed, it had the power to accomplish it. It is contended, however, that the repeal of the former apportionment act, in effect, destroyed the old representative districts, and necessarily abolished the offices of the representatives elected therefrom. The situation is likened to the abolition of a county or township, in which case it has been held that the abolition of the municipal organization has the effect of ousting the officers of such organization from office. This is decided on the theory that the jurisdiction of the officers is confined to the municipality for which they were elected, and that, when the municipality within which the official functions of the officers are to be performed is abolished, the officers themselves go with it. We cannot see the analogy between the two cases. In that case the officers cannot perform their official functions, because the organization in which they are to be performed no longer exists. In the case of a member of the legislature, although he is chosen from, and must reside within, his district, he performs no official function therein. Instead of acting individually within his district, he becomes a member of an organization which acts only in its organic capacity, and at the capital of the state. He is in a certain sense an officer of the state, and, with others, constitutes a department of the state government. The district from which he is elected is not a municipal or quasi municipal corporation, and it never acts or is dealt with as a political entity. Districts are provided to create a system by which the members will be close to the people which they represent, and from which members are to be elected. In creating districts for this purpose, the legislature fixes the boundary lines, and designates them by numbers; but that is the extent of the organization, and the only reason for their existence. The voters within the limits of a district are an electoral body who choose one of their number to represent them in the legislature, and no other action is ever taken by them as a result of such organization. The member is therefore

not an officer of the district, as the probate judge is an officer of the county, or a justice of the peace an officer for the township. The matter of apportionment is only a provision for future elections, and is not designed to affect the title to office, or the tenure of the members making the apportionment. Only brief periods intervene between apportionments, if constitutional requirements are observed; and they must not only be made, but they must go into effect long enough before the election to give the electors opportunity to comply with the ballot and election laws. This necessarily requires considerable time, and certainly it was not contemplated that during this long period the office of representative should be abolished, or that the legislature could not, however great the emergency, be convened. The apportionment act provided means for electing the representatives whose terms began on the second Tuesday in January, 1899, and had no effect whatever except as a provision affecting future elections. The territory constituting the old districts remained, and the constitutional terms of the representatives were not shortened by the shifting of the lines and the change of the numbers; nor was anyone legislated out of office by the passage of the act. An examination of the apportionment act shows that but little change was made in the districts. In most cases a single county constituted a legislative district, and, where a county was divided into two or more districts, the territory composing each district is largely the same as was included in it under the former act, but designated by a different number. The exterior limits being substantially as they were before, and some,

if not all, of the territory of the old districts constituting a part of the new, leave but little ground for the assertion that the members were left without territory or districts. Our view, however, is that the provisions made for future elections were not intended to, and did not, affect the tenure of office of the members making it, and that the members elected in November, 1896, were entitled to hold their offices for the constitutional period of two years, and up to the second Tuesday in January, 1899. It is significant that the representatives elected in November, 1898, did not respond to the call of the governor, or assume that they were entitled to their offices before the time for the convening of the regular session. The members elected in 1896 only claimed a place in the house of representatives at the special session. No person disputed their rights, claimed their seats, or molested them in the discharge of their duties. The house so organized was recognized by the other branches of the lawmaking power, and the validity of the organization was not challenged until the present proceeding was begun. It follows, then, that the house of representatives was a legal organization, and that the preliminary requirements of the Constitution leading up to its meeting with the Senate as a legislature, in special session, were complied with.

For the reasons herein expressed, *the motion of the plaintiff for a peremptory writ of mandamus, notwithstanding the answer and return, will be sustained, and a peremptory writ issued as prayed for.*

All the Justices concur.

KENTUCKY COURT OF APPEALS.

Parmelia J. CLAYTON, *Appt.*,

v.

City of HENDERSON *et al.*

(.....Ky.....)

1. The restriction against locating a pest house within a mile of a city, made by Stat. § 3909, is not repealed by the act of June 14, 1893, providing that the common council of a city of the third class shall have power to make quarantine laws and enforce them within 10 miles of the city, to establish hospitals, and other establishments, and acquire and hold land for such purposes within or beyond the boundaries of the city.
2. A city is liable for the damages caused by the erection of a pest house near the residence of a person, notwithstanding the fact that it is erected within a mile of a city contrary to a statute which expressly makes the officers liable therefor, without declaring the city liable.
3. Ministerial officers only are liable for the erection of a pest house within a mile of a city in violation of Stat. § 3909.

NOTE.—As to nuisance of pest house, see also *Baltimore v. Fairfield Improv. Co.* (Md.) 40 L. R. A. 494.
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4. A surety on the bond of a pest-house keeper is not, by executing the bond, rendered liable for the maintenance of the pest house within forbidden limits.
5. A cause of action under the common law against a city for establishing a pest house near a residence claiming compensatory damages only cannot be joined with an action against officers under a statute for punitive damages, although both causes of action arise out of the same transaction.

(February 19, 1898.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Henderson County in favor of defendants in an action brought to recover damages for the erection and maintenance of a pest house within 1-2 mile of the limits of the defendant city contrary to the provisions of a statute which resulted in injury to plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. Montgomery Merritt, S. B. Vance, and R. D. Vance for appellant.
Messrs. Clay & Clay and Dudley & Fitts for appellees.

Du Belle, J., delivered the opinion of the court:

By an act adopted in 1886, embodied in § 3909, Ky. Stat., it was provided: "It shall not be lawful to locate or maintain any pest house or other place intended for the treatment of eruptive diseases, or diseases which are contagious or infectious, within the corporate limits of any incorporated city or town, or within a distance of 1 mile of the boundary line thereof. Any officer of any city or town, or other person, who shall violate the provisions of this act, or in anywise aid or abet therein, shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be fined not less than \$500 nor more than \$1,000, and be liable in damages to any person injured thereby, and, if wilfully done, such person or his heirs or representatives may recover punitive damages." Under this statute which is set out in the petition, the appellant brought suit, making parties defendant the city of Henderson, the mayor thereof, the members of the common council, and the keeper of the pest house and his surety; alleging that they had wilfully maintained, and aided and abetted in maintaining, a pest house within 1-2 mile of the limits of the city, near appellant's residence; that they had sent persons afflicted with smallpox to the pest house; that by that means that disease was communicated to her, to her damage; and that they had taken no steps, and provided no means, to prevent the spreading of the disease and the communication thereof to other persons. After various motions to require appellant to elect which of the defendants she would proceed against, and whether she would pursue a cause of action under the common law or under the statute, had been overruled, general demurrers to the petition were sustained.

On behalf of appellees it is claimed that the act of 1886 was repealed by implication by the act of June 14, 1893, for the government of cities of the third class, which provides (§ 3200): "The common council of each of said cities shall, within the limits of the Constitution of the state and this act, have power by ordinance . . . to prevent the introduction of contagious diseases into the city, to make quarantine laws for the purpose and enforce the same within 10 miles of the city, to establish and erect hospitals, almshouses, city prisons, workhouses, make regulations for the government thereof, and to acquire and hold land for the purpose either within or beyond the boundaries of the city." The claim is that the act of 1886 is a limitation upon the power of the common council of cities of the third class, and therefore inconsistent with the grant of power in the charter, which recognizes no limitations except the Constitution and this act; and, further, that the act of 1893 was intended to cover the whole subject of the rights, duties, and liabilities of cities of the class named; and it is urged that, being so intended, it is a repeal of all prior legislation upon the subject, even if not in terms repugnant. It was also urged that the intent of the legislature to repeal the act of 41 L. R. A.

1886 is further shown by the provisions of the acts in regard to the government of cities of the second and fourth classes, notably the latter, which provides (Ky. Stat. § 3490) that the boards of council of said cities shall have power "to make regulations to prevent the introduction or spreading of contagious or infectious diseases in the city, to pass quarantine laws for that purpose and to enforce the same within 1 mile of the city; to establish and regulate hospitals or pest houses in or outside of the city; to make all regulations necessary to secure the general health of the inhabitants of the city, and to regulate and provide for the burial of the dead." Undoubtedly, it needs no argument to show that the word "hospitals" includes pest houses. But it does not follow because the city council is authorized to establish hospitals and other named institutions, most of which are proper, and some of which are necessary, to be situate within the city limits, and for such purpose is also authorized to acquire property within or without those limits, that therefore all may be established within the boundary. On the contrary, the preceding subsection above quoted looks directly to the exclusion of contagious diseases from the city limits; and it would be a strained construction to hold that the adoption of an act which was manifestly intended to authorize the deportation of cases of contagious diseases from cities of the third class accomplished the repeal of an act which forbids the treatment of such cases within the limits or in the vicinity of cities of all classes. It is true that the Constitution (§ 156) provides that "all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions;" and, if the act of 1886 were applicable alone to cities of the third class, there might be force in the contention that the act for their government was intended as a complete code of laws on the subject, and therefore repealed all antecedent laws in relation thereto not embraced in its provisions. But the act of 1886 is not restricted in its application to cities of the third class. It embraces all municipalities, is a proper exercise of the general police powers of the state government to take measures for the security of the health of its citizens, and we do not think it repealed by the act of 1893, any more than the common law of nuisances is thereby repealed as to nuisances established within the limits of cities of the third class. Whether the general act is repealed as to cities of the fourth class by the act for their government is not presented by this record, and need not be here considered.

It is further contended on behalf of the city of Henderson that, even if the act of 1886 was not repealed, the city cannot be held liable, because the act does not make the corporation responsible, but only the officers who shall violate its provisions; and, further, because the act complained of, being forbidden by statute, was beyond the scope of the powers of the municipality, was *ultra vires*, and therefore imposed no liability upon the corporation. But, in the contention that the act imposed no responsibility

upon the corporation, the common-law liability for establishing a nuisance which inflicts special damage upon an individual is overlooked; and as it is not necessary that the word "nuisance" should be used in the pleading, but only that facts be stated which show the existence of the nuisance and the damage resultant therefrom, we think a cause of action has been stated against the city. "A pest house erected by town, municipal, or county authorities near the premises of another, injuring the health of his family, or exposing them to contagious disease, is a nuisance for which an action will lie, and, in the case of a county, against the boards or officers erecting it." Wood, Nuisances, 2d ed. § 66. And in *Haag v. Vanderburgh County Comrs.* 60 Ind. 511, 28 Am. Rep. 654, suit was brought against the board of commissioners of the county, which was held to be, in legal contemplation, the county; and the court held that it was a well-recognized rule that municipal corporations are liable for torts in certain classes of cases including nuisances, in the same manner as natural persons; referring to 2 Hilliard, Torts, p. 273; Shearm. & Redf. Neg. § 120; 2 Dill. Mun. Corp. p. 766. And in the contention that the acts alleged in the petition, being unauthorized, cannot impose a liability upon the corporation, counsel seem to confuse the liability of a municipality for unauthorized contracts with its liability for torts committed by its officers acting under its authority in a matter within the scope of its corporate powers, but in regard to which its powers have been abused. Said Chief Justice Shaw, in *Thayer v. Boston*, 19 Pick. 513, 31 Am. Dec. 157, cited with approval in *McGrac v. Marion*, 98 Ky. 673, in which a number of other cases upon the subject are referred to: "The court are therefore of the opinion that the city of Boston may be liable in an action of the case where acts are done by its authority, which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or where, after the act has been done, it has been ratified by the corporation by any similar act of its officers." The rule in this respect is admirably stated in 2 Dill. Mun. Corp. 4th ed. § 968: "To create such a liability, it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers, as prescribed by charter or positive enactment (the extent of which powers all persons are bound, at their peril, to know); in other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances." And, again, in § 972: "Prima facie, a municipal corporation is not liable for the trespass and wrongful acts of its officers, though done *colore officii*; but it will clearly be liable therefor where the act, if not wholly *ultra vires* in the sense before explained, was expressly authorized by the governing body 44 L. R. A.

of the corporation, or where, without special authority, it was done by its officers in the scope of their duties and employment, and has been ratified by the corporation."

The next question which arises is whether the members of the board of council are, by the act of 1886, made liable for damages caused by the establishment of the pest house at a place within the statutory limits. It seems quite clear that, in the absence of statutory provision, they would not be. They are invested with legislative powers, and, in the action complained of, were doubtless exercising those powers. "Where the officers of a municipal corporation are invested with legislative powers, they are, of course, exempt from individual liability for the passage of any ordinance within their authority, and their motives in reference thereto will not be inquired into; nor are they individually liable for the passage of any ordinance not authorized by their powers, for such ordinance is void, and need not be obeyed." 1 Dill. Mun. Corp. 4th ed. § 313, and authorities there cited.

The question remains, however, whether the statute under consideration was intended to create a liability against all classes of officers, both legislative and ministerial, of a municipal corporation, concerned in the establishment of a pest house within the forbidden limits, or whether it applied only to ministerial officers who might participate therein. With some hesitation, on account of the absence of direct authority, we have reached the latter conclusion. It would seem improbable that the legislature intended to create a statutory liability against a class of legislative officers, based upon action taken by them in that capacity, without any specific mention of the class to which they belonged, which had uniformly been held exempt from such liability. Such a construction would produce an interference with freedom of action by a legislative body, which ought not to be lightly inferred when the language construed does not expressly provide therefor. It seems probable, rather, that the act was intended to apply to the establishment of such an institution by the executive or ministerial officers of the municipality, to persons who might establish private pest houses, and to persons who might aid or abet either officers or persons so offending. To the class first named belongs the mayor, as well as the keeper of the pest house; but not the surety of the pest-house keeper, merely by virtue of the fact that he is such surety. The mere execution of the bond by him as surety does not, in any fair or just sense, render him liable for aiding or abetting in the establishment or maintenance of the pest house within forbidden limits.

There remains to be considered, therefore, only the question raised by the motions to require an election by appellant, viz., whether an action under the common law against the city for special damages caused to appellant by its maintenance of a nuisance can properly be joined with an action for damages against an officer under the statute in question. Under the Code of Civil Practice (§

83), several causes of action may be united, if each affects all parties to the action, may be brought in the same county, may be prosecuted by the same kind of action, and if all of them be brought for injuries to person and property. The weight of authority seems to be that, where a specific proceeding is prescribed by the statute, it may not be joined with an action at common law; but that, if a penalty or damages be made recoverable in a specific form of action, counts therefor may be joined with counts for other causes of action in the same form, but not in different forms. See authorities quoted in 11 Am. & Eng. Enc. Law, p. 1015m. So, it has been held that a common-law action for negligence cannot be joined with one for statutory negligence. *Kendrick v. Chicago & A. R. Co.* 81 Mo. 521. And see *Felter v. Manville*, 23 Kan. 191. On the other hand, it has been held that a statutory liability of a corporation and its common-law liability may be enforced in the same action. *Bottomley v. Port Huron & N. R. Co.* 44 Mich. 542. But in the case at bar it is sought to recover at common law against one defendant, and under the statute against another.

Under the averments of the petition, only compensatory damages can be recovered against the municipality, for the statute giving punitive damages does not apply to the corporation, and gross negligence is not averred. Under the statute, punitive damages are sought to be recovered against an individual, upon the allegation that the act done was wilful. Without passing upon the question of whether or not averments might be made under which the city would be responsible in punitive damages, it is sufficient to say that such averments are not made in the petition in this case, and that we think a cause of action under the common law against one party for compensatory damages cannot be properly joined with an action against another party for punitive damages,—a right which is given under the statute, although both causes of action arise out of the same transaction.

For the reasons given, *the judgment is reversed*, and cause remanded for further proceedings consistent with this opinion.

Rehearing denied.

LOUISIANA SUPREME COURT.

W. E. HOGGARD and Wife, *Appts.*,
v.
Mayor, etc., of MONROE.

(51 La. Ann. —.)

- *1. Municipal corporations are not liable in damages for acts of their common councils in respect to matters entirely outside of the powers of the corporation.
2. The authority of towns situated on navigable streams to establish and operate public ferries rests entirely, in Louisiana, upon special grants to that effect; and the fact of the existence of such a special grant must be averred in a petition seeking to hold a municipal corporation liable for damages claimed to have occurred in the maintenance of a public ferry.

(February 6, 1899.)

A PPEAL by plaintiffs from a judgment of the Judicial District Court for the Parish of Ouachita in favor of defendant in an action brought to recover damages for the death of plaintiffs' son which was alleged to have been caused by negligence for which defendant was responsible. *Affirmed.*

Statement by **Nicholls**, Ch. J.:

This case is before us through an appeal by plaintiffs from a judgment of the district court sustaining defendant's exception of no cause of action. Plaintiffs, in their petition, asked judgment in the sum of \$15,000 as damages for the death of their minor son,

who, it was alleged, was drowned from a ferryboat through the negligence and misconduct of defendant's servants and employees in charge of the boat. The allegations of the petition bearing upon the issue before us were: "That on the 18th of August, 1898, the defendant corporation was engaged in the maintenance and conduct of a public ferry across the Ouachita river, a navigable stream, within the corporate limits of the city of Monroe. That on said day Charles Hoggard, the minor son of petitioners, was engaged in hauling wood to the city of Monroe, and in so doing was compelled to cross the said Ouachita river at said ferry, and, at the invitation of defendant's servant and employee, entered the flatboat belonging to, and operated by, said corporation. Driving his team on said ferryboat, there being no barriers at the rear end of said boat, he stopped the same on or near the center of the boat, when he was required by the keeper of said ferry (the employee of said corporation) to drive to the rear of the flat or ferry boat, to make room for other wagons and teams thereon. That, in his effort to obey these instructions, his team became unmanageable, and walked off from the rear of said boat into the river, carrying and precipitating the wagon and petitioner's son with them into the stream, where, after a great and desperate effort and struggle to save himself, he was drowned. That, notwithstanding ample time elapsed from the precipitation of plaintiff's son into the water until he lost his life, there was no effort whatever made by the said corporation, its employees and servants, to render him any assistance, or attempt to save his life. That the death of their son was the result of gross, wanton,

*Headnotes by **NICHOLLS**, Ch. J.

NOTE.—As to liability of municipal corporation for unauthorized operation of toll road, see *Becker v. La Crosse* (Wis.) 40 L. R. A. 829. 44 L. R. A.

and extreme negligence, and criminal carelessness, on the part of said corporation, and its employees and servants, in the fitting out and operating of said ferry, and not from any fault or carelessness of petitioners' son. That said negligence on the part of the corporation, its servants and employees, consisted, among other things, especially in its failure to provide its boats with suitable chains, poles, or other barriers to prevent teams, vehicles, and passengers from being precipitated, as was their son, into the river, which chains, poles, or barriers it was incumbent on the defendant corporation, under the law, as a keeper of a public ferry, to provide its boats with, as well as other necessary appliances for the safety of persons trusting their lives and property into its temporary care and keeping. That said negligence of the defendant corporation, its servants and employees, especially consisted, further, in the command of the keeper of said ferry (he being the servant and employee of defendant) to plaintiff's son to drive his team to the rear of said boat and make room for other teams, notwithstanding the absence of a barrier or other character of appliances to check the same, and prevent its precipitation into the water, and further in the absolute failure on the part of the corporation, its employees and servants, to make any effort whatever to assist plaintiff's son in his struggles to save his life, notwithstanding there was ample time in which such effort could have been successfully made, if the said defendant had provided its ferry with properly constructed life-saving appliances, as it should have done, and which failure was negligence."

Messrs. Hudson, Potts, & Bernstein, for appellants:

A municipal corporation is responsible for acts done by its agents, whether in *contractu* or in *delicto*, in the course of its business and of their employment, or for tortious *ultra vires* acts, as a private corporation or individual would be, under similar circumstances.

Bennett v. New Orleans, 14 La. Ann. 120; *Reynolds v. Shreveport*, 13 La. Ann. 426; *McGary v. Lafayette*, 4 La. Ann. 440; *Ware v. Barataria & L. Canal Co.* 15 La. 170, 35 Am. Dec. 139; *Wilde v. New Orleans*, 12 La. Ann. 15; 27 Am. & Eng. Enc. Law, p. 393; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *New York, L. E. & W. R. Co. v. Haring*, 47 N. J. L. 137, 54 Am. Rep. 123; *Hutchinson v. Western & A. R. Co.* 7 Heisk. 634; *McCreedy v. Guardians of Poor*, 9 Serg. & R. 94, 11 Am. Dec. 667; *McGary v. Lafayette*, 12 Rob. (La.) 674; *Jones, Neg. of Mun. Corp.* § 178; 5 Thomp. Corp. §§ 6279-6353.

On rehearing.

Mr. C. J. Boatner, also for appellants:

A corporation cannot escape the consequences of the acts done in the corporate name, and by corporate authority, on the ground that the articles of incorporation or grant of power, as the case may be, did not authorize the act to be done.

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Dooley v. Kansas, 82 Mo. 444, 52 Am. Rep. 330; *Hunt v. Boonville*, 65 Mo. 620, 27 Am. Rep. 229; *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176.

A corporation is liable for the consequences of an *ultra vires* act.

See *Central R. & Bkg. Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *New York, L. E. & W. R. Co. v. Haring*, 47 N. J. L. 137, 54 Am. Rep. 123; *Buffett v. Troy & B. R. Co.* 40 N. Y. 168; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *Bissell v. Michigan S. & N. I. R. Cos.* 22 N. Y. 258; *Cary v. Cleveland & T. R. Co.* 29 Barb. 35; *Weed v. Saratoga & S. R. Co.* 19 Wend. 534.

Messrs. Stubbs & Russell, for appellee:

The powers contained in the charter of this defendant "do not include the power to lease a ferry, either expressly or by implication, nor is the power incident to those expressly granted.

Millsaps v. Monroe, 37 La. Ann. 641.

If the defendant has no power to lease a ferry for the purpose of operating it, it has no power to maintain and conduct a ferry.

Rev. Stat. § 1501.

The operation of the ferry by defendant was *ultra vires*, or outside of and beyond its corporate powers and duties.

Municipal corporations are not liable for the torts committed by its officers in the performance of an *ultra vires* act.

2 Dill. Mun. Corp. 1181, § 968; 15 Am. & Eng. Enc. Law, p. 1165; 2 Thomp. Neg. 737; Elliott, Roads & Streets, 355, 356; Shearm. & Redf. Neg. § 299; Green's Brice, Ultra Vires, 246; *Becker v. La Crosse*, 99 Wis. 414, 40 L. R. A. 329; *Royce v. Salt Lake City*, 15 Utah, 401; *Albany v. Cunliff*, 2 N. Y. 165; *Smith v. Rochester*, 76 N. Y. 506; *Stoddard v. Saratoga Springs*, 127 N. Y. 261.

Nicholls, Ch. J., delivered the opinion of the court:

Plaintiffs allege that the city of Monroe was engaged in the maintenance and conduct of a public ferry across the Ouachita river, a navigable stream, within the corporate limits of that city; but they nowhere allege that this was done under the authority of general law, of statutes conferring powers to that effect upon municipal corporations generally, or of a special provision in its charter. The circumstance that municipal corporations may be situated on the banks of navigable streams does not carry with it an inherent or impliedly granted power to operate a ferry across the stream. *Millsaps v. Monroe*, 37 La. Ann. 641. If it did, it would be proper for us to take judicial notice of the fact. We know of no statute conferring generally a power of that kind upon towns so situated. On the contrary, § 1501 of the Revised Statutes confers upon police juries, throughout the state, the exclusive privilege of establishing ferries within their respective limits, and of generally regulating the police of the same, except those within the control of municipal corporations. The ferries referred to as being "under the control of municipal corporations" are those under the control of municipal authority, by

direct, general, or special statute grant. There being no general, inherent, or implied authority, or general statute vesting authority, in municipal corporations, to establish and operate public ferries, the right to do so must rest in particular cases upon special authority, and the existence of that authority should be specially pleaded. Plaintiffs herein make before us the broad contention that the city of Monroe is bound to them independently of any authority in it, either general or special, to operate ferries. That liability flows from the fact itself that the city did carry on a ferry, and that, as resulting from that fact, injury was done to plaintiffs' son. They urge that it is monstrous to say that the city of Monroe should operate a ferry freed from all responsibility for the manner in which it was conducted; but this argument involves an assumption of fact, that the "city" did operate such a ferry. It may be true that one was conducted under authority of the common council in the name of the city; but, unless the corporation itself was authorized to establish the ferry, it cannot be said that the act of the council was the act of the city. The council represents the city only in respect to matters which fall within the corporate powers of the corporation. Beyond this, its acts are *ultra vires*. We think that it is universally recognized as law that acts of the directing body of municipal corporations, covering matters entirely beyond the powers of the corporation, do not bind the latter, though it has been held, if the acts be within the powers, but directed to be done at some particular time, or in some particular manner, departure from such provisions of law would not necessarily make the acts absolutely void. Defendant refers the court, on this subject, to 2 Dill. Mun. Corp. §§ 968-971, and § 973a, note; 2 Thomp. Neg. p. 737; 15 Am. & Eng. Enc. Law, p. 1165; Elliott, Roads & Streets, pp. 355, 356; Shearm. & Redf. Neg. § 209; Brice, *Ultra Vires*, Green's ed. p. 246; *Becker v. La Crosse*, 99 Wis. 414, 40 L. R. A. 829; *Royce v. Salt Lake City*, 15 Utah, 401; *Albany v. Cunliff*, 2 N. Y. 165; *Smith v. Rochester*, 76 N. Y. 506; *Stoddard v. Saratoga Springs*, 127 N. Y. 261.

Plaintiffs advance in support of their position a decision of the Supreme Court of the

United States in *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 170, but we think the court in that case did not intend to go, nor did it in fact go, to the extent which plaintiffs assert. That case was presented and passed upon under an exceptional state of facts. The city of Salt Lake was not brought into court upon a claim made against it, based on either contract or tort, but was in court as a plaintiff seeking to recover money which it alleged it had been improperly and illegally made to pay, but under protest. The city, in bringing its suit, fell under the operation of the rule that the right to resist payment of a claim, when advanced, is much broader than is the right when money has been paid under it to recover it back. Independently of this, the supreme court held that the law made the imposition of a tax in favor of the government follow as the immediate and direct result of the fact itself of the carrying on of a particular business without reference to who carried it on, or under what circumstances it was done. The city of Salt Lake had, without authority, carried on a distillery. Called on to pay a tax, it made the payment, but, under protest, and sought afterwards to have the sum so paid reimbursed to it. The court held that the claim so presented was not well founded, and, in the course of its opinion, declared and showed that the acceptance of the doctrine contended for was against public policy, in tax matters, as it would lead to the destruction of the tax system. There is no matter of public policy favoring the acceptance of the doctrine advanced by plaintiffs in cases like the present. On the contrary, it would lead up necessarily to ruinous public results, and would do away with all the checks which experience has shown to be absolutely essential for the safety and well being of the different communities. We would not be justified in departing from established legal landmarks to meet the hardships and supposed equities of a particular case.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

Rehearing denied March 20, 1899.

MARYLAND COURT OF APPEALS.

Archibald H. TAYLOR, Admr., of John Scott, Jr., Deceased, Appt.,

v.

David H. CARROLL *et al.*

(.....Md.....)

1. A special title acquired by an assignee of a mortgage for the purpose of foreclosure only will not vest in or devolve upon his administrator upon his death.

NOTE.—As to effect of pendency of action as notice, see also *Holland v. Citizens' Sav. Bank* (R. I.) 8 L. R. A. 553, and note.

As to effect of assignment of mortgage, see also *Sanford v. Kane* (Ill.) 8 L. R. A. 724, 44 L. R. A.

See also 47 L. R. A. 275.

2. More than twenty years' delay in proceeding with a foreclosure after it has been begun will relieve a purchaser of the property from the effect of the *lis pendens* as notice, if there is no satisfactory excuse or explanation of the delay.

(March 14, 1899.)

APPEAL by defendant from a decree of the Circuit Court of Baltimore City enjoining defendant from proceeding to sell certain property under a mortgage and decreeing that the mortgage did not constitute a lien upon the property. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. P. Keech, Jr., and A. H. Taylor for appellant.

Messrs. George Whitelock and Thomas H. Ridgely, for appellees:

The possession of the appellees and those under whom they claim has conformed to the conveyances to their devisors, and has been, since 1876, both constructively and by physical inclosure, coextensive with the out-lines of the lots as described in these conveyances.

Code, art. 75, § 76; *Kopp v. Herrman*, 82 Md. 350.

Such a possession constitutes title.

Zion Church v. Hilken, 84 Md. 170.

And the appellees being armed with both the legal and equitable title fortified by actual possession can invoke the aid of a court of equity to remove by injunction a cloud upon such title.

Polk v. Rose, 25 Md. 161, 89 Am. Dec. 773; *Baumgardner v. Fowler*, 82 Md. 631; *Polk v. Pendleton*, 31 Md. 118; *Livingston v. Hall*, 73 Md. 395; *Heiden v. Hellen*, 80 Md. 620.

Adverse possession affords, not only a good defensive title, but is sufficient to support an action of ejectment against one in possession having the paper title.

Hoye v. Swan, 5 Md. 248; *Armstrong v. Risteau*, 5 Md. 256, 59 Am. Dec. 115.

It constitutes a title which a court of chancery will compel a purchaser to accept.

Doe, Campbell, v. Fletcher, 37 Md. 430; *Lurman v. Hubner*, 75 Md. 271; *Bay v. Posner*, 78 Md. 49.

The idea that a party ought to stand by and see his property illegally exposed to public sale, and then force the purchaser to bring ejectment, seems to be sustained by no good authority.

Holland v. Baltimore, 11 Md. 196; *Brown v. Stewart*, 56 Md. 432; *Spencer v. Almoncy*, 56 Md. 551.

It can hardly be controverted that courts of equity in Maryland have adopted by analogy to the statute of limitations the period of twenty years, reckoning from the maturity of a mortgage, as constituting a complete bar to the enforcement of the mortgage lien.

Crook v. Glenn, 30 Md. 70; *Baltimore & O. R. Co. v. Trimble*, 51 Md. 109; *Brown v. Hardcastle*, 63 Md. 488; *Baldwin v. Trimble*, 85 Md. 406, 36 L. R. A. 489; 2 Jones, Mortg. §§ 1195, 1208, 1210.

Such a mortgage can no longer be treated as evidence of a subsisting debt.

Boyd v. Harris, 2 Md. Ch. 213; 2 Jones, Mortg. § 1204.

The period of limitations in this case began to run from February 3, 1875, when the mortgagee's right of action accrued.

2 Jones, Mortg. § 1210; *Subers v. Hurlock*, 82 Md. 49.

The jurisdiction here invoked is well established.

Fox v. Blossom, 17 Blatchf. 352; *Downs v. Sooy*, 28 N. J. Eq. 58.

If Carroll's title was good when acquired, the subsequent acts of Scott did not make it bad.

Applegarth v. Russell, 25 Md. 317; *Campbell's Case*, 2 Bland, Ch. 210, 20 Am. Dec. 360, and note to Brantly's ed.

If Scott's proceeding was ever a *lis pendens* 44 L. R. A.

dens it has long since ceased to be such because it was not prosecuted with diligence.

Price v. McDonald, 1 Md. 412, 54 Am. Dec. 657.

The doctrine of *lis pendens* can have no application to this case for Carroll was in possession at the time of Scott's proceedings.

Tongue v. Morton, 6 Harr. & J. 21; *Frazer v. Palmer*, 2 Harr. & G. 469.

And a *lis pendens* must moreover relate to specific property—to the very thing or property in question.

Sanders v. McDonald, 63 Md. 503; *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375.

Then, too, the court in which the suit is pending must have acquired undeniable jurisdiction of the subject-matter and the parties.

Murguiondo v. Hoover, 72 Md. 17.

But the proceeding in Baltimore county was not even a cause, plaint, or action.

Ruley v. Hyland, 77 Md. 488.

It was entirely *ex parte* until it came before the court for ratification of the sale.

McCabe v. Ward, 18 Md. 505.

The power of sale contained in a mortgage ordinarily passes to, and may be exercised by, the assignee or his executor, because it is a power coupled with an interest.

Berry v. Skinner, 30 Md. 567; *Barrick v. Horner*, 78 Md. 253.

But where the power is conferred upon a third person who has no interest in the estate, it is a collateral power, and does not pass on the decease of the donee to his representatives, but can be executed only by the person actually named in the mortgage.

Barrick v. Horner, 78 Md. 245.

Briscoe, J., delivered the opinion of the court:

On February 3, 1873, Spotswood Garland, of Baltimore county, conveyed by way of mortgage to Douglas H. Gordon, of that county, to secure a loan of \$20,000, certain lands situate in Hampden, at that time Baltimore county, but since the act of 1898, chap. 98, a part of Baltimore city including the four lots in controversy in this case.

On the 28th of July, 1877, Gordon, the mortgagee, for the purpose of foreclosure, assigned this mortgage to John Scott, Jr., a member of the Baltimore bar, who subsequently on September 11, 1877, under the power contained in the mortgage, sold a large part of the mortgaged land, not including these lots in dispute, for the sum of \$2,100; the sale was ratified by the court, and afterwards, on the 20th of March, 1878, an auditor's account was filed therein showing a balance of indebtedness of \$7,891.01, with interest from the 5th of September, 1877, after allowing credit for the money arising from the sale. This audit and account was ratified by the court on the 17th of May, 1878.

John Scott, Jr., is dead and Archibald H. Taylor, the appellant, was, on the 28th of October, 1897, appointed administrator of the estate, who, upon an order of the circuit court of Baltimore county, substituting him as party plaintiff, proceeded as such admin-

istrator to advertise and sell the mortgaged land, including these four lots.

It further appears that David Carroll, the testator of the appellee, prior to June 20, 1877, acquired title to both the leasehold and reversionary interests in the four lots described in the mortgage, and under his will they passed to the appellees. This bill is filed by the appellees to restrain the sale and to declare that this mortgage does not constitute a lien or charge on these lots, and from a decree in favor of the appellee this appeal has been taken.

The first question, then, presented by this state of facts relates to the right of the appellant to exercise the power of sale conferred by the mortgage. The appellant admits by his answer to the bill that the mortgage was assigned to John Scott, Jr., for the purposes of foreclosure only, and whether this assignment vested such title in Scott as would pass upon his death to his administrators is the question here.

The general proposition is true that the power of sale contained in a mortgage passes with the estate by assignment of the mortgage debt and is not affected by the death of the mortgagor because it is a power coupled with an interest, and is appendant to the estate. *Berry v. Skinner*, 30 Md. 572; *Mockubin v. Boarman*, 54 Md. 387. But it is distinctly held that where the power is conferred upon a third person, who has no interest in the estate, it is a collateral power. In *Queen City Perpetual Bldg. Asso. v. Price*, 53 Md. 398, this court said: "If any other person than the mortgagor or his assigns be intended by the parties to execute the power he or they must be specially named in the power." In *Chilton v. Brooks*, 71 Md. 450, it was said that the assignee of a mortgage, whoever he may be (if not a corporation), may execute the power as if designed by name, while an attorney may do it only when specially named. And in *Barrick v. Horner*, 78 Md. 256, where the earlier cases on this subject are cited and reviewed, it is said: "It is clear that the right to execute the power cannot vest in his executors, unless they are designated by the instrument in such terms as to bring them within the provisions of the statute. An assignee of the mortgage in a case where the power was effectively conferred upon the mortgagee would take the right to execute the power, as an incident of the estate, but where a stranger is the donee, the power not being appurtenant to the estate, can be exercised by him only who has had it conferred according to a proper construction of the statute—that is, by having been specially named in the mortgage." In that case, it was said that the executors of Horner, not being specially named, are without authority to execute the power.

In view of these analogous authorities there can be no question, it seems to us, that Mr. Scott only acquired a special title for the purposes of foreclosure only by the assignment of the mortgage in this case, and as he took no beneficial interest or property in the mortgage, none could vest in or devolve upon his administrator.

44 L. R. A.

But there is another reason, apart from the one just stated, why the decree of the circuit court should be affirmed. It will be seen that on the 10th of August, 1877, Scott began proceedings as assignee under the mortgage in the circuit court of Baltimore county, and nothing further was done looking to a sale of this property until October 29, 1897. The deeds to the appellees' testator were executed prior to June 20, 1877, and for more than twenty years the appellees and their devisor remained in adverse possession of and have exercised ownership over these lots. There is no evidence of part payment or admission of an existing debt, nor recognition in any manner of the mortgage debt, nor any other circumstance from which it can be inferred that the debt has not been paid.

It is insisted, however, that the mortgage proceedings instituted by Scott in 1877, is a *lis pendens*, and "that no title by adversary possession, or limitations, could be gained by anyone claiming under the parties to that suit."

Whether the proceeding in the circuit court for Baltimore county was at the time a *lis pendens* or not, we do not find it necessary for the purposes of this case to decide, because it is clear that in order "to constitute *litis pendens*, there must be a continuance of *litis contestatio*."

The long and unexplained delay in the prosecution of the suit, we think, amounts to laches. Mr. Pomeroy, in his work on Equity Jurisprudence, 634, thus lays down the rule: "In order, however, that a purchaser *pendente lite* may be thus affected, the suit must be prosecuted in good faith, with all reasonable diligence and without unnecessary delay. A neglect to comply with this requisite would relieve a purchaser from the effect of the *lis pendens* as notice."

In *Johnston v. Standard Min. Co.* 148 U. S. 370, 37 L. ed. 485, the court said: "The mere institution of a suit does not of itself relieve a person from the charge of laches, and that if he fail in the diligent prosecution of the action the consequences are the same as though no action had been begun."

In the recent case of *Demuth v. Old Town Bank*, 85 Md. 326, we said: "Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. There must be a legal duty to do some act, a failure to do that duty and attendant circumstances which cause prejudice to an adverse party before the doctrine can be successfully invoked."

And in *Preston v. Horwitz*, 85 Md. 164, this court repeated the general rule, that the policy of the law is to give quiet and repose to titles, and courts of justice ought not to countenance laches or long delays on the part of claimants.

In the case now before us, there was nothing done "to keep the suit alive and in activity," from the 20th of October, 1877, the date of the ratification of the sale made by Scott, until October 29, 1897, when the ap-

pellant was substituted as plaintiff. Nor does the record disclose any circumstance from which a satisfactory excuse or explanation can be given for the long delay in prosecuting this suit. And this being so, the facts and circumstances of the case bring it within the application of the well-settled rule as to laches.

For these reasons, *the decrees will be affirmed.*

Charles J. BONAPARTE, *Appt.*,
v.

Mary WISEMAN.

(.....Md.....)

The employment of an independent contractor to make an excavation upon a lot in near proximity to a neighbor's house, in a populous city, and to the depth of several feet below the level of the foundation of that house, does not relieve the proprietor from the obligation either to see that the contractor in doing the work protects the neighbor's wall by the exercise of due care, or to give the neighbor timely notice of the nature and extent of the intended excavation that he may take due precautions for the protection of his own wall.

(March 14, 1899.)

A PPEAL by defendant from a judgment of the Court of Common Pleas of Baltimore City in favor of plaintiff in an action brought to recover damages for negligence in excavating upon a lot next to plaintiff's building in such a manner as to cause plaintiff's building to fall. *Affirmed.*

The facts are stated in the opinion.

Mr. William Reynolds, for appellant:

Plaintiff never acquired, by grant or otherwise, any easement in the defendant's land of collateral support to the buildings erected upon her lot.

Such an easement of lateral support for a building may now be acquired by prescription in England.

Dalton v. Angus, L. R. 6 App. Cas. 740; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581; *Sullivan v. Zeiner*, 98 Cal. 348, 20 L. R. A. 730; *Handlan v. McManus*, 42 Mo. App. 551.

The American courts have refused to admit this doctrine.

An employer is *prima facie* exempt from responsibility for the consequences of negligence on the part of an independent contractor or one of the latter's servants.

Deford v. State, Keyser, 30 Md. 179; *City & Suburban R. Co. v. Moores*, 80 Md. 348; *Engel v. Eureka Club*, 137 N. Y. 100.

This doctrine applies to injuries caused to neighboring buildings by excavations on the employer's land.

Gayford v. Nicholls, 9 Exch. 702; *Myer v.*

Hobbs, 57 Ala. 175; *Aston v. Nolan*, 63 Cal. 269.

In such a case as this there is no legal obligation on the landowner's part to give notice of his intention to excavate; at most a failure to give such notice may be evidence of negligence on the part of the person doing the work.

Chadwick v. Trower, 6 Bing. N. C. 1; *Schults v. Byers*, 53 N. J. L. 442, 13 L. R. A. 569; *Shafer v. Wilson*, 44 Md. 268; *Spohn v. Dives*, 174 Pa. 474.

Plaintiff had actual knowledge of defendant's intention to excavate below her foundation.

If the plaintiff's own evidence shows him to have no case, he is not entitled to have the issues submitted to the jury.

Medcalf v. Brooklyn L. Ins. Co. 45 Md. 206; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Altwater v. Baltimore*, 31 Md. 462; *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401; *Bohrer v. Dienhart Harness Co.* 19 Ind. App. 489; *Novotny v. Danforth*, 9 S. D. 301.

Mr. William Colton, for appellee:

Notice of the intention by one who desires to excavate and improve his property must be given to the occupant or owner of the property thereunto adjoining, when such excavation and improvement may endanger the adjoining buildings of his neighbor.

Shafer v. Wilson, 44 Md. 268; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; 3 Kent, Com. p. 532; Washb. Easements & Servitudes, 435.

The excavation and improvement contemplated by the appellant, "however skillfully conducted, may be attended with accidental and disastrous results" to adjoining property, and therefore was notice to the appellant, for he knew the nature and extent of his contemplated improvements.

The course permitted by the appellant to be pursued by the contractor in taking down his foundations and excavating his lot and putting in new foundations in the manner done under the prevailing conditions operated as, and in fact was, a nuisance; and if such nuisance was created on the premises of the appellant, the doctrine of independent contractor, if otherwise applicable, would have no application.

Deford v. State, Keyser, 30 Md. 179; *Ellis v. Sheffield Gas Consumers' Co.* 2 El. & Bl. 767; *Rapson v. Cubitt*, 9 Mees. & W. 714; *Pickard v. Smith*, 10 C. B. N. S. 470; *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Gray v. Pullen*, 5 Best & S. 970; *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *Hughes v. Percival*, L. R. 8 App. Cas. 443; *Stevenson v. Wallace*, 27 Gratt. 77; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701; *Hughes v. Cincinnati & S. R. Co.* 39 Ohio St. 476.

An employer cannot relieve himself from

NOTE.—For exceptions to the rule of nonliability for acts of independent contractor, see note to *Hawver v. Whalen* (Ohio) 14 L. R. A. 828.

For other illustrations thereof, see *Negus v. Becker* (N. Y.) 25 L. R. A. 667; *Colgrove v. 44 L. R. A.*

Smith (Cal.) 27 L. R. A. 590; *Cabot v. Kingman* (Mass.) 33 L. R. A. 45; *Wertheimer v. Saunders* (Wis.) 37 L. R. A. 146; *Richmond & M. R. Co. v. Moore* (Va.) 37 L. R. A. 258; *Thompson v. Lowell*, L. & H. Street R. Co. (Mass.) 40 L. R. A. 845.

liability by contracting with another for the performance of work, the necessary or probable effect of which will be to injure third persons, either personally or in their rights.

Woodman v. Metropolitan R. Co. 149 Mass. 345, 4 L. R. A. 213; *Robbins v. Chicago City*, 345, 4 Wall. 657, 18 L. ed. 427; *New Orleans, M. & C. R. Co. v. Hanning*, 15 Wall. 658, 21 L. ed. 223; *St. Paul Water Co. v. Ware*, 16 Wall. 576, 21 L. ed. 488; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; Cooley, Torts, pp. 643-646.

Mr. Charles A. Briscoe also for appellee.

Schmucker, J., delivered the opinion of the court:

This suit was instituted by the appellee, who is life tenant of the house and lot No. 815 King street, in Baltimore city, to recover damages for injury to her house resulting from an excavation made by the appellant on the adjoining lots. Nos. 811 and 813 King street, for the purpose of erecting a warehouse thereon. All three lots were originally improved by dwellings. The house of the appellee was separated from those of the appellant by an alley 2½ feet wide, which lay almost entirely upon the land of the latter, but was used by both parties in common. The appellant, desiring to erect a warehouse upon his two lots, made a contract with one Anderson, a competent builder, to tear down the houses on the lots and erect thereon a warehouse. In the latter part of 1893, Anderson tore down the two old houses to the level of a few inches below the ground, and also excavated a portion of the rear of the lots behind where the houses had stood and adjacent to the unimproved part of the appellee's lot. He did nothing further to the property until about the middle of March, 1894, when he took out the foundations of the old house next to that of the appellee and excavated for new foundations to a depth of 3 or 4 feet below the foundations of her house, which settled and was injured. There was evidence tending to show that the excavation was the cause of the injury to the house, and also evidence tending to show that the appellee did not have previous notice or knowledge of the appellant's intention to excavate below the level of her foundations. At the request of the appellant, the jury were required, in pursuance of act 1894, chap. 185, to find specially upon the following interrogatories, to each of which they answered, "No:" "Was the plaintiff or her representative, Theodore Seigwart, notified of the intended digging below the foundation wall a reasonable time before the said digging below the foundation was begun?" "Did the plaintiff or her representative, Theodore Seigwart, have actual knowledge of the defendant's intention to excavate below her foundation a reasonable time before such excavation was begun?" The general verdict and judgment were against the defendant, and he took this appeal.

The appellant offered seven prayers, all of which were granted except the fourth and seventh. The seventh prayer will be first considered by us. This prayer is based upon 44 L. R. A.

the assumption that it appeared from the plaintiff's own evidence that she had knowledge in December, 1893, or at latest in January, 1894, of the character and extent of the work about to be done, and its proximity to the easternmost wall of her house, and took no precautions for its protection. We think the court below properly refused to grant this prayer, because while the record shows that the appellant's contractor, Anderson, demolished the two old buildings on his lots during the time extending from September until December, 1893, and excavated for new foundations along the division line in the rear of the appellee's house, it also shows that he then ceased work entirely, and allowed the property to remain in the condition in which it was at that time for more than two months. The work done by the appellant's contractor was, of course, open to the observation of the appellee or the occupants of her house, and doubtless led them to infer that the appellant was getting ready to improve his lots; and the fact appearing from evidence that he owned a warehouse, at the rear of these lots, fronting on Pratt street, may have led them to further infer that he intended to build on the lots an addition to his warehouse, but it was asking too much of the court to request it to direct the jury to assume from the evidence that the character and extent of the work about to be done by the appellant was apparent to the appellee or her agent in December, 1893, or January, 1894. The wisdom of the court in refusing to grant this prayer was fully confirmed by the fact that the jury returned a negative answer to the interrogatories requiring them to pass specially upon the question of the possession of such knowledge by the appellee or her agent.

The appellant's fourth prayer asserts the broad proposition that the appellant was not liable for the injury to the appellee's house by the excavation on his lots, because the work was done by Anderson as an independent contractor, under the written agreement appearing in the record. The question of the extent to which the employment of an independent contractor to do work, which is placed entirely under his control, will relieve the employer from liability for injuries resulting to third persons, has been much discussed by the courts. The general principle, broadly stated, is that when the work is done by a competent contractor, under an agreement which gives him complete control of the work and of the persons employed by him to do it, such persons will be his servants, and not those of the employer, and the latter will not be liable for injuries caused by the negligence of the workmen, because they are not his servants and are not under his control. But this doctrine has been repeatedly held not to relieve an employer from all responsibility of every kind for the consequences of defective or unskilful work done on his premises, even by the servants of an independent contractor. In the case of *Deford v. State, Keyser*, 30 Md. 179, Chief Justice Alvey, in an able and elaborate opinion, reviews the leading cases upon this subject, quoting at length from

the opinions of the learned judges who decided them, and comes to the conclusion that the distinction is well established between the cases in which, when work is being done under a contract, an injury is caused by negligence in a matter collateral to the contract, and those in which the thing contracted to be done causes the mischief. In the former class of cases the employer is not liable for the injury, but in the latter he is. In the case of *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, the court says: "One who causes work to be done is not liable ordinarily, for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case, the person causing the work to be done will be liable, though the negligence is that of any employee of an independent contractor." In the same case, at page 214, 47 Ohio St., and page 703, 7 L. R. A., the court says: "It is equally clear that the law devolves upon everyone, about to cause something to be done which will probably be injurious to third persons, the duty of providing that reasonable care shall be taken to obviate those probable consequences. In this class of cases, the doctrine of *respondere superior* has no application; his liability is placed upon the principle that he cannot set in operation causes dangerous to the person or property of others, without taking all reasonable precautions to anticipate, obviate, and prevent these probable consequences." The same doctrine has been announced by this court in the recent case of *City & Suburban R. Co. v. Moores*, 80 Md. 352, where the opinion says: "Even if the relation of principal and agent or master and servant do not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work."

Under these authorities, the appellant would have been liable for injury happening to the house of the appellee from the excavation of his lots if it might reasonably have been anticipated that such injury would probably occur as a consequence of an excavation made in the location and to the depth appearing from the evidence in this case. The question as to whether such injury might reasonably have been anticipated as a probable consequence of the excavation was a question of fact for the jury, which would have been taken away from them, if the appellant's fourth prayer had been granted.

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There remains to be considered the further question, Did the appellant owe to the appellee the duty of giving her notice of his intention to excavate in near proximity to her wall a reasonable time in advance of commencing the work, in order to afford her an opportunity to take suitable precautions for the protection of her foundations? In the argument of the case the appellant's counsel earnestly contended that he did not owe any such duty, and the appellee's counsel contended, with like earnestness, that he did. The cases are not uniform upon the subject of the duty of a person who is about to excavate his own lot adjacent to another's house, and below the level of its foundations, to give such notice, and it cannot be said that there is an imperative obligation to give it. The obligation to give the notice, like that to see that the excavation is made with due care, seem both to rest upon the recognized proposition that a party in possession of fixed property must take care that it is so used and managed that other persons shall not be injured, whether it be managed by his own servants or contractors or their servants. If one about to excavate his own lot do it, or cause it to be done, so carefully as not to injure the adjacent houses, he need not give notice to their owners. If, on the other hand, he give timely notice to the adjacent owners, the burden will be thrown upon them to protect their own property, and he will not be liable for damages sustained by them, if he makes the excavation with reasonable and ordinary care.

In the case of *Shafer v. Wilson*, 44 Md. 280, the court says: "There seems to be no doubt that an adjacent owner of land has no right to deprive his neighbor of the natural support afforded by his soil. The authorities are somewhat conflicting as to the extent of the right of the owner of any adjacent ground built upon, to improve his own property, where he is under no disability (from grant of easement, prescriptive right, or necessity) to restrict him, although it may operate to injure his neighbor's property. But it is agreed on all sides that his right, whatever that may be, must be exercised with due care and skill, at his peril, to prevent injury to the adjacent owner." In the same case, at page 281, the court, in discussing the duty of the party about to make such excavation to give timely notice of his purpose to the adjacent owner, says: "Such notice would seem to be a reasonable precaution in a populous city, where buildings are necessarily required to be contiguous to each other, and improvements made by one proprietor, however skillfully conducted, may be attended with accidental and disastrous results to his neighbors, who ought to have an opportunity to take the steps necessary to protect themselves and property." In support of these views, the court cites *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; 3 Kent, Com. p. 532; Washb. Easements & Servitudes, pp. 435 *et seq.*

The law as laid down by the cases we have cited does not permit the owner of a lot of ground, in a populous city like Baltimore, to make an excavation, even through an in-

dependent contractor, upon his lot in near proximity to his neighbor's house, and to a depth of some feet below the level of the foundations of that house, and be under no obligations either to see that the contractor in doing the work protects the neighbor's wall by the exercise of due care, or to give the neighbor timely notice of the nature and extent of the intended excavation, that he may take due precautions for the protection of his own wall. The appellant's fourth prayer ignored the obligation on his part either to see that the work on his lots was done with due care, or to give timely notice to the appellee of his intention to have the work done, and treated the employment of Anderson to do the work, under a written contract, as being all that was required of him in the premises. The prayer was therefore properly rejected.

The judgment will be affirmed, with costs.

Walter MCCREA, *Appt.*,

v.

Charles B. ROBERTS, Judge of Circuit Court for Carroll County.

(.....Md.....)

1. A writ of mandamus does not lie to control judicial discretion.
2. The determination as to the issuance of a license by a judge of the circuit court under act 1894, chap. 6, § 7, upon an application by the clerk, when an objection has been filed, is required to be made upon notice to the applicant and objector and after hearing the evidence, and is, therefore, judicial in its nature, and not the exercise of a purely executive or administrative function which cannot be imposed upon the court.

(March 16, 1899.)

APPEAL by petitioner from an order of the Circuit Court for Carroll County refusing a mandamus to compel the issuance of a license to sell liquor. *Affirmed.*

The facts are stated in the opinion.

Messrs. James A. C. Bond and Francis Neal Parke, for appellant:

The judge selected by the clerk is limited to the consideration of the cause shown to him at the hearing why the license should issue or not issue. What is cause under the statute becomes, therefore, not a question of discretion but a question of law.

The courts hold that where a statute provides that an officer may be removed from office for cause only, they have the right to control the discretion of the removing officer in deciding what is cause.

2 Comparative Administrative Law, p. 206; *Miles v. Stevenson*, 80 Md. 358; 5 Am. & Eng. Enc. Law, 2d ed. note, pp. 774, 775.

In determining what is cause, the investigation must be confined within the four corners of chapter 6.

NOTE.—As to imposing nonjudicial duties upon courts, see also *Norwalk Street R. Co.'s Appeal* (Conn.) 39 L. R. A. 794, and footnote. 44 L. R. A.

Miles v. Stevenson, 80 Md. 358; *Prospect Brewing Co.'s Petition*, 127 Pa. 523; *Pollard's Petition*, 127 Pa. 507.

With the appellee, therefore, limited in this case to the consideration of the jurisdictional questions as to the sufficiency of the application and the certificate attached thereto and the personal fitness of the appellant to sell liquor, the petition disclosed a compliance on the part of the appellant with every requirement of law; that the case was properly before appellee; that the appellant proved at the hearing every statement in his application and in the certificate attached thereto; that he established and the appellee admitted his exceptional character and fitness to be intrusted with the sale of liquor; that every fact and thing necessary for his obtaining the license was proved and done; and that no evidence was adduced and no cause whatever existed or was shown why the license should not be granted to appellant.

The answer filed by the appellee does not deny these statements of facts, nor does it set up any facts by way of defense, although § 3 of art. 60 of the Code requires him to set out all his defenses; and, consequently these facts are admitted, the answer being nothing more than a demurrer.

Merrill, Mandamus, §§ 270, 274; High, Extr. Legal Rem. § 492.

Where no legal cause why the license should not exist was shown there could be no exercise of discretion, and the appellee brought himself within the principle that mandamus will lie "to correct abuses of discretion when it has been made clearly to appear that the official refusing to do the act has either not exercised his discretion or has wilfully chosen to act in manifest disregard of duty and the legal rights of individuals."

Spelling, Extraordinary Relief, § 1384; Merrill, Mandamus, §§ 38-41, 188, 195; High, Extr. Legal Rem. 3d ed. §§ 218, 327; Black, Intoxicating Liquors, § 172; 11 Am. & Eng. Enc. Law, p. 663, and notes; *Miles v. Stevenson*, 80 Md. 365; *Prospect Brewing Co.'s Petition*, 127 Pa. 523; *Re Sparrow* (Pa.) 20 Atl. 692; *Pollard's Petition*, 127 Pa. 507; *Johnson's License*, 156 Pa. 322; *Kelminski's Appeal*, 164 Pa. 231; *Zanone v. Mound City*, 103 Ill. 553, 11 Ill. App. 334; *State, Wolfe, v. Kirke*, 12 Fla. 278, 95 Am. Dec. 314; *Ex parte Bradley*, 7 Wall. 376, 19 L. ed. 218.

Every principle of pleading requires the answer to meet the substance of the petition, but here the answer not only avoids it but has no relevancy to the case made by the sworn petition.

Legg v. Annapolis, 42 Md. 203; *Harwood v. Marshall*, 10 Md. 451; *Creager v. Hooper*, 83 Md. 490; Merrill, Mandamus, § 274; High, Extr. Legal Rem. §§ 467, 472; 2 Dill. Mun. Corp. § 876; *Amperse v. Kalamazoo*, 59 Mich. 78.

The courts will review the arbitrary action of judicial officers and compel them to discharge their duties of mandamus.

Merrill, Mandamus, §§ 274, 275; High, Extr. Legal Rem. §§ 467, 472; *Johnson's Li-*

cense, 156 Pa. 322; *Re Sparrow* (Pa.) 20 Atl. 692.

In this case no reason for the appellee's action is disclosed.

If the answer be sufficient, then it will lie in the power of any respondent to make a defense that will stife investigation and supply a cover for any action, no matter how iniquitous.

United States v. Schurz, 102 U. S. 378, *United States, McBride, v. Schurz*, 26 L. ed. 167; *People, Belknap, v. Beach*, 19 Hun, 259.

The writ of mandamus in Maryland, when not in aid of the appellate jurisdiction of the court of appeals, issues out of the circuit courts.

Harwood v. Marshall, 9 Md. 83.

The judge selected by the clerk acts in no way by virtue of his judicial office or as a court, but as a distinct tribunal.

Anderson v. Levely, 58 Md. 192.

Mandamus will lie just as any other process will issue against the appellee in the ordinary course of the administration of justice.

Magruder v. Tuck, 25 Md. 217.

In order to deny a mandamus on the ground of another remedy at law the other remedy must be plain, speedy, adequate, and specific.

Harwood v. Marshall, 9 Md. 98; *Merrill, Mandamus*, §§ 51-54; 2 Dill. Mun. Corp. § 831a.

Courts will pass upon constitutional questions in mandamus proceedings.

Merrill, Mandamus, § 65; *Allegany County Public School Comrs. v. Allegany County Comrs.* 20 Md. 449.

The appellee, chief judge of the fifth judicial circuit, did not perform a duty pertaining to his office in deciding, after he had been selected for that purpose from his associates by the clerk of his court, that a license should not be granted to the appellant.

United States v. Ferreira, 13 How. 47, 14 L. ed. 44; *Goldsbrough v. Lloyd*, 86 Md. 374; *Houseman v. Montgomery*, 58 Mich. 364; *Auditor of State v. Atchison, T. & S. F. R. Co.* 6 Kan. 500, 7 Am. Rep. 575; *Case of Election Suprs.* 114 Mass. 247, 19 Am. Rep. 341; *Re Cleveland*, 51 N. J. L. 311.

If the act or power is not the act or power of the court, then the act or power is not a judicial one, as it could not have been done or exercised in the performance of a duty properly pertaining to the function of a judge *qua* judge.

Anderson v. Levely, 58 Md. 192.

The duty cast upon the judge selected must be said to be nonjudicial for it cannot be performed by the three judges, by two judges, nor even by one judge until he has been selected by the clerk to act, nor can it be performed by the judges or any one of them acting as a court.

The legislature of Maryland cannot impose upon the appellee, a judge of the circuit court for Carroll county and of the court of appeals of Maryland, nonjudicial duties.

Hayburn's Case, 2 Dall. 409, 1 L. ed. 436; *Norwalk Street R. Co.'s Appeal*, 69 Conn. 576, 39 L. R. A. 794; *Wilkinson v. Leland*, 44 L. R. A.

2 Pet. 627, 7 L. ed. 542; *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Cochran v. Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570; *Campbell's Case*, 2 Bland, Ch. 209, 20 Am. Dec. 360; *United States v. Todd*, 13 How. 53, 14 L. ed. 47, note; *Ex parte Siebold*, 100 U. S. 393, 25 L. ed. 725; *Wayman v. Southard*, 10 Wheat. 46, 6 L. ed. 263; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. ed. 496; 31 Am. L. Reg. N. S. 438; *State v. Chase*, 5 Harr. & J. 298; *Wright v. Wright*, 2 Md. 452, 56 Am. Dec. 723; *United States v. Maurice*, 2 Brook. 103.

Messrs. William H. Thomas, Reifsnider & Reifsnider, and *Guy W. Steele* for appellee.

Briscoe, J., delivered the opinion of the court:

The appeal in this case is from an order of the circuit court for Carroll county refusing a mandamus and dismissing the petitioner's application therefor. A brief statement of the facts will be necessary for a clear understanding of the case.

The act of 1894, chap. 6, regulates the sale of liquor in Carroll county. By § 4 of that act it is provided that any person desiring to obtain a license to sell liquor shall file an application in writing with the clerk of the circuit court for that county, in which he shall state his name, place, where the business is to be carried on, the kind of license desired, etc.

Section 5 of the act enacts "that there shall be annexed to said application a certificate signed by at least nine reputable freeholders, bona fide residents of the neighborhood in which the applicant proposes to conduct the business under the license applied for, in which each of the persons certifying shall state his residence or place of business; that he is over twenty-five years of age; how long he has known the applicant; that he believes the statements made in the application to be true; that from his knowledge of the applicant or applicants and his acquaintance with him or them, he believes the applicant to be a proper person or the applicants to be proper persons to have the privilege of selling spirituous or fermented liquors, and he accordingly recommends the issuance of the license applied for."

Section 6 of the act provides: "That upon the filing of such application and certificate, the applicant shall pay to the clerk with whom the same are filed, the sum of \$2, to be applied to paying the expense of advertising, as hereinafter provided for, and thereupon said clerk shall insert in two successive issues in some weekly newspaper published in said county, prior to the 15th day of the month preceding the month for which the license is to begin, a notice that such application has been filed, specifying the kind of license applied for, and the place where the business is to be conducted, and stating that unless cause be shown to the contrary in writing, on or before the aforesaid 15th day of the month preceding the month with which the license is to begin, the license applied for will be issued, provided the appli-

cant complies with the requirements of this law requisite thereto, as hereinafter provided."

Section 7 further provides "that if any person shall file with said clerk, in writing, within the time specified any reason why the license applied for should not be granted, such clerk shall forthwith present the application and certificate and the objection to a judge of the circuit court for said county, and such judge shall proceed to hear and determine the question as to whether the license applied for shall be issued or not, after giving such notice to the applicant and objector as such judge shall deem reasonable, and shall award the cost of such hearing as such judge shall deem equitable and just."

On the 25th of October, 1898, the appellant, Walter McCrea, filed an application under this law, in proper form, for a license to sell liquor in Gamber, Carroll county, with a certificate signed by eleven persons who alleged themselves to be reputable freeholders, of whom six stated that they resided in Gamber and five stated that they resided a mile or more therefrom.

Shortly afterwards an objection was filed to the issue of the license, which was signed by forty-nine persons who alleged themselves to be residents of and adjacent to the village of Gamber.

The objection stated two reasons why the license should not be issued: First, because the certificate to the application is not signed by nine reputable freeholders, bona fide residents of the neighborhood in which the appellant proposes to conduct the business under the license applied for. Secondly, because the application is not certified to by persons who appear to be sufficiently acquainted with him to know his character as a fit person to sell spirituous and fermented liquors.

This application and the objection were presented by the clerk of the circuit court to Hon. Charles B. Roberts, chief judge of the circuit court for Carroll county, who set the case for hearing before him. At the hearing, the appellant and the objectors were represented by counsel and witnesses were examined. An order was subsequently passed dismissing the application. The appellant, thereupon filed in the circuit court for Carroll county a petition alleging in substance that he had complied with all the requirements of the law, and had proved the fact of such compliance at the hearing of the objection to his application, and that he was entitled to have a license issued to him. The prayer of the petition was "that a writ of mandamus might be issued directed to Judge Roberts, a judge of the circuit court for Carroll county, commanding him to pass an order rescinding and annulling the order passed by him on the 8th day of October, 1898, dismissing the application for a license to sell spirituous and fermented liquors, and authorizing and directing that the application of McCrea . . ." be granted by the clerk of the circuit court. And it is from an order overruling a demurrer to defendant's answer and dismissing the petition that this appeal has been taken.

44 L. R. A.

It is the settled law of this court that one judge of a circuit has no jurisdiction to issue a writ of mandamus against the other judges of the circuit to compel him or them to do an act which the others are authorized to do themselves. *Goldsborough v. Lloyd*, 86 Md. 376.

But it is urged by the petitioner that since he proved at the hearing that he had complied with the statute and did possess the requisite qualifications, there was no legal ground upon which a license could have been refused, and that the order dismissing his application was consequently not passed in the exercise of a discretion, and can be reviewed under those proceedings.

It is quite true that in cases where a tribunal refuses to exercise the judgment and discretion imposed by a statute, or arbitrarily exceeds its jurisdiction, a mandamus will lie. *Miles v. Stevenson*, 80 Md. 358.

This case does not, however, fall within the rule applicable to those cases. The answer of the respondent states "that he fully discharged his duty and exercised the judgment and discretion required to be exercised by him by the act, and after a full hearing, a careful consideration of the law and evidence, he dismissed the petition." And the demurrer to the answer admits these facts.

In the recent case of *Wailes v. Smith*, 76 Md. 469, this court said: "Where the duty is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such a duty is not ministerial, and not being ministerial, the decision of a public officer to whom the discharge of such duty has been confided cannot be reviewed or reversed in a mandamus proceeding.

In *Re Burtis*, 103 U. S. 238, 26 L. ed. 392, the Supreme Court thus states the rule: "A writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction but not to control its discretion while acting . . . nor to reverse its decision when made." Both these rules are elementary and are fatal to this application. The district judge took jurisdiction of the matter, as it was his duty to do, heard the parties and decided adversely to the claim of the petitioner. In this he may have done wrong, and the reasons he has assigned may not be such as will bear the test of judicial criticism; but we cannot, by mandamus, compel him to undo what he has thus done in the exercise of his legitimate jurisdiction."

We come, then, to the main contention in the case, and that is, the validity of the act of 1894, chap. 6.

It is urged by the appellant that this act is unconstitutional because the issuing of licenses to sell liquor is a purely executive or administrative function and to impose this duty upon a judge is to require him to perform a nonjudicial duty, contrary to the constitutional provision that requires that the legislative, executive, and judicial powers shall be kept separate and distinct.

In the Constitution of 1776, the Bill of Rights, § 6, declared that the legislative, executive, and judicial powers of the govern-

ment ought to be forever separate and distinct from each other. Article 8 of our present Bill of Rights adds to this that "no person exercising the functions of one of said departments shall assume or discharge the duties of any other," and article 33, further provides, that "no judge shall hold any other office, civil or military or political trust or employment of any kind whatsoever under the Constitution or laws of this state or the United States or any of them."

These provisions relating to the division of governmental powers were considered by this court in some of the earliest cases, and we will repeat here what was then said. In *Crane v. Meginnis*, 1 Gill & J. 476, 19 Am. Dec. 237, it is said: "This political maxim made its appearance in some form in all the state Constitutions formed about the time of the War of the Revolution. . . . In whatever terms they have adopted it, in none of these Constitutions are the several departments kept wholly separate and unmixed. In some of them, as in the Constitution of this state, the executive is appointed by the legislature, and the judiciary by the executive; and in others, the power of the several departments are still more blended and mingled together."

In *State v. Chase*, 5 Harr. & J. 298, it was further said: "New judicial duties may often be unnecessarily imposed and services not of a judicial nature may sometimes be required. In the latter case a judge is under no legal obligation to perform them."

But in *Wright v. Wright*, 2 Md. 452, 56 Am. Dec. 723, the court uses this language: "The evident purpose of the declaration last quoted, is to parcel out and separate the powers of the government, and to confide particular classes of them to particular branches of the supreme authority. That is to say, such of them as are judicial in their character to the judiciary; such as are legislative to the legislature, and such as are executive in their nature to the executive."

In the case now before us, we think it is clear that the duty imposed upon the judge of the circuit court by § 7 of the act of 1894, is judicial or "judicial in its nature and character," and that the objection urged against the act upon this constitutional ground is without force. The statute prescribes that a license to sell liquor shall be issued only upon certain conditions. When an objection is filed to an application, the clerk is required to submit the whole matter to a judge of the court. It then becomes necessary for him to determine whether the prescribed conditions have been fulfilled or not. This question may be one of fact or of law, or a mixed question of fact and of law. In deciding it the judge hears the evidence and is bound to make his decision according to the law and the evidence. The statute requires that the applicant for a license shall file a "certificate signed by at least nine reputable freeholders, bona fide residents of the neighborhood in which the applicant proposes to conduct the business." One of the objections filed to the applicant's application denied that the certificate thereto annexed was signed by persons possessing the

qualifications. It was then necessary to determine whether the signers of the certificate were freeholders or not; whether they were reputable or otherwise; whether they were residents of the neighborhood or what was to be considered the neighborhood. It is manifest that these are questions of fact and law upon which the judge was required to exercise his judgment after hearing the evidence. In *Devin v. Belt*, 70 Md. 352, where the law there under consideration provided for the issue of a liquor license by a clerk of court upon the applicant's being recommended by five respectable freeholders, it was held that it was within the exclusive discretion of the clerk to determine whether the parties making the recommendation were respectable or not.

It must have been by hearing the testimony of witnesses as to whether the facts which are made by statute a prerequisite to the issue of the license existed or not, and then by the construction of the statute and its application to the facts of the case, that the judge reached the decision that the appellant was not entitled to a license.

Such a proceeding is within the rule of judicial power, as laid down by Judge Coolidge, in his work on Constitutional Limitations, p. 109, where it is said that to adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department. *Ex parte Thompson*, 52 Ala. 100; *Hopson's Appeal*, 65 Conn. 146.

And in *Fong Yue Ting v. United States*, 149 U. S. 728, 37 L. ed. 918, which related to the act of Congress providing for the deportation of persons of Chinese descent unlawfully within this country, where the act provided that a Chinaman might be taken by a collector or marshal before a United States judge for the purpose of determining whether he was entitled to remain in this country, the court said: "When in the form prescribed by law, the executive officer acting in behalf of the United States brings the Chinese laborer before the judge in order that he may be heard or the facts upon which depend his right to remain in this country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, defendant, and a judge—actor, reus, et judex. 3 Bl. Com. p. 25; *Osborn v. Bank of United States*, 9 Wheat, 738, 6 L. ed. 204. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute."

But it will be observed that under the act of 1894 the license is not issued by the judge, but when an objection is made to the application the duty of the judge is merely to determine upon a case at issue whether the clerk shall issue the license or not, according as the applicant is or is not found by him to be qualified under the law.

In this respect, the case at bar is clearly distinguishable from those cited in argument by the learned counsel for the appellant.

The case of *United States v. Ferreira*, 13

How. 52, 14 L. ed. 47, relied upon by the appellant, is unlike this. There an act of Congress authorizing judges to determine whether certain parties were entitled to be placed upon the pension lists was held to be unconstitutional, because the findings of the judges were subject to revision by the Secretary of War, and since the findings of the judges were not final and conclusive, it was held that the act did not confer judicial power. This case is fully reviewed by the Supreme Court in *Interstate Commerce Commission v. Brimson*, 154 U. S. 481, 38 L.

ed. 1058, 4 Inters. Com. Rep. 545. Nor do we find the *Intoxicating Liquor Cases*, 25 Kan. 752, 37 Am. Rep. 284, cited by the appellant, at all in conflict with the conclusion reached by us in this case.

It, therefore, follows, for the reasons given, that the act of 1894, chap. 6, is valid and constitutional; that the order of Judge Roberts was passed in the performance of a judicial function and in the exercise of a sound judicial discretion. No writ of mandamus lies to control that discretion. *Order affirmed with costs.*

ILLINOIS SUPREME COURT.

Samantha E. MORRIS et al., Appts.,
v.

Isham E. CAUDLE et al.

(178 Ill. 9.)

1. A deed to a son of the grantor and "his own brothers and sisters" gives no interest to a child born a short time after the execution of the deed.
2. A deed executed before the birth of a child, but not delivered until after the birth and also the death of the child, conveys no interest either to the child or those claiming under the child, although the child would have been a grantee if *in esse* when the instrument took effect.

(February 17, 1899.)

APPEAL by plaintiffs from a decree of the Circuit Court for Wayne County in favor of defendants in a suit for the partition of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Edwin Beecher and Creighton & Thomas, for appellants:

The intention of the grantors of the deed in question was to convey the premises therein to Isham E. Caudle and Amy E., the child soon expected to be born when the deed was executed and delivered. Deeds should be construed according to the intention of the parties if that can be ascertained.

Butterfield v. Smith, 11 Ill. 485; *Hadden v. Shoutz*, 15 Ill. 581; *Bataria Mfg. Co. v. Newton Wagon Co.* 91 Ill. 230; *Lehndorf v.*

NOTE—*Infant en ventre sa mère as grantee in deed.*

- I. Ordinary conveyances.
- II. Conveyances of uses, trusts, remainders, etc.

I. Ordinary conveyances.

With reference to ordinary conveyances designed to convey title directly and immediately to the grantee, the old common-law rule upon which the principal case is based, that to validate a deed there must be a grantee in being to take title, seems to have been generally, if not universally, adopted.

Thus, while the idea that a child conceived, but not yet born, may acquire property, may be consistent with the refinements of the civil law or with the doctrine of uses and of executory bequests and executory devises, which is borrowed from the civil law, it is wholly at variance with the plain, direct, and tangible maxims of the common law from which the power of conveyance by deed is derived, under which property must at all times have an owner, and one person cannot part with the ownership unless there be another person to take it from him, and the gift must be accompanied by actual delivery; and a deed of gift, therefore, to an unborn child who has been conceived but about six days before, conveys nothing. *Dupree v. Dupree*, 45 N. C. (Busbee, Eq.) 164, 59 Am. Dec. 590.

And a child *en ventre sa mère* at the date of a deed given, in consideration of love and affection, to grand-children, is not, in contemplation of law, *in esse* and capable of acquiring a right of property thereunder. *Ibid.*

By the strict rule of law, if A was tenant for life the remainder to his eldest son in tail, and A died without issue born, but leaving his wife

big with child and after his death a son was born, this son could not take by virtue of the remainder for the particular estate determined before there was any person *in esse* in which the remainder would vest. To remedy this, the statute of 10 & 11 Wm. III. allows the remainders to vest in children while yet in their mother's womb; but the statute is confined to remainders, and there is no statute which enables children while yet in their mother's womb to take directly by a deed of gift by common law. *Ibid.*, quoting 2 Bl. Com. p. 169.

And a deed of gift to living children by name, providing that afterborn children shall be allowed to share equally in the property intended to be granted, is more in the nature of a command to the children named, than an attempt to convey, and though it might in equity make a trust in such living children to share with the afterborn children, it would still leave the legal estate in the children named. *Hall v. Thomas*, 3 Strobb. L. 101.

And a deed given in consideration of natural love and affection to the children of the donor by name then living, and having a provision that any unborn children should share equally with the children then living, and reciting that the donor had put the said children in full and complete possession of the subject of the gift, vests the whole legal estate in the children then living to the exclusion of those born afterward. *Ibid.*

So, a conveyance cannot be made at common law which will vest the title to a slave in persons then unborn, and if N. C. Code 1823, chap. 411, with reference to conveyances, could help such a deed, it could not be permitted to do so, where the deed was made before the en-

Cope, 122 Ill. 317; *Bradish v. Youum*, 130 Ill. 386.

At the time of the execution and delivery of the deed in question, one of the grantees therein, Amy, was a child *in ventre sa mère*; but she was born a month and eleven days afterward and lived two months. She was in being for all beneficial purposes to herself, and could take by descent, devise and gift.

1 Beck, Med. Jur. 12th ed. 423; 1 Bouvier, Inst. 73; 2 Bouvier, Inst. 333.

She was *in esse* from the time of her conception.

10 Am. & Eng. Enc. Law, p. 624, and notes.

She could have had a guardian appointed for her, and could have been appointed an executrix at common law.

1 Bouvier, Inst. 73; 10 Am. & Eng. Enc. Law, p. 628, note.

She could have been a *cestui que trust* by deed.

Dean v. Long, 122 Ill. 459.

She could have taken by deed as one of a class to which a remainder was limited.

actment of the statute. *Newsom v. Thompson*, 24 N. C. (2 Ired. L.) 277.

And in *Lillard v. Ruckers*, 9 Yerg. 64, it was held that a conveyance by deed of a slave to a person or persons not *in esse* at the time of such conveyance, as, for example, the conveyance to such children as either of two persons may thereafter have, is inoperative and vests no title in such afterborn children; but there is nothing in the case showing whether or not any of such children had been conceived at the time of the conveyance.

And in *Faloon v. Simshauser*, 130 Ill. 649, it was stated that in case of an immediate estate in possession, the grantee must be *in esse*, and a deed of that kind may be avoided by showing that the grantee came into being subsequent to the delivery of the deed; but in this case it appeared that the grantee in question was born about three years afterward.

But a man may surrender copyhold land immediately to the use of an infant *en ventre sa mère*, for a surrender is a thing executory, and nothing vests before admittance; and in such case the title of the surrender vests in a third person until the infant is born and becomes capable of taking an estate. *Dupree v. Dupree*, 45 N. C. (Busbee, Eq.) 164, 59 Am. Dec. 590, quoting *Macpherson on Infants*, 25 Law Lib. N. S. 565.

And it has been held that where a deed is made to a third person, who immediately conveys to the wife of the first grantor and her child or children begotten by him, a child born shortly after the date of the conveyance becomes at the instant of its birth a joint tenant with her mother by the force of the deed, and may be regarded as a prospective copurchaser. *Powell v. Powell*, 5 Bush. 619, 96 Am. Dec. 372.

And in *Grimes v. Orrand*, 2 Helak. 298, in which the subject of controversy was a deed to the heirs of a living person to whom a child was born about three weeks after the deed was made, it was said that such person, and perhaps the unborn child, were the only persons who could inherit; but the child in question had died and this point was not necessary to the decision of the case.

The common-law rule that to render a deed valid there must be a grantor and grantee, as well as a thing granted, is only modified in North Carolina in so far as it affects a child

20 Am. & Eng. Enc. Law, pp. 854, 855, and notes 1 and 2.

She was sufficiently described in the deed. *Faloon v. Simshauser*, 130 Ill. 649.

A deed is presumed to have been delivered on the day it bears date.

Masterson v. Cheek, 23 Ill. 72; *Price v. Hudson*, 125 Ill. 284; *Hayes v. Boylan*, 141 Ill. 400; *Grand Tower Min. Mfg. Transp. Co. v. Cady*, 96 Ill. 430; 5 Am. & Eng. Enc. Law, pp. 445, 446, note 2; *Blake v. Fash*, 44 Ill. 302.

The conveyance of a fee reserving a life estate in the grantor is a vested remainder.

20 Am. & Eng. Enc. Law, p. 833, note 5;

Fowler v. Black, 136 Ill. 363, 11 L. R. A. 670.

Messrs. Creighton, Kramer, & Kramer and *W. T. Bonham*, for appellees:

In order that any acts may constitute a good delivery, the grantor must part with his entire control of the deed.

5 Am. & Eng. Enc. Law, p. 448; *Hayes v. Boylan*, 141 Ill. 400.

en ventre sa mère; and where a deed was made to a woman and her children, and at the time the deed was executed she had no living children, but a child was born within two months thereafter, such child will take under said deed as tenant in common with the mother, but children afterwards born and not conceived at the time of the deed will not take. *Heath v. Heath*, 114 N. C. 547.

II. Conveyances of uses, trusts, remainders, etc.

"Although by a grant or common-law conveyance, nothing could be transferred directly to a child in the womb, for the reason that it could not be a party to such an instrument, yet in a conveyance to uses it was otherwise; for then, the legal estate vesting in the trustee, the rule of the common law was supposed to be satisfied, and the use was allowed to shift, so as to include a child in the womb." *Gay v. Baker*, 58 N. C. (Jones, Eq.) 344, 78 Am. Dec. 220, *dictum*.

And a conveyance in trust for the benefit of a woman and her children will vest the estate in the mother and the children then born, and in one *en ventre sa mère* at the time, as tenants in common, but children born afterwards and not conceived at that time will not be entitled to come in. *Ibid.*

And such a conveyance will not, in the absence of anything on the face thereof to show that intention, be deemed to have been intended to give to the mother the use for life, and the remainder to her children so as to let in after-born children. *Ibid.*

In the above case it was said that the case of *Dupree v. Dupree*, 45 N. C. (Busbee, Eq.) 164, 59 Am. Dec. 590, *supra*, L., is not open to the rule of construction laid down in the case at bar, but will be found upon examination to be in accordance with it.

So, while in respect to a grantee in a deed it is necessary that he be a person in being at the time of the grant if he take immediately; if he take by way of remainder it is not necessary that he should be in being; but it is necessary that he come into being during the continuance of the particular estate or at the instant of its termination. *Dupree v. Dupree*, 45 N. C. (Busbee, Eq.) 164, 59 Am. Dec. 590.

And a remainder may be lawfully created an-

When the deed was executed Amy was unborn.

The grantee of a vested estate must be *in esse* at the time of the creation of the estate. A child *en ventre sa mère* is not *in esse* for the purpose of taking by deed.

10 Am. & Eng. Enc. Law, p. 625, note 1.

Equity follows the law, and appellants cannot acquire new legal rights under this deed by resorting to a court of equity.

Marsellis v. Thalhimer, 2 Paige, 35, 21 Am. Dec. 66.

Craig, J., delivered the opinion of the court:

This was a bill for partition, brought by the appellants in the circuit court of Wayne county wherein they prayed for partition of the lands described in the bill, as heirs at law of Samuel Caudle, deceased. Amy E. Caudle put in an answer to the bill, in which she denied that Samuel Caudle was the owner and seised of the lands named in the bill at the time of his death, and alleged "that on November 26, 1884, said Samuel Caudle and this defendant, who was at that time his wife, by warranty deed of that date conveyed the lands above described to the defendants, Isham E. Caudle and Bertha M. Caudle, . . . reserving unto themselves their life

estates therein, which said deed was on said date duly acknowledged, and afterwards, on the 22d day of July, 1885, filed for record in the recorder's office of the said county of Wayne, . . . and that by reason of the said conveyance the entire estate, title, and interest which the said Samuel Caudle had, prior to the date of the said conveyance in the said lands, passed into this defendant and the said Isham E. Caudle and Bertha M. Caudle." The answer further denied that the complainants in said bill, and the defendants therein, except this defendant and the said Isham E. Caudle and Bertha M. Caudle, were seised in fee, as tenants in common by descent from said Samuel Caudle, of the said premises, or had any interest therein, and alleged that the same belonged solely to Isham E. Caudle and Bertha M. Caudle, subject to the life estate of Amy E. Caudle. The answer of Isham E. Caudle and Bertha M. Caudle set up the same defense as that of defendant Amy E. Caudle. Upon the coming in of the answer the appellants filed an amended bill, in which they alleged that the deed claimed to have been made by the said Samuel Caudle on November 26, 1884, conveying said described lands to Isham E. Caudle and Bertha M. Caudle, was never delivered to the grantees therein;

der the Michigan statutes, in favor of an unborn child, and an assignment to a man for the sole purpose of conveying the same to his wife, remainder to his heirs, is sufficient to vest the title in a child born to him by said wife a few months after the deed was made. See *V. Derr*, 57 Mich. 369.

So, in *Graham v. Houghtall*, 30 N. J. L. 352, it was held that a deed to a husband and wife, for and during the term of their natural life, or the life of the survivor of them, and after their decease to the children of such man by said wife, and their heirs and assigns, forever, vests the remainder in the children then born, subject to being opened at the birth of each succeeding child so as to let them in equally as they are born; but there was nothing in the case to show whether any of the children unborn at the time of the deed had been conceived.

And in *Palmer v. Cracroft*, 2 Vern. 578, in which lands were given by marriage settlement to the sons in tail male, remainder to the husband in fee, provided that if the husband or wife, or either of them died without issue male living at the time of his or her death, leaving only one daughter unmarried, the estate was to be accumulated for the benefit of such daughter, or if there were more daughters than one at the time of the death of the husband or wife, unmarried, and there was no male issue then to such daughters, and at the time of the death of the husband there were daughters and a son *en ventre sa mère*, it was held that under the statute 10 & 11 Wm. III., chap. 16, the posthumous son would take, though no provision was expressly made for a son.

So, a power to charge lands by will or deed for portions for children living at the time of their father's death includes within it a child *en ventre sa mère*. *Beale v. Beale*, 1 P. Wms. 244.

And where the donee of a power to found a fund in favor of her own issue to be born before the appointment executes it by a deed, which, after reciting the power and her desire to exercise it and the state of her family, appoints the fund to her daughter for life, and after the

daughter's death to the daughter's children in equal shares on their respectively attaining the age of twenty-one years, but if any such children should die under twenty-one leaving issue, the share of the one so dead should go to such issue and vest at twenty-one, and at the date of the deed the daughter had three children, including one *en ventre sa mère*, and had three born afterwards, those existing at the date of the deed of appointment, including the unborn one, were the only objects of the power. *Re Francombe*, L. R. 9 Ch. Div. 652, 47 L. J. Ch. N. S. 328.

And the intention of a donee to exercise a power to appoint a fund for her own issue to make it include unborn children, as well as those in existence, does not render the appointment void *in toto*, but the share of each of the children will be determined by the total number of objects which may be included. *Ibid.*

So, provision made by a deed of fine out of the estate of a wife after marriage for daughters to be born includes daughters then begotten and not yet born. *Hewet v. Ireland*, 1 P. Wms. 426, Gilb. Eq. Rep. 145.

Where a deed of gift to living children by name is given declaring that afterborn children shall be allowed to share equally in the property intended to be granted, if a conveyance of lands, the most that could be made of it between the parties would be that at law the legal estate was in the grantees named, but in equity they might be regarded as trustees of a springing or shifting use, first, for themselves, and second, for themselves and the afterborn children as they respectively came into being; but in equity the result might be the same with reference to personality, but such a trust could never be set up against a third person without notice. *Hall v. Thomas*, 3 Strobb. L. 101.

A posthumous child is within the provision of marriage articles for such children to a marriage as should be living at the death of the father or mother, and such child will not be excluded on account of his being born after his father's death. *Miller v. Turner*, 1 Ves. Sr. 85.

F. H. B.

that said Bertha M. Caudle was not at that time in being, but was born on the 3d day of January, 1890; that the said deed purported to be made to "Isham E. Caudle and his one brothers and sisters"; that he, said Isham E. Caudle, at that time had no brothers and sisters other than the defendants and complainants in this bill, as Bertha M. Caudle, one of the defendants, was not at that time born; that the only persons said term "one brothers and sisters" could have referred to were the other defendants and the complainants in this bill, except the said Bertha M. Caudle, who was not then born, and was not born until January 3, 1890, afterwards; that said deed was never delivered, and was never intended to be delivered, to said Isham E. Caudle, or any other of the defendants or complainants in this bill. It was also set up in the amended bill that, at the time of the making of said deed, the said defendant Amy E. Caudle was pregnant, and a short time after the making of said deed gave birth to a female child, to wit, on or about the 7th day of January, 1885; that the said child was born after the making of said deed, and was named Amy E. Caudle, but said child, Amy E. Caudle, died on or about March 11, 1885. To the amended bill Isham E. Caudle and Bertha M. Caudle filed a plea, in which they set up that in May, 1896, Amy E. Caudle, as guardian, filed a petition with the Wayne county court for leave to sell said lands as the property of Isham E. Caudle and Bertha M. Caudle; that thereafter Samuel Caudle filed his intervening petition in said court, wherein he stated that he and his wife had deeded to Isham E. Caudle and his brothers and sisters the land mentioned in the petition of Amy E. Caudle, together with other lands, by which statement he intended to admit, and did admit, that he signed, sealed, acknowledged, and delivered the deed referred to in complainant's bill; that by the admissions above pleaded the said Samuel Caudle and his heirs, the complainants herein, were and are estopped from denying the execution and delivery of the deed.

From the foregoing statement of the pleadings it appears the appellants predicate their right of recovery on the ground that Samuel Caudle died seised of the lands in controversy, and that they inherited from him, that the deed executed November 26, 1884, by Samuel Caudle and wife to "Isham E. Caudle and his one brothers and sisters," was never delivered, and hence the lands did not pass by the pretended conveyance. But appellants, from their argument filed in this court, seem to have changed their position, and they now claim that the deed of November 26, 1884, was delivered, and that the title to the land passed under that deed to Isham E. and Amy E. Caudle, an unborn child; that upon the death of Amy E. Caudle they became possessed of an undivided interest in the land as her heirs. There is no substantial dispute between the parties in regard to the facts connected with the execution of the deed in question, nor in regard to what was said and done in regard to the delivery of the instrument. It appears

from the record that Samuel Caudle, the grantor in the deed, was a man advanced in years, who had raised a large family of children, and having lost his wife he had married a young woman. As a result of the second marriage one child had been born, before the deed was made, another was expected to be born within four or five weeks, and others might reasonably be expected at regular periods so long as the health and vigor of the grantor continued. Having raised and educated his children by his first wife, and being desirous of making some provision for his children of the second marriage, he called upon a justice of the peace with a view of making a will, in which he desired to devise the land in question to Isham E. Caudle, a son of the second marriage, and such other children as might thereafter be born. Upon consultation with the justice, the latter told Caudle that a will might be broken. He then decided to make a deed, and directed the squire to prepare a deed conveying the land to "Isham E. Caudle and his own brothers and sisters." The justice prepared the deed as directed, but in writing the name of the grantees in the deed he used the word "one" instead of "own." After the deed was executed and acknowledged, the grantor, Caudle, took the instrument and carried it away. Upon arriving at his home, he gave it to his wife, saying, "Mother, here's your deed; take care of it."

Under the facts as shown by the record, the question presented is whether the unborn child, Amy E. Caudle, took title to the land under the deed of November 26, 1884, executed by Samuel Caudle and his wife to Isham E. Caudle and his own brothers and sisters. A grantee must be *in esse* at the time the deed is executed; otherwise no title will pass by the deed. 9 Am. & Eng. Enc. Law, 2d ed. p. 131. In Tiedeman on Real Property (§ 673) the author says: "The common law did not treat children *en ventre sa mère* as persons *in esse* for the purpose of holding or acquiring property. This capacity only attached upon their birth alive. Consequently, by the old common law children born after the death of the ancestor were precluded from participating with the others in the distribution of the intestate's estate. But this harsh rule has now been generally changed by statute." There is no doubt in regard to a posthumous child being entitled to inherit property by descent under our existing laws, and to also take by devise, but an unborn child has no such existence as will enable it to take a present grant of lands by deed. Indeed, in *Faloon v. Simshauser*, 130 Ill. 649, we held that in case of a grant of an immediate estate in possession the grantee must be *in esse*, and a deed of that kind may be avoided by showing the grantee came into being subsequently to the delivery of the deed. In speaking in regard to the necessity of the existence of a grantee in a deed of conveyance, Tiedeman (§ 797) says: "For the grant of an immediate estate in possession it is necessary that the grantee be *in esse*, and if it be shown that the grantee came

into being after the conveyance it will avoid the deed."

There is another fatal objection to the deed,—it was never delivered to the unborn grantee or to any person for her. As has been seen, the deed was executed November 26, 1884. The child was born January 7, 1885, and died March 11, 1885. After the deed was executed, the grantor, Caudle, took it home with him, and then handed it to his wife, and it was kept in the house where he and his wife resided, under his control, until the last of July, 1885, when the wife sent it to the county seat to be recorded. If, upon the execution of the deed, Caudle had delivered it to his wife to be by her held for the grantees therein named, we would not hesitate to hold that the instrument was delivered; but where one of the grantors

merely places the deed in the hands of the other grantor for safe-keeping, as was the case here, and the instrument is kept in the possession and under the control of the grantors, the deed cannot be held to be delivered. Some time after the death of the child, the deed was placed on record, and thereafter, in May, 1896, the grantor admitted, as shown by the pleadings, that he had executed and delivered the deed. This rendered the deed valid as to the grantee Isham E. Caudle, but had no bearing as to the rights of the unborn child or any person claiming under her.

As the appellants failed to establish title to the premises in question, the court properly dismissed the bill, and *the decree will be affirmed.*

MICHIGAN SUPREME COURT.

BOARD OF FIRE & WATER COMMISSIONERS of the City OF MARQUETTE, Appt.,

v.

Edwin C. WILKINSON *et al.*, Assignees of James M. Wilkinson.

(.....Mich.....)

1. A deposit of public moneys by a treasurer of a board of fire and water commissioners, under direction of the board, in a bank of which he was a partner, is in violation of Pub. acts 1875, p. 158 (1 How. Anno. Stat. §§ 424, 427), prohibiting an officer to mingle public money with that of himself or any other person, or to receive, directly or indirectly, any pecuniary or valuable consideration as an inducement for the deposit thereof.
2. Public moneys deposited by an officer in a bank of which he was a partner constitute a trust fund, even if he had the legal title to the money.
3. A receiver of a bank in which a trust fund was deposited cannot be required to repay it in preference to the claims of other creditors, unless the trust fund can be identified or traced into some other specific fund or property.

(April 18, 1899.)

A PPEAL by petitioner from a decree of the Circuit Court for Marquette County refusing to allow its claim to a preference out of the funds in the hands of assignees for benefit of creditors of James M. Wilkinson. *Reversed.*

The facts are stated in the opinion.

Messrs. Charles E. Brown and George P. Brown, for appellant:

Wilkinson, the treasurer, could not contract with Wilkinson, the banker.

Mechem, Pub. Off. § 839; *People*, *Plugger*, v. *Overysse* Twp. Board, 11 Mich. 222; *Cute v. Barron*, 2 Mich. 192; *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130;

NOTE.—In connection with this case, see also *Marquette v. Wilkinson* (Mich.) 43 L. R. A. 840. 44 L. R. A.

Moore v. Handlebaum, 8 Mich. 433; *Powell v. Conant*, 33 Mich. 396; *Merryman v. David*, 31 Ill. 404; *Kerfoot v. Hyman*, 52 Ill. 512; *Cotton v. Holliday*, 59 Ill. 176; *Mason v. Bauman*, 62 Ill. 76; *Ely v. Hanford*, 65 Ill. 267; *Stone v. Daggett*, 73 Ill. 367; *Tewksbury v. Spruance*, 75 Ill. 187; *Hughes v. Washington*, 72 Ill. 84.

A trustee cannot legally become interested to the detriment of his *cestui que trust*, or an agent to the detriment of his principal.

Mechem, Pub. Off. 839, 840; *Davoue v. Fanning*, 2 Johns. Ch. 257; *Flint & P. M. R. Co. v. Dewey*, 14 Mich. 477.

If the board had drawn their warrant upon their treasurer for funds in his possession, his duty, involving no exercise of discretion, would be to pay, and his failure or refusal could be enforced by mandamus.

Barney v. State, 42 Md. 480; *Murphy v. Smith*, 49 Ark. 37.

A duty laid upon a municipality by the legislature for the protection of the citizens is not a right to be waived but an obligation to be performed. And no one attempting to act under the statute can have any excuse for disregarding any of its provisions.

Atty. Gen. v. Hanchett, 42 Mich. 438; *Cullen v. O'Hara*, 4 Mich. 132; *Gilkey v. Hamilton*, 22 Mich. 283.

A municipal corporation cannot be estopped by an act void in its inception and wholly *ultra vires*.

Taymouth Twp. v. Koehler, 35 Mich. 22; *Sault Ste. Marie Highway Comrs. v. Van Dusan*, 40 Mich. 429; *Bogart v. Lamotte Twp.* 79 Mich. 294; *Davis v. Jackson*, 61 Mich. 530; *Wrought Iron Bridge Co. v. Jasper Twp.* 68 Mich. 441.

A trust created for any public purpose cannot be assignable at the will of the trustee.

See *Cooley*, Const. Lim. p. 300, and cases there cited.

The treasurer "is himself, to all intents and purposes, the treasury, and bound to account for all that he receives, and no one else can supervise his action."

Perley v. Muskegon County, 32 Mich. 132, 20 Am. Rep. 637; *People v. Wadsworth*, 63 Mich. 500; *Lansing v. Wood*, 57 Mich. 211.

A fund is a distinct thing, however frequently the coin or bills which may be received on its account are changed in identity.

People v. Bringard, 39 Mich. 24, 33 Am. Rep. 344.

If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.

Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 65, 26 L. ed. 699; *Stephenson v. Little*, 10 Mich. 439; *Colerain v. Bell*, 9 Met. 499; *Rock v. Stinger*, 36 Ind. 346; *Hancock v. Hazzard*, 12 Cush. 112, 59 Am. Dec. 171; *San Diego County v. California Nat. Bank*, 52 Fed. Rep. 59; *Swartwout v. Mechanics' Bank*, 5 Denio, 555; *Burnett v. First Nat. Bank*, 38 Mich. 630; 3 Lewin, Tr. pp. 1090 *et seq.*, chap. 30, § 2; *State v. Bank of Commerce*, 54 Neb. 725.

As between the *cestui que trust* and the trustee, the relation may be, and usually is, not only that of trustee and *cestui que trust*, but also of debtor and creditor.

Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 65, 25 L. ed. 699; *People v. McKinney*, 10 Mich. 54; *Gunter v. Janes*, 9 Cal. 643; *People v. Bringard*, 39 Mich. 22, 33 Am. Rep. 344; *Independent Dist. v. King*, 80 Iowa, 497; *Buntun v. King*, 80 Iowa, 506; *Monroe Twp. v. Whipple*, 56 Mich. 518; *Brooke v. King*, 104 Iowa, 713.

If it were legal or possible for Wilkinson as treasurer to deposit trust funds with Wilkinson the banker, knowledge by Wilkinson, the banker, that the funds belonged to the water board would prevent his acquiring title to the funds.

School District v. First Nat. Bank, 102 Mass. 174; *Independent Dist. v. King*, 80 Iowa, 497; *Buntun v. King*, 80 Iowa, 506; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722; *Long v. Emsley*, 57 Iowa, 12.

Equity will follow trust funds.

People v. Merchants' & M. Bank, 78 N. Y. 269, 34 Am. Rep. 532; *Slater v. Oriental Mills*, 18 R. I. 352; *Little v. Chadwick*, 151 Mass. 109, 7 L. R. A. 570; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237; *City Bank v. Blackmore*, 43 U. S. App. 617, 75 Fed. Rep. 771, 21 C. C. A. 514; *Anheuser-Busch Brewing Assn. v. Morris*, 36 Neb. 31; *Farmers' & M. Nat. Bank v. King*, 57 Pa. 202; *Peak v. Elliott*, 30 Kan. 156, 46 Am. Rep. 90; *People v. City Bank*, 96 N. Y. 32; *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Stephenson v. Little*, 10 Mich. 433; *Morbeck v. State, Jackson Twp.*, 28 Ind. 86; *Halbert v. State, Martin County Comrs.*, 22 Ind. 128; *Burnett v. First Nat. Bank*, 38 Mich. 630; *Re Greene*, 2 Connolly, 166.

The supreme court of Wisconsin, and one or two others, have drifted back to the old rule that a *cestui que trust* must trace the trust fund and identify it or the specific property into which it was converted; but 44 L. R. A.

even these authorities recognize the rule that when a trustee mingles trust moneys with his own, any moneys drawn from the common fund by the trustee will be deemed to have been drawn from his own instead of the trust fund.

Burnham v. Barth, 89 Wis. 362; *Wisconsin Marine & F. Ins. Co. Bank v. Manistee Salt & Lumber Co.* 77 Mich. 81; *Barney v. State*, 42 Md. 480; *Murphy v. Smith*, 49 Ark. 37.

These assignees cannot set up in a proceeding in equity a defense which at law would be held to be unconscionable.

Carley v. Graves, 85 Mich. 483; *Re Johnson*, 103 Mich. 109; *Wallace v. Stone*, 107 Mich. 190; *Sunderlin v. Mecosta County Sav. Bank* (Mich.) 4 Det. L. N. 1115, 74 N. W. 478.

The law favors diligence in the enforcement of the claims, and the creditor "first on deck" is entitled to speedy justice, regardless of its effect upon others who are dilatory in asserting their rights.

Eureka Dist. Twp. v. Farmers' Bank, 88 Iowa, 194.

Mr. A. B. Eldredge, with *Mr. A. E. Miller*, for respondents:

The statute does not prohibit the almost universal practice of the deposit in bank of public moneys.

Perley v. Muskegon County, 32 Mich. 132, 20 Am. Rep. 637; *Monroe Twp. v. Whipple*, 56 Mich. 516; *Lansing v. Wood*, 57 Mich. 201; *People v. Wadsworth*, 63 Mich. 500.

The act of 1875 does not prohibit the board from depositing its moneys in bank, but, on the contrary, expressly recognizes such power.

A bank is more than a borrower of the funds of its depositors; it is a place for the safe keeping of moneys, a convenience for the public. This is the chief purpose of a bank.

Morse, Banks & Banking, 3d ed. p. 124, § 47.

If there was not express authority and sanction by the petitioner for all that was done, there was full knowledge on the part of the board; and the act being lawful, such long-continued knowledge and acquiescence amount to ratification, which is as binding upon the petitioner as though it were an individual.

Dill. Mun. Corp. 4th ed. § 463; *Lansing v. Wood*, 57 Mich. 201; *Davis v. Jackson*, 61 Mich. 530; *Chicago v. Seaton*, 115 Ill. 230; *Peterson v. New York*, 17 N. Y. 453; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 470; *Ross v. Madison*, 1 Ind. 281; *Allegheny City v. McClurkan*, 14 Pa. 81; *Clark v. Washington*, 12 Wheat. 40, 6 L. ed. 544; *Bank of United States v. Dandridge*, 12 Wheat. 70, 6 L. ed. 554; *Brady v. Brooklyn*, 1 Barb. 584; 4 Thomp. Corp. § 4964.

The right to trace trust funds has its basis in the right of property, and never was based upon any theory of preference by reason of unlawful conversion.

Where the property converted is money, and money is found in the hands of the assignee or receiver, sometimes, and under certain circumstances, such moneys are held to

be identified as trust moneys, under the presumption that the trustee paid out his own moneys and kept those belonging to the trust. This presumption is, however, overcome when the trust fund is shown not to be contained in such money.

Neely v. Rood, 54 Mich. 134, 52 Am. Rep. 802; *Pierce v. Holzer*, 65 Mich. 283; *Sherwood v. Central Mich. Sav. Bank*, 103 Mich. 109; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237; *Re Plankinton Bank*, 87 Wis. 378; *Sherwood v. Milford State Bank*, 94 Mich. 78; *Carley v. Graves*, 85 Mich. 483.

A trust fund must be traced into the assets delivered to the assignee, or the *cestui que trust* will be compelled to share as a general creditor.

Sunderlin v. Mecosta County Sav. Bank (Mich.) 4 Det. L. N. 1115, 74 N.W. 478; *Carley v. Graves*, 85 Mich. 485; *Wisconsin Marine & F. Ins. Co. Bank v. Manistee Salt & Lumber Co.* 77 Mich. 76; *Sherwood v. Milford State Bank*, 94 Mich. 78; *Slater v. Oriental Mills*, 18 R. I. 352; *State v. Bank of Commerce*, 54 Neb. 725; *State v. Foster*, 5 Wyo. 199, 29 L. R. A. 226; *Little v. Chadwick*, 151 Mass. 109, 7 L. R. A. 570; *Freiberg v. Stoddard*, 161 Pa. 259; *Cavin v. Gleason*, 105 N. Y. 256; *Oeol Nat. Bank v. Thurber*, 8 U. S. App. 496, 59 Fed. Rep. 913, 8 C. C. A. 365; *Ex parte Hardcastle*, 44 L. T. N. S. 524; *Englar v. Offutt*, 70 Md. 78; *Commercial Nat. Bank v. Armstrong*, 39 Fed. Rep. 684; *Northern Dakota Elevator Co. v. Clark*, 3 N. D. 26; *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 696; *Thuemmler v. Barth*, 89 Wis. 381.

Hooker, J., delivered the opinion of the court:

The board of fire and water commissioners of the city of Marquette is a corporation organized by act No. 243, Laws 1869, vol. 2, p. 104. This act provides for the selection of a secretary and a treasurer from among the members of the board. The board was organized soon after its creation, and from that time its funds were deposited in the First National Bank of Marquette, the water consumers being in the habit of paying their rates at the bank. The money was credited to the board, and checked out by the secretary. James M. Wilkinson was a member of the board from a time previous to December 10, 1883, to his death, which occurred January 24, 1893. In 1893 he was engaged in the business of banking, with a Mr. Campbell, under the name of Campbell & Wilkinson. The following is a record of proceedings of the board for December 10, 1883: "The secretary informed the board that all the accommodation in the banking business received by the board was had at the Bank of Campbell & Wilkinson, and that the banking business was done at the First National Bank, and asked the board if all the business could not be done at Campbell & Wilkinson's bank; and on motion it was resolved that all business was to be done at Campbell & Wilkinson's bank, commencing January 1, 1884." On January 1, 1884, the following proceedings were had: "The president stated that the banking was to be done

at Campbell & Wilkinson's bank; from this, it would be well for this board to elect a treasurer, out of its number, to receive all moneys, and give receipts for same, and take the bank's receipts for deposits. J. M. Wilkinson was elected as treasurer of this board, and the following resolution was unanimously adopted: 'Resolved, that the moneys of this board shall be paid over to the treasurer of this board, and he is hereby authorized to give his receipt, in the name of this board, for all money which he may receive for this board.' " The money of the board was thereupon transferred to the Bank of Campbell & Wilkinson, and the business of the board was carried on there, until the death of Campbell, in 1889, in the same way that it had been done with the First National Bank. The water consumers paid their money to the bank, the bank credited them on a book kept for the purpose, and, by deposit slips, placed the amount to the credit of the board. The money was drawn, as wanted, upon ordering bank checks signed by the secretary, who kept the accounts. In December, 1889, Mr. Campbell died, and Mr. Wilkinson continued in the banking business until the time of his death; and no change whatever was made in the business of the bank, or in the board's dealings with the bank, until April 26, 1893, when a change having been made in the city charter creating a comptroller and requiring "all accounts and demands against the city and all boards thereof" to be audited by the comptroller, and the orders drawn in payment thereof to be countersigned and registered by the comptroller (City Charter, chap. 9, § 3), this led to the use of orders being drawn upon the treasurer, which orders were paid by the bank, and returned to the secretary, exactly as the checks had been before. On January 22, 1898, Wilkinson made a general assignment to the defendants for the benefit of his creditors, but made no schedule of his property. He died, as stated, two days later. The assignees took possession of his property. The petition is filed for the purpose of recovering a balance of \$11,376.42, the amount which is claimed to have been in Wilkinson's hands, of the funds of the board. It proceeds upon the theory that this was a trust fund, and that the petitioner's claim should have precedence over those of other creditors of Wilkinson.

The first contention of the appellees is that the board authorized the loan of the funds (i. e., that it directed their deposit in banks, with the expectation that they would become the money of the banks holding them, and be used as the money of ordinary depositors is used by banks), and that, therefore, the relation of debtor and creditor arose between the bank and the board, as in other cases, and that the claim of the board is not a preferred claim, because the money was not held in trust.

In 1875 the legislature passed "An Act to Provide for the Safe Keeping of Public Moneys." Pub. Acts 1875, p. 158 (1 How. Ann. Stat. §§ 423-430). Among its provisions are the following:

"Sec. 1. The people of the state of Michi-

gan enact, that all moneys which shall come into the hands of any officer of the state, or of any officer of any county, or of any township, school district, highway district, city, or village, or of any other municipal or public corporation within this state, pursuant to any provision of law authorizing such officer to receive the same, shall be denominated public moneys within the meaning of this act.

"Sec. 2. It shall be the duty of every officer charged with the receiving, keeping, or disbursing of public moneys to keep the same separate and apart from his own money, and he shall not commingle the same with his own money, nor with the money of any other person, firm, or corporation.

"Sec. 3. No such officer shall, under any pretext, use, nor allow to be used, any such moneys for any purpose other than in accordance with the provisions of law; nor shall he use the same for his own private use, nor loan the same to any person, firm, or corporation without legal authority so to do.

"Sec. 4. In all cases where public moneys are authorized to be deposited in any bank, or to be loaned to any individual, firm, or corporation, for interest, the interest accruing upon such public moneys shall belong to and constitute a general fund of the state, county, or other public or municipal corporation, as the case may be.

"Sec. 5. In no case shall any such officer, directly or indirectly, receive any pecuniary or valuable consideration as an inducement for the deposit of any public moneys with any particular bank, firm, or corporation.

"Sec. 6. The provisions of this act shall apply to all deputies of such officer or officers, and to all clerks, agents, and servants of such officer or officers."

Section 429 makes violations of this act punishable by fine and imprisonment.

Wilkinson was elected treasurer in 1884, and a resolution was adopted "that the moneys of the board should be paid over to the treasurer of the board." The funds were afterwards deposited with Campbell & Wilkinson. This was done by direction of the board and after Campbell's death the board seems to have been content to have Wilkinson treat the same as a deposit in his bank. If the law of 1875 has application to this board,—and we think that it has,—the legal custodian of the funds of this board had no right to deposit these funds in a banking institution in which he was a stockholder or partner; for § 427 prohibited his receiving, directly or indirectly, any pecuniary or valuable consideration, and § 424 prohibited his commingling the money with that of himself or any other person, firm, or corporation. If we should construe this section liberally, and say that it was not designed to prohibit a treasurer from depositing his funds in a bank in the ordinary way, we should be required to except deposits in banks in which he has a pecuniary interest. The deposit with Campbell & Wilkinson was in violation of this law, and no order of the board could make it lawful. Still more clearly improper was the practice adopted by Wilkinson, of using this fund, with his own money, in his

own banking business. This was a trust fund, as much as though Wilkinson had been a farmer or broker or contractor or merchant, and had used the fund in his business. It does not follow that the fund is not a trust fund because he had the legal title to the money, though that fact may protect one who receives the money innocently. In the case of *People v. Bringard*, 39 Mich. 22, 33 Am. Rep. 344, it was said that "we have no hesitation in holding that whenever any township treasurer misappropriates his trust funds to his private purposes, and fraudulently refuses to account for them, he comes as plainly within the law as if he made a similar misuse of specific coins or bills, which he had no right to exchange for their equivalents." The case recognized the rule that such officers become responsible as debtors, and not bailees, and that they become owners of the money they receive. See *Perley v. Muskegon County*, 32 Mich. 139, 20 Am. Rep. 637, and cases cited. But it does not follow that the fund is not a trust fund, which a court of equity may require the application of to the discharge of the trust, as was held in the recent case of *Marquette v. Wilkinson* (Mich.) 43 L. R. A. 840. The case of *People v. Wadsworth*, 63 Mich. 500, does not, in our opinion, militate against this, as the question there was whether one was necessarily guilty of embezzlement of public funds of which he was custodian, lost through insolvency, said funds having been on deposit in his bank by arrangement with the township treasurer. It was only held that a fraudulent intent was essential to that offense. In the case before us, Wilkinson was a member of the board, and its treasurer. He received its funds, through his clerks, and he had no right to mingle and use them with his private funds. It should have been kept as a special fund, and, though it was not, it cannot be said that a court of equity may not apply it to its proper use, if it can find the fund. In *Lansing v. Wood*, 57 Mich. 211, Mr. Justice Campbell uses this language in referring to cases holding that the money which officers deposit in banks is not a public bailment, but becomes a private debt from the banker to the officer depositing it: "But it does not follow . . . that such an officer becomes, as to the public, the absolute owner of the funds in his hands, so that no one can question the use he makes of them." And he adds that in *People v. McKinney*, 10 Mich. 54, and *People v. Bringard*, 39 Mich. 22, 33 Am. Rep. 344, it was held that "a public trust fund does not lose its character by changing the specific moneys which make it up," and in the latter case the duty of the officer to keep such money entirely separate from his own was fully recognized. The law by which the board was created requires the election of a treasurer, and, though it does not prescribe his duty, the custody of funds is so uniformly considered the principal duty of such officers, in corporations, that it may be fairly implied. Moreover, the resolution quoted placed the money in the hands of the treasurer, if the board had control of its custody. The treasurer took this fund, and placed it in the custody of his copartner and

himself. The collections and disbursements were made by their clerks, by whom the treasurer's account, so far as there appears to have been any, was kept. But, whatever may be said of the relation that the firm of Campbell & Wilkinson sustained to these funds, when the former died the moneys on hand belonging to the board, and those subsequently collected, passed into the hands of Wilkinson. If the act of 1875 applied, he was prohibited from mingling them with his own moneys; and, if it did not, he still held them by virtue of his office, and had no right to convert them to his own use. The fund was a trust fund in either case.

Having reached the conclusion that the funds of the board in the hands of its treasurer constituted a trust fund, it remains to ascertain whether it can be collected from the receivers. This involves questions of law as well as fact. The theory upon which property is taken from a receiver, and paid to a beneficiary, is that the court is able to find in the hands of the receiver property, or its proceeds, which was held by the insolvent, not in his own absolute right, but charged with a trust. In such a case a court of equity will hold that it is not subject to the claims of other creditors. But when the fund received in trust has been dissipated, so that it cannot be traced into some other specific property or fund, the only remedy of the beneficiary is to share equally with other creditors. In its origin, this right to follow a trust fund was limited. Early cases went only to the extent of holding that the beneficiary of property held by a trustee could follow it, and retake it from the possession of such trustee, or others in privity with him, and not bona fide purchasers for value, whether such property remained in its original form, or in some other or substituted form, so long as it could be ascertained to be the same property, or the product or proceeds thereof, but that such right ceased when the means of ascertainment failed, as when the subject of the trust was money, or had been converted into money, and then mixed and confounded in a general mass of money, of the same description, so as to be no longer divisible or distinguishable. *Taylor v. Plumer*, 3 Maule & S. 575.

The case of *Cavin v. Gleason*, 105 N. Y. 262, recognizes this rule and its limitations. It is there said: "It is clear, we think, that, upon an accounting in bankruptcy or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent merely on the ground of the nature of his claim; that is, that he is a trust creditor, as distinguished from a general creditor. We know of no authority for such a contention. The equitable doctrine that, as between creditors, equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears, in addition, that there is some specific, recognized equity, founded on some agreement, or the relation of the debt to the assigned property, which entitles the

claimant, according to equitable principles, to preferential payment. If it appears that trust property specifically belonging to the trust is included in the assets, the court, doubtless, may order it to be restored to the trust. So, also, if it appears that trust property has been wrongfully converted by the trustee, and constitutes, although in a changed form, a part of the assets, it would seem to be equitable, and in accordance with equitable principles, that the things into which the trust property has been changed should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property or funds or proceeds of the trust property, entering into, and constituting a part of, the assets. This rule simply asserts the right of the true owner to his own property. But it is the general rule, as well in a court of equity, as in a court of law, that in order to follow trust funds, and subject them to operation of the trust, they must be identified. A court of equity, in pursuing the inquiry and in administering relief, is less hampered by technical difficulties than a court of law; and it may be sufficient to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place. The authorities require, at least, this degree of distinctness in the proof, before preference can be awarded." In *Atkinson v. Rochester Printing Co.*, 114 N. Y. 175, this language was approved.

In *Holmes v. Gilman*, 138 N. Y. 376, 20 L. R. A. 566, the following language appears: "The claim of the plaintiff to recover the moneys arising from the payments of these policies is based upon the principle which allows a *cestui que trust* to follow trust funds, and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the trust fund can be clearly ascertained, traced, and identified, and provided the rights of bona fide purchasers for value, without notice, do not intervene. The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the *cestui que trust* has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title."

In discussing this subject in the case of *Frelinghuysen v. Nugent*, 36 Fed. Rep. 239, Mr. Justice Bradley said: "Another difficulty in the complainant's case is the want of identity of the property claimed with the proceeds of the money abstracted from the bank. Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it de-

pended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it, by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held, as the better doctrine, that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were, either in whole or in part, the proceeds of any money unlawfully abstracted from the bank. On the contrary, the goods and stock on hand were purchased of the other creditors of Nugent & Co. almost entirely, if not wholly, on credit, and really stand in the place of, and represent, the debts of the firm due and owing to said creditors. This is true with regard to all the raw stock on hand, and with regard to all the stock and materials from which the manufactured or partially manufactured goods were produced. If any moneys derived from the bank entered into the latter, they were those moneys which were regularly drawn by checks of the firm weekly for the payment of their hands. It seems impossible, therefore, to sustain any such general charge or trust upon the goods and property of Nugent & Co. as that which has been set up and claimed by the complainant."

The supreme court of Massachusetts, in *Little v. Chadwick*, 151 Mass. 109, 7 L. R. A. 570, speaking through Mr. Justice Allen, said: "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails. Under such circumstances if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains. He may have lost it, with property of his own, and in such case the *cestui que trust* can only come in and share with the general creditors."

The case of *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, is an interesting case,—the more so as it overrules some prior cases which took advanced ground upon the subject of trust funds. It is there said, quoting from Jessel, M. R., in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696: "The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of

the trust. But so long as the trust property can be traced and followed into other property, into which it has been converted, that remains subject to the trust." The court continued: "That case is as favorable to the claim of the plaintiff as any in the English courts; and yet it nowhere sanctions the proposition that the owner of the property or money intrusted is entitled to a preference over other creditors of an insolvent estate out of property or assets to which no part of the trust fund, or the proceeds thereof, is traceable. All such cases turn upon the question of fact, whether the trust property or fund, or the proceeds thereof, are traceable into any specific property or fund." The opinion is replete with authorities in support of the rule laid down by it.

In *Slater v. Oriental Mills*, 18 R. I. 352, the supreme court of Rhode Island refuses to hold that, "where one's property has been wrongfully applied and dissipated by another, a charge remains upon the estate of the latter for the amount thus wrongfully taken upon the ground that his estate is thereby so much larger, and that the trust property is really and clearly there, in a substituted form, although it cannot be directly traced." Proceeding with the discussion, that court said: "This view is pressed with much skill, and some authority, but we are unable to adopt it. While one who has been wronged may follow and take his own property, or its visible product, it is quite a different thing to say that he may take the property of somebody else. The general property of an insolvent debtor belongs to his creditors, as much as particular trust property belongs to a *cestui que trust*. Creditors have no right to share in that which is shown not to belong to the debtor, and, conversely, a claimant has no right to take from creditors that which he cannot show to be equitably his own. But right here comes the argument that it is equitably his own, because the debtor has taken the claimant's money and mingled it with his estate, whereby it is swelled just so much. But, as applicable to all cases, the argument is not sound. Where the property, or its substantial equivalent, remains, we concede its force; but, where it is dissipated and gone, the appropriation of some other property in its stead simply takes from creditors that which clearly belongs to them. In the former case, as in *Pennell v. Deffell*, 4 DeG. M. & G. 372, and in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, the illustration may be used of a debtor mingling trust funds with his own, in a chest or bag. Though the particular money cannot be identified, the amount is swelled just so much, and the amount added belongs to the *cestui que trust*. But in the latter case there is no swelling of the estate, for the money is spent and gone; or, as respondent's counsel pertinently suggests, 'Knight Bruce's chest,—Jessel's bag,—is empty.' Shall we therefore order a like amount to be taken out of some other chest or bag, or out of the debtor's general estate? Suppose the general estate consists only of mills and machinery acquired long before the complainant's money was ap-

propriated. Upon what principle could that property be taken to reimburse them? But the complainants say: 'Our money has been misappropriated by the debtor without our consent and without our fault. Why should we not be reimbursed out of his estate?' Undoubtedly, it is right that everyone should have his own; but, when a claimant's property cannot be found, this same principle prevents the taking of property which equitably belongs to creditors of the trustee to make it up. The creditors have done no wrongful act, and should not be called upon, in any way, to atone for the misconduct of their debtor. It is an ordinary case of misfortune on the part of claimants whose confidence in a trustee or agent has been abused. In examining the question upon authority, we think it is equally clear that there can be no equitable relief, except in cases where the fund claimed is in some way apparent in the debtor's estate. Of the cases cited by the complainants, only four go to the extent of holding that a *cestui que trust* is entitled to a lien for reimbursement on the general estate of the trustee, where the trust fund does not in some form so appear. These are *Davenport Plow Co. v. Lamp*, 80 Iowa, 722; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Francis v. Evans*, 69 Wis. 115; *Bowers v. Evans*, 71 Wis. 133. In the first of these cases the court lost sight of the distinction, which we desire to make clear, between funds remaining in the estate, which go to swell the assets, and funds which, having been dissipated or used in the payment of debts, do not remain in the estate, and so do not swell the estate. Upon the former fact, as we have stated above, we concede the right to relief. But the court, in the Iowa case, seems to ignore this very important distinction, and in so doing overthrows the foundation on which its decision is based. For it says: 'The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys.' Now, how can this be so, if the trust moneys, or their substantial equivalent, are not there? The court assumes that the payment of debts is the same thing as an increase of assets, or, perhaps, that it works the same result to a creditor, by increasing his dividends. But this is not so. How the satisfaction of a debt by incurring another of equal amount either decreases one's liabilities or increases his assets can only be comprehended by the philosophic mind of a Micawber. If a debtor is solvent, it is all right, either way, because he will have enough to pay everything he owes; but, if he is insolvent, the injustice of the doctrine of the Iowa court is made almost painfully plain by the following illustration from the dissenting opinion of Taylor and Cassoday, JJ., in *Francis v. Evans*, 69 Wis. 115; 'Suppose that an insolvent debtor, D, has only \$1,000 of property, but is indebted to the amount of \$2,000, one half of which is due to A, and the other half to B. In this condition of things, D's property can only pay 50 per cent of his debts. By such distribution, A and B would each be equitably entitled to \$500. Now, suppose D, while in

that condition, collects \$1,000 for F, but instead of remitting the money, as he should, he uses it in paying his debt in full to A. By so doing, D has not increased his assets a penny, nor diminished his aggregate indebtedness a penny. The only difference is that he now owes \$1,000 each to B and F, whereas he previously owed \$1,000 each to A and B. Now, if F is to have a preference over B, then his claim will absorb the entire amount of D's property, leaving nothing whatever for B. In other words, the \$500 to which B was equitably entitled from his insolvent debtor, upon a fair distribution of the estate, has, without any fault of his, been paid to another, merely in consequence of the wrongful act of the debtor.' It is impossible to state the case more clearly. The illustration demonstrates that the mere fact that a trustee has used the money does not show that it has gone into his estate. If used to pay debts, he has simply turned it over to a creditor, thereby giving him a preference, while his own estate and indebtedness remain exactly as before. . . . Suppose he had stolen the money, and turned it over to somebody from whom it could not be reclaimed. Can anyone say the owner should have an equitable lien upon the thief's insolvent estate, in preference to his creditors? They and the owner are equally innocent.' See also *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693.

We think it unnecessary to quote at length from our own authorities which point in the same direction. *Sherwood v. Milford State Bank*, 94 Mich. 83, recognizes the principle that the trust property must be traceable. *Sherwood v. Central Michigan Sav. Bank*, 103 Mich. 110, goes no further than to hold that, where money is traced to a fund, it will be presumed that the trust property is the last to be paid out. In *Wallace v. Stone*, 107 Mich. 196, it was said that, unless the fund can be identified as being or containing the actual fund, the trust cannot be enforced against general creditors. Many authorities are cited. This language was in a dissenting opinion, but the dissent rested upon a difference of opinion relating to the facts, not law, and the rule there stated was approved by the full bench in the later case of *Sunderlin v. Mecosta County Sav. Bank* (Mich.) 4 Det. L. N. 1115, 74 N. W. 479.

The overruled Wisconsin cases are made the subject of the following comment in the opinion hereinbefore cited from Massachusetts: 'In Wisconsin a majority of the court has declared that it is not necessary to trace the trust fund into any specific property, in order to enforce the trust; and that if it can be traced into the estate of the defaulting agent or trustee, this is sufficient. *McLeod v. Evans*, 66 Wis. 401, 409, 57 Am. Rep. 287. But this seems to us to be stated too broadly.'

This review of cases might be extended indefinitely, as will be shown by the numerous citations contained in the cases discussed. They seem to effectually dispose of the claim that the entire estate of an insolvent trustee can be subjected to the claim of a *cestui que trust*, to the exclusion of general creditors,

and firmly establish the proposition that one who seeks such relief must be able to trace the trust property to some specific fund or piece of property, and that when this is done there is a presumption that what remains of such fund or article is the trust fund, or its proceeds. The burden of proof is upon the complainant, and, in the opinion of Mr. Justice Bradley, "he should make it out, not only by preponderance of proof, but by a very clear preponderance." *Frelinghuysen v. Nugent*, 36 Fed. Rep. 237.

In this case it is impossible to say that the estate contains the proceeds of any checks received in payment for water rates, because it is impossible to say what disposition was made of such checks or their proceeds. The record shows \$11,376.42 to be the balance due the board when the receiver took charge. This all accrued after April 14, 1891, because there was an overdraft at that time. It is difficult to tell how much of this was cash paid in. There is, however, some testimony on the subject. Edwin C. Wilkinson, the son of James Wilkinson, testifies that from November 1, 1897, to the day on which the bank closed its doors, one third of the amount paid in for the water board, or a little more, was paid by checks, and that, according to his best judgment, the amount was \$3,176.14. That was a little more than one third, for the amount deposited during that period was \$9,208.18. It would follow that \$6,032.04 was deposited in cash. During the same period there was drawn out \$4,265.46, but this was \$2,168.24 less than the amount standing to the credit of the board on November 1. Unless we are to say that the amount drawn out should be applied against the cash paid in, viz., \$6,032.04, this sum may be presumed to have been in the treasury when the bank was closed. There is no reason why we should say it, as it does not appear that these payments should not be charged against the older credit. We think it may be justly said that \$6,032.04 of the cash received for the board found its way to the general cash fund of the bank within the last two months that business was done at the bank. We find an amount exceeding that sum in the fund when the assignee took it. We will presume, in the absence of proof to the contrary, that it was the trust fund that remained.

The decree will be reversed, and a decree entered here in favor of the complainant for the sum of \$6,032.04, with costs of both courts.

The other Justices concur.

Augusta DETZUR, by Pauline Detzur, Her
Next Friend,
v.

B. STROH BREWING COMPANY, Plff. in
Err.

(.....Mich.....)

1. Permitting a shattered pane of glass

NOTE.—As to liability for negligence in respect to things falling into street, see note to St. Louis, I. M. & S. R. Co. v. Hopkins (Ark.) 12 L. R. A. 189.
41 L. R. A.

to remain in a window above a street where pedestrians are frequently passing, when there is an apparent danger of the pieces falling or being shaken out by the wind or otherwise, is such negligence as will create a liability to a person who is struck by a piece of the glass while on a sidewalk below the window.

2. The question of negligence in leaving cracked windows above a sidewalk is for the jury, where the testimony tends to show a dangerous condition of the windows.
3. An ordinary wind which blows broken glass out of a window is not the proximate cause of an injury caused by the fall of the glass, when there was negligence in leaving the window in such condition that the glass was liable to fall out.
4. The opinion of a witness that the glass in a broken window was unsafe is incompetent, where that is one of the principal points in the case.
5. An objection that a witness is not an expert is insufficient to raise the question of the competency of opinion evidence on the question involved.
6. An objection that a hypothetical question is incompetent does not raise the point that the question is not in proper form because it includes the witness's understanding of the testimony of another witness.
7. An objection to the incompetency of the admissions of the president of a defendant corporation, made a few hours after an accident, does not raise the question of his authority to make a settlement, or of his being engaged in the company's business, or in an attempt to make a compromise.
8. The sum of \$3,500 is not so excessive a recovery for a stiff arm that it will be interfered with on appeal.
9. A new trial may be made dependent upon a refusal to remit a portion of the verdict for unliquidated damages.

(January 20, 1899.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Thomas S. Jerome, with Mr. Henry M. Duffield, for plaintiff in error:

Ordinary witnesses are not to be allowed to give their opinions to the jury, but must state the facts, from which the jury are to form an opinion.

A question calling for the conclusion of the witness upon matter of fact should be excluded.

Anderson v. Thunder Bay River Boom Co. 61 Mich. 489; *Lemon v. Chicago & G. T. R. Co.* 59 Mich. 618; *Kelley v. Detroit L. & N. R. Co.* 80 Mich. 237; *Harris v. Clinton Twp.* 64 Mich. 447; *Girard v. Kalamazoo*, 92 Mich. 610; *Atherton v. Bancroft*, 114 Mich. 241; *Langworthy v. Green Twp.* 88 Mich. 207; *Smith v. Sherwood Twp.* 62 Mich. 159; *Cook v. Johnston*, 58 Mich. 457, 55 Am. Rep. 703; *Smaltz v. Boyce*, 109 Mich. 383; *Zube v. Weber*, 67 Mich. 52; *Passmore v. Passmore*, 60 Mich. 463; *Marcott v. Marquette*,

H. & O. R. Co. 49 Mich. 99; *Ireland v. Cincinnati, W. & M. R. Co.* 79 Mich. 163; *Jones v. Lake Shore & M. S. R. Co.* 49 Mich. 573; *Lewis v. Bell*, 109 Mich. 189.

In a question to an expert, the evidence must be hypothetically propounded.

Van Deusen v. Newcomer, 40 Mich. 90; *Jones v. Portland*, 88 Mich. 598, 16 L. R. A. 437.

An expert cannot be allowed to give his opinion upon facts unless the facts are all stated in the question.

Hitchcock v. Burgett, 38 Mich. 501; *Fuller v. Jackson*, 92 Mich. 197.

An expert cannot be allowed to state that he heard the testimony of a witness and then give his opinion, without stating the particular points of the evidence upon which he rests his conclusion.

People v. Aikin, 66 Mich. 460; *People v. Millard*, 53 Mich. 63.

To render the admissions of the agent of a corporation competent evidence it must be (1) in respect to a matter within the scope of his authority, (2) made in reference to the subject-matter of his agency, (3) made at the time of the transaction while the agent was actually engaged in the performance of the act concerning which the admission is made, or at a time so near after as to be practically at the same time.

Mechem. Agency, §§714, 715; *Patterson v. Wabash, St. L. & P. R. Co.* 54 Mich. 91; *Stebbins v. Keene Turp.* 55 Mich. 552; *O'Neil v. Deerfield Turp.* 86 Mich. 610; *Wormsдорф v. Detroit City R. Co.* 75 Mich. 472; *Mabley v. Kittleberger*, 37 Mich. 360; *Bowen v. School Dist. No. 9*, 36 Mich. 149; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230; *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich. 327; *Peek v. Detroit Novelty Works*, 29 Mich. 313; 2 Cook, Stock & Stockholders, § 726; *Hoag v. Lamont*, 60 N. Y. 96; *Lombard & S. Street Pass. R. Co. v. Christian*, 124 Pa. 114.

That there had been broken glass in the window of the brewery six months before the accident was immaterial. Previous negligence—if this be negligence—is unimportant, and showing it may be prejudicial.

Thompson v. Lake Shore & M. S. R. Co. 84 Mich. 281.

Negligence cannot be inferred merely from an accident.

Robinson v. Charles Wright & Co. 94 Mich. 283; *Stern v. Michigan C. R. Co.* 76 Mich. 591; *Werbonlsky v. Fort Wayne & E. R. Co.* 86 Mich. 236; *Toomey v. Eureka Iron & Steel Works*, 89 Mich. 249; *Early v. Lake Shore & M. S. R. Co.* 66 Mich. 349; *Brown v. Congress & B. Street R. Co.* 49 Mich. 153.

Where an accident happens in a wholly unaccountable way, a jury will not be allowed to speculate and find culpable negligence on the theory that defendant might have avoided the accident by different rules.

Whalen v. Michigan C. R. Co. 114 Mich. 512; *Hall v. Murdock*, 114 Mich. 233.

At the time of this accident there had just been a cyclone in the neighborhood of Detroit, and unusually high winds had been blowing for some time, and there were great atmospheric disturbances. These extraor-

dinary gales were the proximate cause of the accident, and consequently defendant was not liable.

Lewis v. Flint & P. M. R. Co. 54 Mich. 55, 52 Am. Rep. 790.

The jury were not authorized to give even a sum which, at interest, would produce the amount of plaintiff's yearly earnings at the time of the accident, for that would be a perpetuity.

Kinney v. Folkerts, 78 Mich. 688; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Atlanta & W. P. R. Co. v. Newton*, 85 Ga. 517; *Field, Damages*, 864.

A new trial will be granted where the excessiveness is apparent at the first blush.

Woodson v. Scott, 20 Mo. 272; *Kelly v. McDonald*, 39 Ark. 387; *Baltimore P. & C. R. Co. v. Pizley*, 61 Ind. 22; *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *Gale v. New York C. & H. R. R. Co.* 76 N. Y. 594; *Berry v. Central Railway of Iowa*, 40 Iowa, 504; *Pittsburgh, C. & St. L. R. Co. v. Sponster*, 85 Ind. 165; *Graham v. Pacific R. Co.* 66 Mo. 536; *Boyers v. Pratt*, 1 Humph. 93; *Goodall v. Thurman*, 1 Head, 217; *McConnell v. Hampton*, 12 Johns. 236; *Wilford v. Berkeley*, 1 Burr. 609; *Chambers v. Caulfield*, 6 East, 245; *England v. Burt*, 4 Humph. 399; *Jones v. Jennings*, 10 Humph. 428; *Nailing v. Nailing*, 2 Sneed, 631; *Vaulx v. Herman*, 8 Lea, 687; *Tennessee Coal & R. Co. v. Roddy*, 85 Tenn. 400; 5 Am. & Eng. Enc. Law, p. 54.

The best criterion as to excessive damages is a comparison with the average amount awarded for injuries of like nature and extent, and where the verdict largely exceeds the average it will be set aside.

Lockwood v. Twenty-Third Street R. Co. 15 Daly, 374; *South Covington & C. Street R. Co. v. Ware*, 84 Ky. 267; *Florida R. & Nav. Co. v. Webster*, 25 Fla. 394; *Louisville Southern R. Co. v. Minogue*, 90 Ky. 369; *Missouri P. R. Co. v. Texas P. R. Co.* 41 Fed. Rep. 311; *Honeycutt v. St. Louis, I. M. & S. R. Co.* 40 Mo. App. 674; *Brown v. Southern P. R. Co.* 7 Utah, 288; *International & G. N. R. Co. v. Hall*, 78 Tex. 657; *Peri v. New York C. & H. R. R. Co.* 87 Hun, 499; *Ryder v. New York*, 18 Jones & S. 220; *Brassel v. Minneapolis, St. P. & S. S. M. R. Co.* 101 Mich. 5.

This is not a case where the court can properly enter a remittitur.

Savannah, F. & W. R. Co. v. Harper, 70 Ga. 119; 1 Sutherland, Damages, 812; 16 Am. & Eng. Enc. Law, pp. 593, 594; *Leeson v. Smith*, 4 Nev. & M. K. B. 304; *Sherry v. Frecking*, 4 Duer, 452; *Koeltz v. Bleckman*, 46 Mo. 320; *International & G. N. R. Co. v. Wilkes*, 68 Tex. 617; *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730.

Where it is impossible to determine what the jury acted upon, or how they made up their verdict under the charge of the court, so as to correct the error and arrive at the amount they should have given, a remittitur will not cure the verdict.

Smith v. Dukes, 5 Minn. 373; *Orange & A. R. Co. v. Fulvey*, 17 Gratt. 306; *Lambert v. Craig*, 12 Pick. 199; 2 Sutherland, Damages, ed. 1883, 812; *Hodapp v. Sharp*, 40 Cal.

69; *Sourwine v. Truscott*, 25 Hun, 67; *M'Connell v. Hampton*, 12 Johns. 234; *Nudd v. Wells*, 11 Wis. 408.

Where the excess cannot be determined by the record the parties may agree as to the amount and have the excess remitted.

Lambert v. Craig, 12 Pick. 199.

The court cannot substitute its judgment for the verdict of the jury upon a question which the jury could alone determine.

Nudd v. Wells, 11 Wis. 408; *Thomas v. Womack*, 13 Tex. 580.

On petition for rehearing.

A distinct question of fact was raised by the testimony as to the liability of the defendant. Upon this question, a jury influenced "by sympathy for the plaintiff and by their common knowledge of the financial ability of the defendant and their belief of large amounts expended by the defendant for medical expert evidence," could not fairly and impartially pass.

A jury who are "so moved by sympathy for the plaintiff and by their common knowledge of the financial ability of the defendant" (without any evidence to support it), and their belief "of large amounts expended by the defendant for medical expert evidence," of which there is no evidence, that the trial judge finds partiality to exist, are not qualified to pass on a disputed and independent question of fact, whether the defendant was liable at all.

Brassel v. Minneapolis, St. P. & S. S. M. R. Co. 101 Mich. 5.

Mr. James H. Pound, for defendant in error:

The acts of superior agents of corporations are binding.

It is within the rule of *res gestæ* the admission was made the same day.

Kimball & A. Mfg. Co. v. Vroman, 35 Mich. 310, 24 Am. Rep. 558; *James v. Emmet Min. Co.* 55 Mich. 336; *Williams v. Edmunds*, 75 Mich. 92.

The fall of a large wooden sign of its own weight from its position over a public sidewalk raises a presumption of negligence in respect to its fastenings.

St. Louis, I. M. & S. R. Co. v. Hopkins, 54 Ark. 209, 12 L. R. A. 189; *Barnowski v. Helson*, 89 Mich. 523, 15 L. R. A. 33.

A presumption of negligence arises where a chisel drops from a scaffold on which a workman is engaged with tools and injures a person walking upon a sidewalk, where the injured person has a right to travel, and where people are constantly traveling.

Dixon v. Pluns, 98 Cal. 384, 20 L. R. A. 698; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Lyons v. Rosenthal*, 11 Hun, 46; *Kearney v. London, B. & S. O. R. Co.* L. R. 5 Q. B. 411; *Byrne v. Boodle*, 2 Hurlst. & C. 722; *Scott v. London & St. K. Docks Co.* 3 Hurlst. & C. 596; *Shearm. & Redf. Neg.* § 60; *Cooley, Torts*, p. 799; 1 *Addison, Torts*, p. 578; *Thomas v. Western U. Teleg. Co.* 100 Mass. 158; *Schoepper v. Hancock Chemical Co.* 113 Mich. 582; *Myers v. Hinds*, 110 Mich. 300, 33 L. R. A. 356.

If a verdict in other respects valid is excessive in amount, the court may in its discretion, instead of unconditionally award-

ing a new trial, give the successful party the option of reducing the amount of his recovery to the extent of the excess.

28 Am. & Eng. Enc. Law, p. 309; *Parker v. Lake Shore & M. S. R. Co.* 93 Mich. 611; *Craig v. Cook*, 28 Minn. 232; *Hurry v. Watson*, 4 T. R. 659, note; *Pacific Exp. Co. v. Malin*, 132 U. S. 531, 33 L. ed. 450; *Blunt v. Little*, 3 Mason, 102; *Kinsey v. Wallace*, 36 Cal. 462; *Patrick Red Sandstone Co. v. Skoman*, 1 Colo. App. 323; *Georgia R. & Bkg. Co. v. Crawley*, 87 Ga. 191; *Illinois C. R. Co. v. Ebert*, 74 Ill. 399; *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 62; *Fuller v. Chicago & N. W. R. Co.* 31 Iowa, 211; *Collins v. Council Bluffs*, 35 Iowa, 432; *Lombard v. Chicago, R. I. & P. R. Co.* 47 Iowa, 494; *Doyle v. Dixon*, 97 Mass. 208, 93 Am. Dec. 80; *Howard v. Grover*, 28 Me. 97, 48 Am. Dec. 478; *Federspiel v. Johnstone*, 87 Mich. 308; *Pratt v. Pioneer-Press Co.* 35 Minn. 251; *Breck v. Smith*, 44 Miss. 690; *Hoit v. Molony*, 2 N. H. 323; *Willard v. Stevens*, 24 N. H. 271; *Belknap v. Boston & M. R. Co.* 49 N. H. 358; *Chils v. Gronlund*, 41 Fed. Rep. 505; *Dublin v. Murphy*, 3 Sandf. 19; *Barber v. Rose*, 5 Hill, 76; *Sears v. Conover*, 3 Keyes, 113; *Butt v. Schrimpf*, 31 Tex. 601; *Goldstein v. Cook* (Tex. Civ. App.) 22 S. W. 762; *McHugh v. Chicago & N. W. R. Co.* 41 Wis. 75; *Corcoran v. Haran*, 55 Wis. 120; *Collins v. Albany & S. R. Co.* 12 Barb. 492; *Clapp v. Hudson River R. Co.* 19 Barb. 461; *Murray v. Hudson River R. Co.* 47 Barb. 196; *McIntyre v. New York C. R. Co.* 47 Barb. 515.

Hooker, J., delivered the opinion of the court:

The plaintiff was injured by a piece of glass, which fell from a window of the defendant's building, cutting her arm severely, and permanently impairing its use, according to some of the testimony in the case. There is testimony upon the part of the plaintiff tending to show that a round window in the upper story was broken for some days or weeks before the accident, and that it was a piece of glass from this window which injured the plaintiff. The defendant offered testimony tending to show that there was no broken window in the building on the day before the accident, and that the glass causing the injury came from a square window, in a lower story, and its fall was caused by a high wind blowing at the time. The theory of the only count relied upon is that the defendant created and maintained a nuisance, in an insecurely fastened and broken window sash and glass, whereby the plaintiff was injured. A verdict of \$10,000 was rendered in behalf of the plaintiff. A motion being made for a new trial, the court denied the same, upon condition that the plaintiff remit the sum of \$6,500 from the verdict, which was done. The defendant has brought error.

Error was assigned upon the refusal of the court to charge the jury that there was no evidence of negligence. It is urged that it cannot be inferred from the mere fact that there was an accident. There is testimony tending to prove that there was a broken

window; that, immediately before the accident, a window or glass was heard rattling, and the witness looked up, and saw triangular pieces of glass falling from the window which she had previously seen in a broken condition; that several pieces fell to the sidewalk; and that it was a pleasant day, with but little wind. The window was 50 or 60 feet from the ground, in a building that stood but a few feet from the street. If it is true that a pane of glass was shattered, as, we think, there was some testimony tending to show, we cannot say that a jury could not legitimately find that it was negligence to leave it in that condition until the action of the elements loosened it, and caused it to fall. It is true that, where there is no evidence suggestive of a negligent cause, no recovery should be allowed upon a charge of negligence, but this is not such a case. Circumstances consistent with the plaintiff's theory are found in the case, and offer a reasonable opportunity for the inference that the injury resulted from a careless disregard of the broken and loosened condition of glass in a window, above a street, where pedestrians were frequently passing.

Counsel say that it is common knowledge that there is nothing dangerous in itself in a broken windowpane. We know that it is common to see cracked and broken windows, and we recognize the fact that some of them are considered safe; but others are sometimes seen which are so palpably unsafe, because of the apparent danger of the pieces falling or being shaken out when the sash is shaken by wind or otherwise, that they may well be considered dangerous. As we cannot say that all cracked windows are safe, we must submit the question to the jury, when the testimony tends to show a condition of the window indicating danger.

In this connection we will mention the question of proximate cause. Counsel contend that, if the glass fell by means of its being dislodged by the wind, the negligence of the defendant was not the proximate cause of the injury, and they complain of a refusal to instruct the jury that in such event the plaintiff should not be allowed to recover. The negligence complained of is the maintenance of a window in such a condition that the glass was liable to fall out; not necessarily from its own weight, but under the natural conditions and strain to which it was likely to be subjected. It might not be negligent to leave a broken pane, if assurance could be given that it would be undisturbed by wind or by use. But wind is an every-day occurrence. It is a condition, not necessarily a cause, and one which should be taken into consideration before determining that a broken glass is not likely to fall. The wind may have been a concurring circumstance, but it cannot be said to have been the proximate cause, and the broken glass the remote cause. It cannot be true that a defendant who is liable if a defective glass falls from its own weight on a quiet day is to be relieved from responsibility because its fall is due to the pressure of a wind which should have been anticipated.

The testimony of two witnesses was relied
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upon to prove that a round window in the upper story had been broken for some time. One of these witnesses testified that she had noticed the window before; that it had a hole in it, etc.; she had noticed the rattling of these panes. She was then asked:

Q. Will you state as to whether or not, before this, when you would hear this rattling, whether you thought that was a safe window or not?

A. No, sir.

The testimony was inadmissible. If we overlook the fact that the question did not ask her to state her opinion upon oath, but called merely for a previously existing opinion, and assume that she meant to give it as her opinion at the time of the trial that the glass was unsafe, such testimony was incompetent. It was proper for her to state the condition of the window, and the circumstances which came under her observation; but it was for the jury to draw inferences and conclusions, as to danger or safety. The condition of this window as to safety was one of the principal points in the case. Upon the unsafe condition of this window the case may be said to have hinged. Analogous questions have been passed upon repeatedly by us, as shown by the cases cited in the brief of counsel. But the objection now urged was not made, and it is fair to presume that the trial court did not consider it. The reason given for the objection was that she was not shown to be an expert. The court probably considered it a matter requiring no special qualification, and in this he was right; and we can hardly believe that he would have admitted the testimony had the objection been made which was made in this court.

Again, error is assigned upon a hypothetical question asked a medical expert. The objection appearing upon the record is that it was incompetent, which did not advise the court that the form of the question was objectionable. The precise point argued here is that the question made the witness's understanding of the testimony of another witness a part of the question,—a practice which has been criticised by this court, though permitted in some states. See *People v. Aikin*, 66 Mich. 476; *Kempsey v. McGinniss*, 21 Mich. 137; *Lawson*, Expert Ev. pp. 144 et seq.

Error is also assigned upon the introduction of admission of Bernard Stroh, the president of the company, who is said to have stated to the plaintiff's mother, in an interview some hours after the accident, that the windows were defective. Objection was made to the questions, but no ground whatever was stated, in two instances. A third objection to this testimony is based upon the ground of incompetency. While there may be cases in which a court could not fail to understand the point relied upon, even under so general an objection as incompetency, there are others where such an objection would not even suggest the real objection. In this case it might have been intended to mean that the president had no authority to negotiate a settlement or that he was not

engaged in a negotiation for that purpose, and, therefore, that he was not acting in the company's business, or that, the admission being made in an attempt to compromise the matter, it should not be treated as an admission. If anything is settled by our decisions it is that, unless an objection clearly advises the trial court of the specific ground upon which it is made, it will not justify a reversal. Among the cases supporting this rule are the following: *Rash v. Whitney*, 4 Mich. 495; *Hoard v. Little*, 7 Mich. 468; *Young v. Stephens*, 9 Mich. 507; *Morissey v. People*, 11 Mich. 332; *Hollister v. Brown*, 19 Mich. 166; *Gilbert v. Kennedy*, 22 Mich. 118; *Snyder v. Willey*, 33 Mich. 490; *Campbell v. People*, 34 Mich. 351; *Ward v. Ward*, 37 Mich. 259; *Stevens v. Hope*, 52 Mich. 69; *Merkle v. Bennington Twp.* 68 Mich. 145; *Jennison v. Haire*, 29 Mich. 207; *Heymes v. Champlin*, 52 Mich. 26; *Jochen v. Tibbells*, 50 Mich. 33; *Bulen v. Granger*, 63 Mich. 311; *Abbott v. Chaffee*, 83 Mich. 256; *People v. Moore*, 86 Mich. 134; *Hutchinson v. Whitmore*, 95 Mich. 592; *Seventh-Day Adventist Pub. Asso. v. Fisher*, 95 Mich. 274; *Peopie v. Durfee*, 62 Mich. 491.

A motion for a new trial was made upon the following grounds: (1) The damages were excessive; (2) the damages are so excessive as to evince passion, prejudice, partiality, or corruption of the jury; (3) the verdict is against the weight of evidence. The court found that the damages were excessive; that they were not so excessive as to evince passion, prejudice, or corruption, and that they do not exist; that the jurors were so moved by sympathy for the plaintiff, and by their common knowledge of the financial ability of the defendant, and their belief of large amounts expended by the defendant for medical expert evidence, as to have awarded a larger amount than they otherwise would have done, and to that extent

partiality is found; that the verdict is not contrary to or against the weight of evidence. The order was then made ordering a new trial unless \$6,500 should be remitted from the verdict. Error is assigned upon this order. Counsel argue that \$3,500 is excessive damage for a stiff arm; but we cannot say that it is so clearly excessive as to justify our interference upon that ground. We are also of the opinion that making a new trial dependent upon a refusal to remit a portion of the verdict in cases of this kind is a well-settled practice in this state, where, as in this case, the amount of unliquidated damage is the only question involved. It has always been considered lawful for the trial judge in such a case to set aside a verdict as excessive; and it has been a common practice to grant a portion of the relief asked by requiring a remission of a portion of the verdict as a condition upon which the new trial will be denied. This has always been a matter of discretion, and, where it is not clearly erroneous, the action of the trial court should not be disturbed.

Several other questions are raised, but our investigation of them leads to the conviction that they do not furnish a ground for reversal of the case. We think it unnecessary to discuss them. The jury found a cause of action, and that left merely the question of the amount of damages to be awarded. These involved pain and suffering, and prospective as well as past deprivation of the use of the arm. Such damages are not altogether a matter of mathematical computation, but they are determined by the consensus of opinion of the jury, acting under the direction of the judge. The question of new trial was within the discretion of the court.

The judgment of the Circuit Court is affirmed.

The other Justices concur.

MINNESOTA SUPREME COURT.

MINNEAPOLIS SASH & DOOR COMPANY, *Appt.*,
v.

METROPOLITAN BANK, *Respt.*

(.....Minn.....)

*1. For the purposes of collecting a check or draft deposited or left for collection, a bank must employ a suitable subagent, if an agent be necessary. It must not transmit checks or drafts directly to the bank or party by whom payment is to be made. No party upon whom rests the obligation to pay upon presentation can be deemed a suitable agent, in contemplation of law, to enforce, on behalf of another, a claim against itself.

*Headnotes by COLLINS, J.

NOTE.—As to right of collecting bank to send check directly to drawee bank, see *Anderson v. Rodgers* (Kan.) 27 L. R. A. 248, and note; also *Kershaw v. Ladd* (Or.) ante, 236.
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See also 44 L. R. A. 236; 47 L. R. A. 270.

2. This rule is not affected by notice to a depositor that the bank attempting a collection limits its liability so that it acts as agent only for the depositor, and in forwarding items for collection is only bound to select agents who are responsible according to its judgment and means of knowledge, and assumes no risk or responsibility on account of the omission, negligence, or failure of such agents.

3. Nor will an established usage and custom existing among banks to send checks or drafts payable by other banks, at distant points, to the drawee directly, and by mail, in case there is no other bank of good standing in the same town, excuse or justify such a course of procedure. In case of loss through the bad conduct of the drawee, the sender of the check or draft must bear it.

(Start, Ch. J., dissents.)

(May 2, 1899.)

A PPEAL by plaintiff from an order of the District Court for Hennepin County

overruling a motion for new trial after verdict in favor of defendant in an action brought to hold defendant liable for negligence in failing to promptly collect a check which had been deposited with it for collection. *Reversed.*

The facts are stated in the opinion.

Messrs. Penney & McMillan, for appellant:

The respondent, having undertaken the collection of this check, was liable, not only for its own negligence, but for the negligence of its chosen agents, unless there was some contract between the parties to the contrary.

Streissguth v. National German-American Bank, 43 Minn. 50, 7 L. R. A. 363.

In the absence of express authority, an agent to collect or receive payment can receive nothing but money in satisfaction of his principal's claim.

1 Am. & Eng. Enc. Law, 2d ed. p. 1027; Story, Agency, 9th ed. 98; Mechem, Agency, 375; Trull v. Hammond, 71 Minn. 172; Hazlett v. Commercial Nat. Bank, 132 Pa. 118; Fifth Nat. Bank v. Ashworth, 123 Pa. 212, 2 L. R. A. 491; Merchants' Nat. Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 728; Whitney v. Esson, 99 Mass. 308, 96 Am. Dec. 762; Farwell v. Curtis, 7 Biss. 160; Marine Bank v. Fulton County Bank, 2 Wall. 252, 17 L. ed. 785; Ward v. Smith, 7 Wall. 447, 19 L. ed. 207; Bank of Antigo v. Union Trust Co. 149 Ill. 343, 23 L. R. A. 611.

By giving up the check and taking the draft, respondent made the draft his own as between it and appellant.

Whitney v. Esson, 99 Mass. 308, 96 Am. Dec. 762.

The alleged customs are nothing more than habits or methods of transacting business, adopted by the local bankers for their own convenience and economy. There is no pretense that appellant had any knowledge of them.

Even if valid, they are operative only in respect to those who have been shown to have had knowledge of them.

Baxter v. Sherman (Minn.) 5 Det. L. N. No. 21, 76 N. W. 211; *Dern v. Kellogg*, 54 Neb. 560; *Thompson v. Minneapolis & St. L. R. Co.* 35 Minn. 428.

There can be no presumption that the usages of a particular trade or business are known to persons not in that business.

27 Am. & Eng. Enc. Law, p. 750; *Keavy v. Thuet*, 47 Minn. 266; *Nippolt v. Firemen's Ins. Co.* 57 Minn. 275.

In placing the check with respondent for collection, appellant did not assent by implication to a custom that it should be negligent.

Dern v. Kellogg, 54 Neb. 560.

No custom or usage among bankers as to the manner of presenting ordinary checks for payment, *e. g.*, of presenting by mail, will relieve them from the legal duty of presenting such checks within a reasonable time.

First Nat. Bank v. Miller, 37 Neb. 500; 27 Am. & Eng. Enc. Law, p. 708; *Whitney v. Esson*, 99 Mass. 308, 96 Am. Dec. 762.

In a legal sense a custom is to be deemed unreasonable if it be opposed to the policy of the law, as where it tends to unsettle well-44 L. R. A.

established rules of law established for the protection of the rights of parties.

Merchants' Ins. Co. v. Prince, 50 Minn. 53; *Globe Mill. Co. v. Minneapolis Elevator Co.* 44 Minn. 153; *William Deering & Co. v. Kelso* (Minn.) 76 N. W. 792.

When respondent received the Norton check for collection, there was an implied undertaking on its part to take all steps necessary to protect appellant's rights against the maker of the check.

Jagger v. National German-American Bank, 53 Minn. 386; *West v. St. Paul Nat. Bank*, 54 Minn. 460.

It therefore undertook in appellant's behalf, not to mail the check to the bank on which it was drawn, but, within a reasonable time, to present the same to this bank and demand its payment. If it failed to do this, it lost to appellant all recourse on the maker of the check.

Oork v. Bacon, 45 Wis. 192, 30 Am. Rep. 712; *Western Wheeled Scraper Co. v. Saddle*, 50 Neb. 105; *Wagner v. Crook*, 167 Pa. 259; *Anderson v. Rodgers*, 53 Kan. 542, 27 L. R. A. 248; *Industrial Trust, Title, & Sav. Co. v. Weakley*, 103 Ala. 458; *National State Bank v. Weil*, 141 Pa. 457; *Grange v. Reigh*, 93 Wis. 552; 2 Dan. Neg. Inst. 1590 *et seq.*

If respondent was willing to take the check without special stipulations, appellant was authorized to assume therefrom that it was able to collect, and that it had the proper agent through whom to do it promptly.

Drovers' Nat. Bank v. Anglo-American Pkg. & P. Co. 117 Ill. 100, 57 Am. Rep. 855.

Instead of presenting the check through the express company or through any third or disinterested party, respondent mailed the check direct to the bank on which it was drawn. This was such negligence as renders it liable for the loss sustained thereby.

1 Dan. Neg. Inst. 328a; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *Drovers' Nat. Bank v. Anglo-American Pkg. & P. Co.* 117 Ill. 100, 57 Am. Rep. 855; *Anderson v. Rodgers*, 53 Kan. 542, 27 L. R. A. 248; *First Nat. Bank v. City Nat. Bank*, 12 Tex. Civ. App. 318; *Farwell v. Curtis*, 7 Biss. 160; *German Nat. Bank v. Burns*, 12 Colo. 539.

In a note to *Anderson v. Rodgers* (Kan.) as reported in 27 L. R. A. 248, after reviewing the American and English authorities, it is said: "The result of the American decisions is entire unanimity in holding that it is not proper to send a check by mail directly to the drawee for payment except in New York state, where, as shown above, the decision to the contrary cites as authority two other cases which do not exactly decide the question."

Mr. John T. Baxter, for respondent:

The pass-book notice showed what was the contract between the parties, and served to fix the duties and liabilities of this respondent.

No court has ever held that the implied contract between the bank and its customer governing collections might not be varied by express agreement.

Allen v. Merchants' Bank, 22 Wend. 215, 34 Am. Dec. 289.

In determining what the agreement is between the bank and its customer, it has been held that the contents of a placard posted up in the bank, whereby the bank offered to make collections upon certain terms, was proper evidence to show what the contract between the parties was, even without proof that the customer had ever seen the placard, or knew of its existence.

Wingate v. Mechanics' Bank, 10 Pa. 104; *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78, 88 Am. Dec. 194; *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418; *Re State Bank*, 56 Minn. 119; *Re Bank of Minnesota* (Minn.) 77 N. W. 796.

It was not negligence to send the Norton check direct to the Mapleton Bank for collection.

It had long been the usage of the respondent bank, and appellant was bound by that usage.

1 Morse, Banks & Banking, 28, 29; *Mills v. Bank of United States*, 11 Wheat. 431, 6 L. ed. 512.

It was sanctioned by the general usage of banks.

Flanders v. Chicago, St. P. M. & O. R. Co. 51 Minn. 193; *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337; note on *Banking Customs to Shaw v. Jacobs* (Iowa) 21 L. R. A. 440; *Dorchester & M. Bank v. New England Bank*, 1 Cush. 177; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Davis v. First Nat. Bank*, 118 Cal. 600; *British & American Mortg. Co. v. Tibballs*, 63 Iowa, 468.

The particular usage above described was long since adopted by the London banks, and is recognized and sanctioned by the English courts.

Heywood v. Pickering, L. R. 9 Q. B. 428; *Prudeau v. Criddle*, L. R. 4 Q. B. 461.

It is also sanctioned in New York, where the volume of banking business transacted lends weight to the decisions.

McIntosh v. Tyler, 47 Hun, 99; *Indig v. National City Bank*, 80 N. Y. 100; *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 285; *Shipsey v. Bowery Nat. Bank*, 50 N. Y. 485.

A drawee bank to whom a check is mailed for collection becomes thereby a subagent of the owner for purposes of presentment, notice of dishonor, etc.

Simonds v. Black River Ins. Co. Fed. Cas. No. 12,874; *Blakeslee v. Hewett*, 76 Wis. 341; *Mount Pleasant Branch of State Bank v. McLeran*, 26 Iowa, 306.

By express agreement the selection of agents was to be according to respondent's "judgment and means of knowledge."

1 Morse, Banks & Banking, 432.

Where the drawee bank is the only one in the town it is excepted from the operation of the rule.

Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105.

Collection by express would have been unusual, and was never contemplated by the parties.

1 Morse, Banks & Banking, § 243.

But the question of proper presentment is 44 L. R. A.

eliminated from this case, for it resulted in no loss to this appellant.

Indig v. National City Bank, 80 N. Y. 100.

There was no negligence in receiving the draft on the Mankat6 Bank.

Jefferson County Sav. Bank v. Commercial Nat. Bank, 98 Tenn. 337; *British & American Mortg. Co. v. Tibballs*, 63 Iowa, 468; *Russell v. Hankey*, 6 T. R. 12; 1 Morse, Banks & Banking, 23, ¶ 8; *Lawson, Usages & Customs*, § 228; *Story, Agency*, 9th ed. § 98; *Mechem, Agency*, § 376.

Collins, J., delivered the opinion of the court:

On the admitted facts in this case, the only question necessarily to be determined, in our opinion, is whether defendant bank, doing business at Minneapolis, was negligent when it sent by mail, and for collection, the Norton check, directly to the bank at Mapleton, 117 miles distant, upon which bank the check was drawn; loss having resulted by reason of the adoption of this method of presenting the paper for payment. The defendant seeks to justify its procedure upon the ground that it had restricted its liability to its depositors, when collecting checks and drafts, by means of the notice printed upon its depositors' bank or pass books, of which notice plaintiff's secretary had actual knowledge; and also because of a well-settled usage and custom then prevailing in banks; and, further, because the same result would have ensued had another correspondent been selected.

1. Although the defendant had limited its liability so that when receiving checks or drafts for collection, or on deposit, it acted as an agent only, and in forwarding these items to other points, for collection, it was only bound to select agents who were responsible, according to its judgment and means of knowledge, and assumed no risk or responsibility on account of their omission or neglect or failure, defendant was obliged to exercise reasonable care and diligence in adopting a method of presenting the check in question to its drawee for payment, in selecting its agent. Now, can it be held that defendant exercised reasonable care when it sent the check by mail to the very party most interested against the payee and principal, and thus to place such principal entirely in the hands of its adversary. Norton had ample funds on deposit when he drew the check and also when the check reached the drawee, presumably on July 31, at the opening of business hours. It was important that it should speedily be presented for payment, in order to fix his liability in case of nonpayment. This was of the utmost importance to both payee and maker, in order that the interests of each might be protected. The interest of the drawee would naturally be to procrastinate, and possibly this would be its inclination. It seems to be settled by all of the authorities that, "for the purposes of collection, the collecting bank must employ a suitable sub-agent. It must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittances be

made therefor. It is considered that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself." 1 Dan. Neg. Inst. 328a; 3 Am. & Eng. Enc. Law, 2d ed. p. 809; *Drovers' Nat. Bank v. Anglo-American Pkg. & P. Co.* 117 Ill. 100, 51 Am. Rep. 855; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *Wagner v. Crook*, 167 Pa. 259; *German Nat. Bank v. Burns*, 12 Colo. 539; *Anderson v. Rogers*, 53 Kan. 542, 27 L. R. A. 248. See note to this last case in 27 L. R. A. 248, in which the authorities are carefully considered. The truth of the remark as to the unsuitability of the drawee of a check as the agent selected to enforce its collection, and what may be expected if the practice is upheld, is well illustrated by the facts now before us. As before stated, the check must, in due course of mail, have reached Mapleton on the morning of July 31. Had it been in the hands of a properly designated third party, it would have been presented and paid that day. The proceeds would, if promptly transmitted, have reached defendant on the morning of August 1 or 2. Even if the payment had then been made, as it finally was, in a check upon the Mankato Bank, and defendant had pursued the course it did as to its collection, no loss would have resulted. But instead of accounting for the Norton check, so that defendant would receive the proceeds as early as August 2, the Mankato check was made out on August 4, and came to defendant's hands the next day. With sufficient funds in its hands to meet the check, the Mapleton Bank postponed a remittance for three days, and then sent a check, which proved to be worthless when seasonably presented for payment.

2. We have stated the grounds upon which defendant attempts to justify. It did show that it was usual and customary for banks to send checks and drafts, payable by other banks at distant points, to the drawee direct, and by mail, provided there was no other bank of good standing in the same town, while plaintiff was allowed to prove that an express company, whose business it was to collect and transmit money, had offices in both places. We fail to see what possible effect upon a case of this kind the fact that the drawee is the only bank in good standing in the town can have upon the duty of a bank which undertakes a collection. Any reason for such a course is equally as sound where there are two or more banks in the town as where there happens to be but one. While the syllabus of one of the cases cited in support of counsel's proposition (*Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 44 L. R. A.

may justify him, the opinion does not. We cannot agree with counsel that the usage and custom here relied upon is a defense to the claim that defendant was negligent when forwarding this check to the Mapleton Bank for presentation and payment. As a general rule, usage and custom will not justify negligence. It may be admitted that such a course is frequently adopted, but it must be at the risk of the sender, who transmits the evidence of indebtedness upon which the right to demand payment depends, to the party who is to make the payment. Such a usage and custom is opposed to the policy of the law, unreasonable and invalid. It was so decided in *Drovers' Nat. Bank v. Anglo-American Pkg. & P. Co.* 117 Ill. 100, 57 Am. Rep. 855, and *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728. Counsel for defendant has cited two cases from the English Law Reports and three from the New York circuit court of appeals as authority upon this question. An examination of these cases will show that this exact question was not decided. See 27 L. R. A. 248, note, *supra*.

3. Counsel for defendant also urges that plaintiff ought not to recover, because the result would have been the same had another correspondent been selected to present the check. This assumes that a third party would have waited until August 4 for payment, and then would have accepted a check upon the Mankato Bank as payment, which would have been transmitted to defendant August 5. Such an assumption reflects seriously upon the ordinary methods of bank officers, and is without foundation. Primarily, the loss to plaintiff grew out of the fact that defendant negligently selected an unsuitable party to present the check, the payee, to compel payment, or, in case of refusal, to protect its rights, as against Norton, by due protest and notice of nonpayment. We need not discuss the further contention that payment of the Norton check could only be made in money.

The order refusing a new trial is reversed, and, on the findings of fact, judgment must be ordered in plaintiff's favor in the court below, unless such court, in its discretion, grants a new trial.

Start, Ch. J., dissenting:

1 dissent. Under the undisputed evidence in this case, as to the universal custom of banks in collecting paper drawn upon a bank in good standing, which is the only bank at the place of its location, it cannot in my opinion be held, as a matter of law, negligence for the collecting bank to send the paper to the drawee bank for collection.

MONTANA SUPREME COURT.

Minnie A. CAMERON, Admr. etc., of Angus D. Cameron, Deceased, Appt.,
v.

KENYON-CONNELL COMMERCIAL COMPANY, Deft.,
and

W. R. KENYON et al., Respts.

(.....Mont.....)

1. A city ordinance cannot authorize a larger quantity of explosive powder to be kept within the city limits than the state statute allows.
2. An explosion of giant powder kept by a corporation within the city limits in violation of law renders the corporation liable for the damages thereby caused.
3. It is the duty of the directors of a corporation dealing in explosives to exercise such reasonable supervision over the management of their company's business as will result in the observance of the utmost care on the part of the subordinates who direct or handle the explosives.
4. It is the duty of the directors of a corporation to avoid the creation of nuisances by their corporation through its employees acting within the line of their duties.
5. A servant is held to the same degree of care in the performance of whatever is intrusted to him by the master to do that the law would hold the master to were he acting for himself.
6. The liability of a director of a corporation in tort is not to be avoided by his vicarious character, where a tort of the corporation has been committed through the directors.
7. Nonexecution of the duty of directors, which results in the positive act of a creation and maintenance of a continuing nuisance by the corporation, on account of which a third person is killed, amounts, unless explained, to a misfeasance on their part, or, if they have actual knowledge of and authorize the nuisance, to malfeasance, and is not merely a nonfeasance for which their liability can be limited to the corporation only.
8. A director who knows nothing of a nuisance maintained by the corporation, and who could not, by exercising ordinary diligence in control, have known of it, or who has performed his duty of taking care, is not personally responsible for the nuisance.
9. The liability of the officers of a corporation for negligence in storing giant powder in violation of law depends upon their exercise of reasonable diligence in the control and supervision of the business.

(March 20, 1899.)

A PPEAL by plaintiff from a judgment of the District Court for Silver Bow Coun-

NOTE.—As to personal liability of officers of a corporation for its torts or negligence, see note to *Nunnely v. Southern Iron Co.* (Tenn.) 28 L. R. A. 421.

As to liability of agent or servant in general for his own negligence, see note to *Mayer v. Thompson-Hutchison Bldg. Co.* (Ala.) 28 L. R. A. 433.
44 L. R. A.

ty in favor of the individual defendants in a suit brought to hold them liable as directors of a corporation for the death of plaintiff's intestate which was alleged to have been caused by the negligent management of the corporate business. *Reversed.*

The facts are stated in the opinion.

Messrs. J. W. Kinsley and T. J. Walsh,
for appellant:

The place was a public nuisance, being maintained in violation of law.

Wood, Nuisances, 69; Chicago, W. & V. Coal Co. v. Glass, 34 Ill. App. 384; Laftin & R. Powder Co. v. Tearney, 131 Ill. 322, 7 L. R. A. 262.

And the defendant company was liable for all damages occasioned by the nuisance, regardless of the question of negligence.

Ibid.

The corporation is an intangible, incorporeal thing, existing only in the contemplation of the law. It can do nothing except through the trustees; it can know nothing except through its trustees. Its trustees manage its stock, property, and concerns.

Comp. Stat. § 460, 5th Div.

The trustees may appoint subordinate agents to attend to details of the company's business, but they must supervise it.

3 *Thomp. Corp.* § 4107.

In the exercise of this duty of supervision the measure of care and diligence required of trustees is generally held to be such as a prudent man exercises in his own affairs.

Spelling, Priv. Corp. 432; Williams v. McKay, 46 N. J. Eq. 25; Hun v. Cary, 82 N. Y. 68, 37 Am. Rep. 546.

The character of the business is of weighty import in the determination of the degree of circumspection to be observed by trustees about the business of the company.
Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662.

The explosive nature of the material handled, and the constant danger of explosion, were a continuing admonition to guard against explosion.

Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464; Burke v. Anderson, 34 U. S. App. 132, 69 Fed. Rep. 814, 16 C. C. A. 442.

If the trustees permit the business as carried on to become a public nuisance, they are jointly liable with the corporation for all damages ensuing.

Wood, Nuisances, 834; Parker & W. Public Health, 197; Rex v. Medley, 6 Car. & P. 292; People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722; Nunnely v. Southern Iron Co. 94 Tenn. 397, 28 L. R. A. 421; 2 Wharton, Crim. L. 1423; 1 Bishop, Crim. L. 316.

The trustees were wilfully or negligently blind if they did not know of the nuisance.

They are held to have knowledge of the customs of the company, and the usual way in which its business is transacted.

3 *Thomp. Corp.* §§ 4098-4108; *Fraylor v. Sonora Min. Co.* 17 Cal. 594; *Williams v. McKay, 46 N. J. Eq. 25; Reynolds v. Collins, 78 Ala. 94; Cow v. Robinson, 70 Fed. Rep. 761;*

Com., Lawson, v. Ohio & P. R. Co. 1 Grant, Cas. 329; *Lawson, Usages & Customs*, 51.

Every violation of law is a breach of duty.

Thompson v. Greeley, 107 Mo. 577.

Anyone who may be punished criminally for maintaining a public nuisance is answerable civilly to any person who suffers in consequence of the nuisance.

Congreve v. Smith, 18 N. Y. 80.

The doctrine of misfeasance and nonfeasance is one of those subtleties of the law for which no man can give any sensible reason, and which the courts of the present day usually succeed in refining away.

Greenberg v. Whitcomb Lumber Co. 90 Wis. 225, 28 L. R. A. 439; *Mayer v. Thompson-Hutchison Bldg. Co.* 104 Ala. 611, 28 L. R. A. 437; *Nunnally v. Southern Iron Co.* 94 Tenn. 397, 28 L. R. A. 427; *Simmons v. Everson*, 124 N. Y. 319.

Mr. John F. Forbis, for respondents:

The officer or agent of a corporation becomes liable with the corporation primarily to third parties, whenever by malfeasance or by misfeasance he has contributed to the injury to such third person. On the contrary, he is never liable to third persons for acts of nonfeasance, but may be held liable therefor to his principal, the corporation.

3 *Thomp. Corp.* § 4091; *Fanning v. D. M. Osborne & Co.* 102 N. Y. 441; *Hewett v. Swift*, 3 Allen, 420; *Nunnally v. Southern Iron Co.* 94 Tenn. 397, 28 L. R. A. 421.

In the absence of any express provisions of statutes or ordinances on the subject, the liability of an officer or director of a corporation for any wrongful act of the corporation itself may be fairly said to depend on their personal participation therein.

One who was the director and the president of a corporation was held personally liable, in *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407, for the wrongful use by the company of its bridge as a toll-bridge, whereby business was improperly diverted from another bridge. In this case he actively participated in the wrongful acts of the corporation.

But the president of a corporation who was not shown to have advised or approved of its wrongful use of a street for a private railroad of a corporation was held not personally liable therefor.

Fanning v. D. M. Osborne & Co. 102 N. Y. 441.

The same distinction clearly appears in the other cases.

Beach, Priv. Corp. 253, 254, 255, 262; *Bath v. Caton*, 37 Mich. 199; *Harriman v. Stowe*, 57 Mo. 93; *Carey v. Rochereau*, 16 Fed. Rep. 87; *Henshaw v. Noble*, 7 Ohio St. 232; *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Rep. 278; *Phelps v. Wait*, 30 N. Y. 78; *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231; *Lane v. Cotton*, 12 Mod. 488.

If an agent digs a hole which he should cover for the protection of passersby, his failure to cover it is not an act of nonfeasance, but by reason of his having dug the hole his failure to cover it becomes an act of misfeasance. On the other hand, if the hole had been dug by some other agent, and he had no knowledge thereof, or if the hole had been 44 L. R. A.

dug before his employment, his failure to cover it would be an act of nonfeasance.

Nunnally v. Southern Iron Co. 94 Tenn. 397, 28 L. R. A. 421; *Greenberg v. Whitcomb Lumber Co.* 90 Wis. 225, 28 L. R. A. 439; *Ellis v. McNaughton*, 76 Mich. 237.

There is no presumption of knowledge on the officer's part.

Rudd v. Robinson, 126 N. Y. 113, 12 L. R. A. 473; *Fisher v. Graves*, 80 Fed. Rep. 590.

Mr. W. H. DeWitt also for respondents.

Hunt, J., delivered the opinion of the court:

Plaintiff, as administratrix of the estate of Angus D. Cameron, deceased, brought this action against the Kenyon-Connell Commercial Company, a corporation, and M. J. Connell, W. R. Kenyon, J. E. Gaylord, C. H. Palmer, and W. A. Clark, trustees and agents of the corporation, for damages by reason of the killing of Angus D. Cameron, on January 15, 1895, through force of an explosion of giant powder negligently and unlawfully kept by defendant corporation in its warehouse within the limits of the city of Butte. The corporation denied the negligence and unlawful acts averred. Kenyon, Connell, and Palmer each separately answered, and denied any unlawful or negligent act on his part, and each affirmatively pleaded that the warehouse was the property of the corporation, and that he never authorized or directed any powder to be stored therein, and was ignorant of the fact that any powder was stored therein. Gaylord and Clark each denied the allegations of the complaint, or that he was a managing agent or trustee or officer of the corporation. Trial to jury. Motion for nonsuit by individual defendants was granted. Thereafter plaintiff's motion for a new trial as to defendants Kenyon, Connell, Palmer, and Gaylord was overruled. Plaintiff appeals.

The record discloses these facts. The defendant corporation dealt in hardware, merchandise, and powder. It owned a large frame, iron-roofed warehouse, near a railroad depot within the corporate limits of the city of Butte, where it kept its merchandise, including Hercules powder, a dangerous explosive compound of nitroglycerin and other substances. On the night of January 15, 1895, the warehouse took fire. Plaintiff's intestate, Cameron, was the chief of the fire department of the city of Butte, and commanded the firemen who responded to the alarm. While the firemen were actually engaged in an endeavor to put the fire out, a fearful explosion occurred within the corporation's warehouse, and many persons, including Cameron, were killed. From the beginning of the year 1893, Hercules and giant powder had been kept in the warehouse. Defendants Kenyon and Connell had both been seen in or about the building during 1893, and at divers times up to the time of the explosion,—Kenyon often, Connell very seldom, the other defendants never. The quantity of powder kept in the warehouse about the 1st of each month was from twenty to fifty boxes, larger quantities being stored in a powder magazine 3 miles out of the

city. On the day before the explosion, a witness saw some seven boxes of powder, 50 pounds in each box, in the warehouse. An employee, one Orcutt, had immediate charge of the warehouse, and ordered the powder put where it was. He said that on the day of the explosion he thought there were somewhere about 3 to 5 cases of powder in the warehouse; while another witness, a mining superintendent accustomed to using powder, said he thought a ton must have exploded on the night of the fire. Defendant Connell was president of the corporation. Kenyon was general manager. Kenyon's duties were to give attention to the corporation's business, his particular duties being to look after the financial part, and ordering goods, but not to manage or control the warehouse or magazine, which were under the warehouseman Orcutt's direct charge. Neither Connell, the president, nor any of the other trustees, except Kenyon, had anything whatever to do with the actual personal management of the affairs of the corporation.

It is plain that this corporation, like many others in the commercial world, had one head,—director,—to whom all the other trustees gave the entire practical management of the concern. It thus furnishes but a single instance of the common practice among business men to incorporate commercial enterprises, and, in doing so, of their trusting the entire actual management to the one director who is familiar with, and assumes the real control of, the particular business undertaken. This custom has doubtless been the outgrowth of a belief, generally correct too, that, by incorporating mercantile or other undertakings, directors are not liable to creditors in case of business reverses, while those who associate themselves as members of a partnership are. But notwithstanding all this, there are various unavoidable responsibilities that attach themselves inseparably to the office of corporate directorship, which, in case of negligence or misconduct, often illustrate the risks incidental to accepting such positions of trust in a corporation, and of not prudently guarding against their possible consequences. It is a general rule that the ordinary business of a corporation is managed in the name and on behalf of the corporation by particular agents chosen by the stockholders. These agents are the directors. For their acts, performed within the apparent scope of their authority, the corporation is responsible, while, *e converso*, the corporation can act through these agents alone. These principles are generally familiar to business men, as well as to lawyers. They control the relation of the artificial being, the corporation, to the world at large. They find their foundation in the law of agency, which makes the corporation the principal. Still, they are extended, under certain conditions, far enough to inculcate the agents or directors of the corporation, notwithstanding the fact that the principal may also be liable for a wrong done.

Now, bearing in mind that this case presents itself upon a motion for a nonsuit, and 44 L. R. A.

that we must accordingly consider as true everything which the evidence tended to prove on the trial, we have before us a corporation guilty of a nuisance, by having kept in a frame warehouse within the limits of an incorporated city, in the vicinity of railroad depots and other buildings, an amount of Hercules powder in excess of the quantity—50 pounds—allowed to be stored therein by the laws of the state. Mont. Laws, Ex. Sess. 1887, p. 68; Comp. Stat. 1887, § 361. *Cheatham v. Shearon*, 1 Swan, 213. It is very hard to conceive of anything more terrible in its danger to life and property than a quantity of highly explosive powder kept near to where people live or do business. Such a menace, when known, obstructs that free use of property which the law assures to an owner; while nothing could more seriously interfere with the comfortable enjoyment of life than the knowledge that in one's neighborhood there is a frame building in which nitroglycerin explosives are stored in large quantities. No ordinance of a city could authorize a larger quantity of powder to be kept by a corporation within the city limits than the state statute allows, unless some special exception is to be found exempting the inhabitants of such city from the operation of the general statute. None such affecting Butte is known to us, however; so we must regard the ordinance of that city, pleaded by defendants, which permits one hundred and fifty pounds of powder to be kept at one time by a company in its warehouse within the limits of that city, as inconsistent with the state law, without force, and immaterial to the case before us. The corporation, therefore, by maintaining this nuisance, became the subject of indictment for misdemeanor (Wharton, Cr. L. § 91), as well as liable in civil action for injury to person or property caused by the nuisance (*Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654). These propositions are too plain for extended comment. They demonstrate a liability to this plaintiff, assuming always the evidence is uncontradicted. Hence we pass to the more direct inquiry whether the directors of the guilty corporation are also liable for Cameron's death.

As said before, the trustees manage the stock, property, and concerns of a corporation (Comp. Stat. div. 5, § 450); wherefore it is difficult to see how all responsibility in this management can be avoided as long as the trustees hold their offices. Certainly the ministerial work of a corporation may be delegated to subordinate agents, and often must be. The details of a corporation's business necessitate this; and if directors act in good faith, and with reasonable care and diligence in appointing and supervising such inferior agents, they are not personally responsible for damages occasioned by the agents' negligence, or even crimes. 3 Thomp. Corp. § 4107. But a director cannot wholly escape his duty of supervision or transfer his authority to represent his principal, at least without the principal's consent; otherwise, he could evade every responsibility imposed by law upon him by simply absenting

himself from meetings, or by avoiding information of the acts of the other directors in expressing the will of the corporation, or by delegating an employee to act as trustee for him. Morawetz on Private Corporations, in § 536, says: "The general supervision and direction of the affairs of a corporation are specially intrusted by the shareholders to the board of directors; it is upon the personal care and attention of the directors that the shareholders depend for the success of their enterprise. It follows that authority to delegate these general powers of management cannot be implied. Thus, the directors of a company have no implied authority to enter into a contract with a creditor by which the entire management of the company's affairs is placed in his control until the debt has been paid."

Third persons may hold directors liable in positive tort, upon the principle that a positive wrong done by a servant or ordinary agent must be applied to the misfeasance of directors also. *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255. Persons having in their custody gunpowder or other instruments of danger should keep them with the utmost care. "The risk incident to dealing with fire, firearms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, . . . is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term 'consummate care' is used to describe the amount of caution required; but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception), where unsuccessful diligence on the defendant's part was held to exonerate him." Webb's Pollock, Torts, p. 615. A company charged with an obligation of this nature cannot devolve it upon another in a manner so as to exonerate the company from a liability for an injury caused to a third person by the negligent way in which the duty pertaining to the care of giant powder or other dangerous explosives may be executed. In torts, the relation of principal and agent cannot relieve the wrongdoer. *Berghoff v. McDonald*, 87 Ind. 559.

It is unnecessary to consider the rule which relieves the master from liability for his servant's acts, where the servant does something outside of his employment, for that is not involved. But the case does present facts to which this principle fits: that whatever the servant is intrusted by the master to do for him must be performed with a like degree of care which the law holds the master to were he acting for himself. We apply this principle for the reason that there is a presumption that the trustees of a trading corporation know of the principal articles in which their company deals, and whether or not such articles are highly dangerous to life and property. It is therefore the duty of the trustees of a corporation dealing in explosives to exercise such reasonable supervision over the management of their company's business as will result in the observance of the utmost care on the part 44 L. R. A.

of the subordinates who direct or handle the explosives. This rule grows out of "the great principle of social duty that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339. It is likewise their duty to avoid the creation of nuisances by their corporation, through its employees acting within the line of their duties.

Nor will inaction by itself overthrow the force of this obligation upon trustees to so control their corporation's business as to not negligently injure third persons. Along with the assumption of the duties of trusteeship go the duties of exercising reasonable care in the manner of performing those duties. This reasonable care appears not to have been exercised in this case, where the corporation, by its trustees, permitted a public nuisance to be created, and to continue, whereby, as a consequence of the act of permitting it, a third person, not in fault, has been killed. Because directors are themselves agents, it is none the less true that they owe a common-law duty to third persons. If they violate that duty, they are responsible, whether the violation is the result of a wrongful omission or commission. *Mechem, Agency*, § 572. Were the rule such that wrongful commission alone meant liability, as before indicated, directors' statutory duties to manage would be sufficiently performed by absence; and, the denser the ignorance on a director's part of the business of his concern, the more certain his exoneration from liability for the tortious acts of the company's employees. Such a rule would be unhealthy and unsound. The liability of a director in tort is not to be avoided by his "vicarious character," where the tort of the corporation has been committed through the directors. *Nunnally v. Southern Iron Co.* 28 L. R. A. 421, 94 Tenn. 394; *Bank of Atchison County v. Byers*, 139 Mo. 627; *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456. Relationship of contract to a corporation neither adds to nor subtracts from a man's duty to strangers to so use his own property, or that under his control, as not to injure another. *Baird v. Shipman*, 132 Ill. 16, 7 L. R. A. 128; *Rich's note to Nunnally v. Southern Iron Co.* (Tenn.) 28 L. R. A. 421; *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578; *Mayer v. Thompson-Hutchinson Bldg. Co.* 104 Ala. 611, 28 L. R. A. 433. Eminent judges have drawn distinctions between a trustee's liability for misfeasance, malfeasance, and nonfeasance. *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741. But they are of no vital importance on this appeal. Nevertheless, reasoning upon these distinctions, defendants have argued that they are liable, if at all, to the corporation only, inasmuch as the record shows nonfeasance merely, or nonexecution of the duties of their directorships. This argument seems to overlook the proposition that directors are charged with the affirmative duty of knowing something of the management of

their company's business, and of exercising reasonable supervision of its management. Management usually signifies positive, rather than negative, conduct.

As a matter of defense, it is proper to show all facts by which the jury can say whether the inaction or ignorance relied on is a sufficient excuse for the wrong done. But we have no hesitation in saying that, upon a state of facts like that before us, nonexecution which resulted in the positive act of a creation and maintenance of a continuing nuisance on account of which a third person was killed amounts, unless explained, to misfeasance upon the part of all the directors of the company, except as to Kenyon, who, it appears *prima facie*, must have actually known of and authorized the nuisance. As to him it was malfeasance. A director who knew nothing of the nuisance, and who could not, by exercising ordinary diligence in control, have known of it, or, generally speaking, one who, considering the situation and all the attendant circumstances, has performed his duty of taking care, is not liable, and cannot be held so. In this case the defense must show this though, for a *prima facie* case is made by plaintiff. Due care involves several elements relative to the circumstances of the case. Ordinary care, for instance, on the part of a corporation that deals in hardware would not prevent the storage of large quantities of nails in a frame warehouse in the middle of a city. The dangers from doing so would be slight, even in case of fire or lightning; but such a practice with giant powder or nitroglycerin would be negligence, fraught with imminent peril to life and property. We said, in considering the law of negligence in a boiler explosion case (*Johnson v. Boston & M. Consol. Copper & Min. Co.* 10 Mont. 175): "Familiar underlying principles, evolved from generations of experience and thought, are to be applied to the peculiar phases presented by the facts and circumstances of the particular case under investigation. And so we find the opinions, in discussing the definition of 'ordinary care,' recognize that no fixed arbitrary rule can be laid down, but that the degree of care and vigilance required varies ac-

cording to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised." In *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 30 L. ed. 485, the court, in very clear language, said: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

After all, therefore, the question of the personal liability of the officers of this corporation for the negligence which resulted in Cameron's death resolves itself into whether or not they exercised reasonable diligence in the control and supervision in their management of the corporation's business, or whether they were negligent in doing or not doing so under all the circumstances of the case.

The case must be reversed and remanded for a new trial.

It is so ordered.

Brantly, Ch. J., and Pigott, J., concur.

NEW YORK COURT OF APPEALS.

Albert S. EMBLER, *Appt.*,

v.

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY *et al.*, *Respts.*

(158 N. Y. 431.)

1. Recovery against an employer for the death of an employee precludes any right of the latter's representatives to recover on an insurance policy taken out by the em-

NOTE.—For other cases as to insurance against employer's liability, see *Anoka Lumber Co. v. Fidelity & C. Co.* (Minn.) 30 L. R. A. 689, and *Hoven v. West Superior Iron & S. Co.* (Wis.) 32 L. R. A. 388.
44 L. R. A.

ployer, which includes a clause insuring against death or injury of employees or other persons, and providing for payment therefor to the employer "for the benefit of the injured person or persons, or their legal representatives in case of death."

2. Insurance of an employer against loss of life or injury to person either of his employees or other persons, caused by a peril insured against, making the insurance payable to him for the benefit of the injured person or persons, or their legal representatives in case of death, and not contingent upon his legal liability, does not create any right of action in favor of an employee or his legal representatives,—especially in case of one who was not employed when the insurance was taken. (*Per Gray, J.*)

3. A third person cannot recover on a contract made for his benefit unless some obligation or duty was owing to him from the promisee. (*Per Gray, J.*)

(March 21, 1899.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Special Term for Albany County in favor of defendants in an action brought to enforce a claim on behalf of an employee upon a policy insuring an employer against liability for injuries arising from boiler explosions. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. Newton Fiero, Francis A. Smith, and E. W. Douglas, for appellant:

The plaintiff is entitled to have the language of this policy construed most favorably toward her.

Griffey v. New York Cent. Ins. Co. 100 N. Y. 421, 53 Am. Rep. 202; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 348, 57 Am. Rep. 729; *Winne v. Niagara F. Ins. Co.* 91 N. Y. 165; *Herrman v. Merchants' Ins. Co.* 81 N. Y. 188, 37 Am. Rep. 488.

The clause in the policy insuring "against loss of human life or injury to person, etc.," is an insurance upon life and subject to the rules governing life policies.

The promise of the Hartford company was made absolutely for the benefit of Provencha, or his legal representatives, in case of death, and not to indemnify the pulp company for any loss it might sustain from such death. Such an intent is apparent from its terms.

The pulp company became a voluntary trustee, and as such could donate a premium to insure the life of an employee for the latter's or his representative's benefit. That life when the contract was made was deemed to be valuable, and the contractors proposed to secure a compensation to the one sustaining a loss in case of the death of a person specified in the policy.

Such a contract is legal, and can be enforced although the contemplated contingency was not then in existence, nor the beneficiary identified, and although the person claiming the benefit of the promise did not know of it when his claim accrued, and although the person paying the premium sustained no money loss by his death.

Riordan v. First Presby. Church, 6 Misc. 84; *Beveridge v. New York Elev. R. Co.* 112 N. Y. 26, 2 L. R. A. 648; *Simson v. Brown*, 65 N. Y. 382; *Wainwright v. Queens County Water Co.* 78 Hun, 149; *Turk v. Ridge*, 41 N. Y. 206; *Builer v. State Mut. L. Assur. Co.* 55 Hun. 301.

A trust was created in favor of the representatives of the employee of which they cannot be deprived.

Dearborn v. A. S. Holmes Ref. Co. 7 Misc. 513.

The contract of the defendant is not restricted to the payment of such sum as the Ticonderoga Company would be obliged to pay, but insured the employee, irrespective of the obligation to the Ticonderoga Company.

44 L. R. A.

This species of insurance in no way resembles a contract of indemnity.

Dalby v. India & L. Life Assur. Co. 15 C. B. 365.

The plaintiff has the right to recover against the defendant because the Ticonderoga Company had an insurable interest in the life of Provencha which was actually insured.

Miller v. Eagle Life & Health Ins. Co. 2 E. D. Smith, 268; *Hebdon v. West*, 3 Best & S. 578; *Addison*, Contr. 9th ed. 1085, 1092; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451.

If the language "assured" referred to the employees or other persons, as well as to the Ticonderoga Company, then the insurance was for the benefit of Provencha and directly to him, without the intervention of any trustee.

Connecticut Mut. L. Ins. Co. v. Luchs, 108 U. S. 498, 27 L. ed. 800.

So far as authority is concerned, it seems to have been considered by counsel and the courts that such a policy of insurance is a valid policy.

Cyrenius v. Mutual L. Ins. Co. 73 Hun, 365, *Affirmed* in 145 N. Y. 576.

Defendant is liable to plaintiff upon the ground that it promised, for a valuable consideration from the Ticonderoga Company, that it would insure the life of Provencha.

Lawrence v. Foa, 20 N. Y. 268; *Dutton v. Poole*, 2 Lev. 210; *Schmerhorn v. Vanderheyden*, 1 Johns. 139, 3 Am. Dec. 304; *Hutchings v. Miner*, 46 N. Y. 456, 7 Am. Rep. 369; *Glen v. Hope Mut. L. Ins. Co.* 56 N. Y. 379; *Roberts v. Ely*, 113 N. Y. 128.

The case comes within none of the exceptions, or qualifications, limiting the application of *Lawrence v. Foa*.

Gifford v. Corrigan, 117 N. Y. 262, 6 L. R. A. 610; *Durnherr v. Rau*, 135 N. Y. 219; *French v. Via*, 143 N. Y. 90; *Wager v. Link*, 134 N. Y. 127.

Whatever view might be taken with regard to the rule of common law applicable to policies of this character, the insurance upon the life of Provencha, taken out by the Ticonderoga Company, is valid under the provision of § 55, chapter 690, Laws 1892.

The insurance company, defendant, could not retain the moneys paid as a premium after the passage of this act, and then upon the happening of the contingency provided for by its policy, repudiate the contract upon the ground that it is an illegal one.

Central Bank v. Empire Stone Dressing Co. 26 Barb. 36; *Curtis v. Leavitt*, 15 N. Y. 9; *Washburn v. Franklin*, 35 Barb. 600.

Mr. Lewis E. Griffith, for respondents:
The policy or contract of insurance upon which the action is brought is one of indemnity solely.

11 Am. & Eng. Enc. Law, p. 280.

An indemnitor cannot be charged unless the party to be indemnified becomes liable.

French v. Via, 143 N. Y. 90.

The measure of the liability has been definitely and conclusively established in and by the action brought by the administratrix of Provencha against the defendant pulp company, in which said loss was adjusted and

the demand therefor satisfied and discharged by the payment of \$1,500 agreed upon by the parties.

At common law, apart from the statute, the death would have created no liability against anybody, and no cause of action could be predicated against any person by reason thereof.

Debevoise v. New York, L. E. & W. R. Co. 98 N. Y. 377, 50 Am. Rep. 663.

The statute simply gives a right of action where the death of the party from such injury prevented his bringing an action, or where he omitted to enforce his right during his lifetime.

Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271.

The pulp company had no insurable interest in the life of Provencha, as his death would not result in a pecuniary loss to the insured.

When the assured has no interest at the time the contract is made the policy is a mere wager, in which one party stakes the sum required, and the other the premium paid, upon the happening or not happening of a particular event.

Howard v. Albany Ins. Co. 3 Denio, 303; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; *Morrell v. Trenton Mut. L. & F. Ins. Co.* 10 Cush. 282, 57 Am. Dec. 92; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Bevin v. Connecticut Mut. L. Ins. Co.* 23 Conn. 244; *Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498, 27 L. ed. 800.

There is lacking in this case the essential relation of debtor and creditor between the defendant pulp paper company and Sylvester Provencha, or such relation as makes the performance of the covenants of the policy at the instance of said Provencha a satisfaction of some legal or equitable duty, owing by the pulp company to the said Sylvester Provencha, which must exist according to law, in order to entitle a stranger to the covenant to enforce it.

Vrooman v. Turner, 89 N. Y. 283, 25 Am. Rep. 195; *Durnherr v. Rau*, 135 N. Y. 219; *Garnsey v. Rogers*, 47 N. Y. 240; *French v. Vix*, 143 N. Y. 94.

Gray, J., delivered the opinion of the court:

The policy of insurance which was the subject of this action was issued to the Ticonderoga Pulp & Paper Company in October, 1891; and it indemnified and insured, among other things, against loss or damage to property of every kind resulting from an explosion or rupture of steam boilers; "also against loss of human life or injury to person, whether to the assured, to employees, or to any other person or persons, caused by such explosion or rupture, payable to the assured for the benefit of the injured person or persons, or their legal representatives in case of death, and not contingent upon the legal liability of the assured." The sum of insurance stated in the policy was \$50,000, and the amount of any recovery under the clause quoted was limited to the sum of \$5,000. In December, 1892, Provencha, who was employed by the pulp company in the

capacity of fireman, was injured as the result of an explosion of one of the boilers, and subsequently died from his injuries. His widow, as his administratrix, brought an action against the pulp company, to recover damages by reason of its alleged negligence in causing the death of her intestate; and, prior to the trial of the issues therein raised, the case was settled by the payment of the sum of \$1,500. Subsequently, Provencha's administratrix assigned to the plaintiff in this action all her rights and interests in and to the policy of insurance in question; whereupon this action was brought, in which the plaintiff seeks to enforce the contract of insurance to the extent of the \$5,000 provided for in the clause above mentioned.

It is contended on the part of the plaintiff in the action that this policy provides for two kinds of insurance,—one of indemnity to the pulp company, against loss or damage to property; and one against loss of human life, or injury to persons, and that the promise of the insurer in the latter respect, under the special clause which I have mentioned, was made absolutely for the benefit of Provencha, or his legal representatives in case of death, and not merely to indemnify the pulp company for any loss which it might sustain from, or by reason of, such death. It is argued that the manifest intent of the contract was to compensate to a limited extent those sustaining a loss from death regardless of any relations existing between the assured and the person killed and regardless of any interest which the assured might have in the person killed.

The policy of insurance was issued prior to the passage of the act of 1892 (Laws 1892, chap. 690, § 55), which expressly authorizes an employer to take out accident insurance covering his employees collectively, for the benefit of such as may be injured, and therefore is not affected by that law. The action must stand or fall upon the determination of the question whether the contract of insurance gave any rights to Provencha or to his legal representatives to enforce it against the insurer for his or their benefit. Certainly, Provencha was not a party to the contract of insurance, and it does not appear from the record, even, that he was an employee of the pulp company at the time the contract was made. The stipulated fact is—and it is all the evidence that we have on the subject—that Provencha, on and prior to the day when the accident occurred, was in the employment of the company. In the face of such a stipulation, it is to be inferred, if not presumed, that Provencha was not an employee when the policy was issued. But perhaps that fact alone may not have a decisive bearing upon the question, if the theory of the plaintiff be tenable, that the promise of the insurer was made for the benefit of those who, being employees, might sustain injury. The difficulty in the way of maintaining the action upon any such theory is radical, in that Provencha was neither privy to the contract, nor to its consideration. It is not necessary to define precisely what was intended between the parties

by the insertion of the clause in question. It may be that it was intended purely as an indemnity to the assured against pecuniary loss resulting to it from an injury occurring to an employee; whether that pecuniary loss were established as a legal liability of the assured, or whether it were a voluntary payment made to compensate the injured person on the part of the company. Assuming that it intended an insurance of the employees through their employer, the case is not helped very much, because no right of action was given to the employee, nor could any cause of action exist at common law. It is, of course, competent for the legislature to alter the rules of the common law, and to create a cause of action where none existed previously, and that is what was attempted to be done by the legislature in the legislation of 1892, to which I have referred. But, under the rules of the common law, giving a right of action upon the engagement or promise of a party, the cause of action is vested in the person with whom or to whom the engagement or the promise is made. An exception is allowed in the case of a third party, for whose benefit a contract is made, when he may be allowed to bring an action in his own name. In such a case, however, it must appear that, when the contract was made, some obligation or duty was owing from the promisee in the contract to the party to be benefited. It is not sufficient that the performance of the contract may benefit a third person. It must have been entered into for his benefit, and the promisee must have a legal interest that it be performed in favor of the third person. *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 193; *Durnherr v. Rau*, 135 N. Y. 219. It was said by Judge Rapallo in *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440, when speaking of the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, that he did not understand that that case went so far as to hold that every promise made by one person to another, from the performance of which a third person would derive a benefit, gives a right of action to such third party; he being privy neither to the contract nor to the consideration. Now, what was there in the relation which Provencha sustained to the pulp company which gave him a legal claim to the benefit of the promise of the insurer in this policy? If he had no legal claim, he could have no equitable claim; because a court of equity will not enforce a demand

which is in contravention of rules of law. We do not know that he was an employee of the pulp company at the time this contract of insurance was made. The only parties to the contract are the pulp company and the insurance company. It cannot be supposed that there was an intention on the part of the pulp company to secure some benefit to Provencha; for he was not in its employment, and he could in no respect be deemed in privity with the pulp company with respect to the contract. There was no relation of debtor and creditor; nor any obligation or duty owing from the pulp company to Provencha, affecting or concerning this contract. The only obligation or duty, as between them, consisted in such as grew out of the relation of employer and employee, for any breach of which the law gave a right of action, and which was, in fact, availed of by Provencha's administratrix.

Nor can it be said that the pulp company had any legal interest that the promise of the insurer should be performed in favor of Provencha; for, assuming that a legal interest could have arisen upon the happening of the injury, it certainly ceased upon the satisfaction by the pulp company of the claim made in the action brought by his administratrix. I think it is impossible for us to hold, under the circumstances, that there was such a relation between Provencha and the pulp company, or any such privity on his part to this contract of insurance, as conferred upon him or his legal representatives a right of action upon the policy of insurance, and, for that reason, the judgment appealed from should be affirmed, with costs.

All concur, **Parker, Ch. J., and Haight, Martin, and Vann, JJ.**, in result.

Parker, Ch. J., and Haight, Martin, and Vann, JJ., concur for affirmance, upon the ground that the insurance policy in question was, at most, intended as a pecuniary indemnity to the legal representatives of the deceased employees for the loss sustained by them in consequence of his death, and that but one recovery is permitted, whether the death was caused through negligence or unavoidable accident. A claim having been presented by the legal representatives against the assured, based upon negligence, and that claim having been recognized and paid, no further right of action could exist under the policy.

NORTH CAROLINA SUPREME COURT.

Thomas J. MITCHELL, *Appt.*,
v.
CAROLINA CENTRAL RAILROAD COMPANY.

(.....N. C.....)

A carrier has the burden of showing its want of negligence, when property is lost in transit, although shipped under a

contract which limits the carrier's liability to a loss resulting from its negligence.

(*Faircloth, Ch. J., dissents.*)

(March 21, 1899.)

A PPEAL by plaintiff from a judgment of the Superior Court for Craven County in favor of defendant in an action brought

NOTE.—As to the burden of proof of negligence by a carrier in the transportation of goods under contract limiting liability, see also 44 L. R. A.

Browning v. Goodrich Transp. Co. (Wis.) 10 L. R. A. 415, and *note*; also *Witting v. St. Louis & S. F. R. Co. (Mo.)* 10 L. R. A. 602.

to recover the value of a mule lost while in defendant's possession for transportation. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. William W. Clark and Owen H. Guion for appellant.

Messrs. Simmons, Fou, & Ward, for appellee, cite—

Smith v. North Carolina R. Co. 64 N. C. 235; *Lee v. Raleigh & G. R. Co.* 72 N. C. 236; *Selby v. Wilmington & W. R. Co.* 113 N. C. 588; *Hutchinson, Carr.* §§ 217 *et seq.*, 248 *et seq.*; 5 Am. & Eng. Enc. Law, 2d ed. p. 446, title "*Where shippers undertake to care for stock,*" and notes 2 and 3.

Douglas, J., delivered the opinion of the court:

We cannot assent to the proposition that in cases of limited liability the burden of proof rests upon the plaintiff to show primarily the negligence of the defendant. In the case before us the plaintiff brought suit for the value of a mule which was shipped to him from Nashville, Tennessee, in a car with other horses and mules. When the car reached Newbern the mule was missing. The plaintiff has no means of knowing what became of it, except information furnished by the defendant, who says that it died *en route*. This may be true, and we presume it is, from the testimony for the defendant; but it has neither been admitted by the plaintiff nor found as a fact by the jury. Uncontradicted testimony is never equivalent to an admitted fact, as the jury may not believe it; and this is especially so where the alleged facts are peculiarly within the knowledge of the witness. Here, the plaintiff simply knew that the defendant received his mule under a contract to deliver it to him at Newbern, which it failed to do. He simply asks for his mule or its value, neither of which does he obtain. The defendant says that the shippers, implied agents of the plaintiff, signed a bill of lading releasing the defendant from all risk of loss or damage from any cause whatever not resulting from the negligence of its agents, and that the burden rests upon the plaintiff of proving affirmatively, not only the shipment and the loss, but that the loss occurred through the negligence of the defendant, when in fact he neither has, nor could have, any knowledge as to how it occurred. It is true the defendant introduced testimony tending to show the death of the mule from natural causes, but it did so purely as a matter of supererogation, with the burden of proving nothing. If its contentions are correct, it need not have said a word. It made no difference how the loss occurred, provided the plaintiff could not prove that it occurred through its negligence. The entire car load of stock might have been safely stolen through the gross negligence or actual connivance of its agents, if done without the knowledge of the plaintiff, or of anyone by whom he might prove it. If this is the law, what protection is there for the shipper? If a resident of Raleigh ships freight to New York under a so-called "released" bill of lad-

ing, he cannot be expected to go with it and watch it day and night. And yet, if he did not, how could he know the facts connected with its possible loss? The carrier could stand upon the word "released," and, without one word of explanation as to the non-delivery of the freight, simply say to the plaintiff, "Prove your case." It is too well settled to need any citation of authority that common carriers cannot exempt themselves by contract from the results of their own negligence. This principle is recognized in the bill of lading before us, and yet we are asked to establish a rule of evidence that will destroy its vital principle and subvert its beneficial purposes. It makes no difference to the plaintiff whether you deny his right or simply deprive him of the only remedy by which it can be obtained, and it is equally beneficial to the defendant whether you relieve it from all liability or only place it beyond the possibility of proof. It seems to us that the error lies in a misapprehension of the true nature of the bill of lading. It is not an agreement primarily intended to release the common-law liability of the carrier, but, as said in *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998: "It is at once a receipt and a contract. In the former character, it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel; in the latter, it is a contract to carry safely and deliver." The safe carriage and delivery are the essential objects of the contract, and it is the duty of every party to a contract to comply with his agreement, or to show such facts as will excuse his nonperformance. This is especially so where the contract is made in the performance of a public duty. It is the duty of a common carrier, irrespective of contract, but subject to reasonable regulations, to accept, safely carry, and deliver all goods intrusted to it. If the goods are lost, it must show what became of them; and if they are damaged, it must prove affirmatively that they were damaged in some way that would relieve it from responsibility. The plaintiff has a *prima facie* case when he shows the receipt of goods by the carrier, and their nondelivery, or delivery in a damaged condition. Any further defense is in the nature of confession and avoidance. If the defendant pleads exemption by virtue of a special contract, it must prove the contract, and show that the loss or damage comes within some one of the exceptions. It must appear to the court, as matter of law, that the contract is reasonable in all of its essential features, and that the exemptions are not contrary to public policy. All such exemptions, being in derogation of common law, should be strictly construed. So far, I think the principles herein laid down are properly deducible from all the authorities; but we now come to an irreconcilable conflict of decisions as to the subsequent burden of proof. The courts of Alabama, Georgia, Iowa, Minnesota, Mississippi, Ohio, South Carolina, Texas, Tennessee, and West Virginia, and perhaps one or two others, hold that the burden still rests upon the carrier of showing that the loss was not due to its own negligence. This

view is clearly laid down in an able opinion by Judge Cooper in *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 1003, 45 Am. Rep. 428, where he says: "To us it also seems that public policy forbids the further relaxation of the principles of the common law governing common carriers. It is no uncommon thing in this age to see under one management a line of railroads extending from the lakes of the North to the Gulf of Mexico, or from the Atlantic to the Pacific Ocean. To hold that a shipper in New York or Chicago shall be required to establish the negligence of the carrier by proof of the circumstances of a fire in California or New Orleans would, in a great number of cases, result in a verdict for the carrier, even though there was in fact negligence. In a large majority of cases the facts rest exclusively in the knowledge of the employees, whose names and places of residence are unknown to the shipper. In many cases the witnesses are the employees whose negligence has caused the loss, and, if known to the shipper, it may be dangerous for him to rest his case upon their testimony, since the natural impulses of mankind would sway them, in narrating the circumstances, to palliate their fault by stating the occurrence in the most favorable light to themselves. All the authorities hold that it devolves upon the carrier to show the loss to have occurred by the excepted cause. In doing this it will add but little to his burden to show all the attending circumstances; and that the burden rests upon him to do so, and disprove his own negligence, we think arises from the terms of the contract, from the character of his occupation, and from that rule governing the production of evidence, which requires the facts to be proved by that party in whose knowledge they peculiarly lie."

This opinion is especially interesting because it tersely reviews the authorities on both sides of the question, which is the single point in the case. Bishop in his *Law of Evidence*, 14th ed. § 219, adopts the same view, in the following words: "And if the acceptance was special, the burden of proof is still on the carrier to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care." It would seem from the recent work of Elliott on Railroads that this has now become the settled rule of a majority of the states, as the author says in § 1548, on page 2403: "There is some conflict among the authorities as to the burden of proof in such cases; but the prevailing rule, where the owner or his agent does not go with the stock, is that when the animals are shown to have been delivered to the carrier in good condition, and to have been lost or injured on the way, the burden of proof then rests upon the carrier to show that the loss or injury was not caused by its own negligence." This rule strongly commends itself to our better judgment, and receives our approval, especially in view of the universal acceptance of the principle that where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him rests

the burden of proof. 5 Am. & Eng. Enc. Law, 2d ed. p. 41; Best, Ev. § 274; 1 Greenl. Ev. § 79; Starkie, Ev. 589; Rice, Ev. § 77; *Selma, R. & D. R. Co. v. United States*, 139 U. S. 560, 567, 35 L. ed. 266, 269; *State v. McDuffie*, 107 N. C. 885, 888; *Govan v. Cushing*, 111 N. C. 458, 461. On the other hand, the Federal courts, with those of a large number of the states, hold that, under a bill of lading containing a contract of limited liability, the burden rests upon the plaintiff of proving that the loss or damage was caused by the negligence of the defendant carrier; but we think that an examination of the cases will show that the true principle of the rule in those jurisdictions is that the burden of proving the negligence of the carrier does not primarily rest upon the plaintiff, but is shifted to him upon the carrier proving that the loss fell within one of the excepted causes. That the carrier must prove that the injury complained of came within one of the special exemptions created by law or contract is admitted by all the authorities. By the act of 1851, Congress relieved the owners of sea-going vessels from all responsibility from loss by fire unless caused by their own design or neglect, and from responsibility for loss of money and other valuables named unless notified of their character and value, with certain other limitations of liability not arising from their own negligence. These limitations are substantially brought forward in chapter 6 of title 48 of the Revised Statutes, subsequently amended by the act of February 13, 1893. Several of the states enacted similar legislation; and the same general principles are held to apply to common carriers on land. In addition to this, it became the custom of shipowners to protect themselves by contract from risks arising from the perils of navigation. Within reasonable restrictions, these contractual limitations have been held to be valid; and it is upon these two classes of exemptions that the decisions generally rest. Those referring to the proper or inherent vice of animals do not appear to have any bearing upon the case at bar in its present status. It must be admitted that among the different states adhering to the same general rule there is much diversity of application, as well as uncertainty of definition. This may come in some degree from the unfortunate tendency of some otherwise able judges to formulate general principles upon special cases, unmindful of the limitations or modifications that may necessarily arise from the varying facts of other cases. Some of these definitions, like our old state grants, where each grantee furnished his own survey, cover much more than was originally intended, and lap over upon other essential principles. Those unlucky rights which lie within the lappage are necessarily of uncertain tenure. Of course, perfection of definition is impossible to human foresight; and, as human motives and resulting action do not run in parallel lines, there is frequently an ultimate point of conflict between essential principles themselves. There the superior principles must prevail; such, for instance, as depend upon public policy or natural right. The

great principle of legal construction was never better stated than by Lord Mansfield in *King v. Bembridge*, 3 Dougl. 332, where he says: "The law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases." It is impracticable to review any considerable number of cases bearing upon that at bar, but a few citations from the Supreme Court of the United States, which sustains the rule most favorable to the carrier, will sufficiently illustrate this view.

In *The Mohler*, 21 Wall. 230, 233, *The Mollie Mohler v. Home Ins. Co.* 22 L. ed. 485, 486, the court says: "It is insisted that the loss occurred through a peril of navigation, which was one of the exceptions contained in the bill of lading, and that, therefore, the carrier was excused from delivery of the wheat. . . . The burden of proof lies on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment." In *Clark v. Barnwell*, 12 How. 272, 13 L. ed. 985, the court held (quoting from the syllabus) that, "where goods are shipped, and the usual bill of lading given, 'promising to deliver them in good order, the dangers of the sea excepted,' and they are found to be damaged, the *onus probandi* is upon the owners of the vessel to show that the injury was occasioned by one of the excepted causes. But although the injury may have been occasioned by one of the excepted causes, yet still the owners of the vessel are responsible if the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted upon the shipper to show the negligence." The same rule is sustained in *Rich v. Lambert*, 12 How. 347, 13 L. ed. 1017; *The Niagara v. Cordes*, 21 How. 7, 16 L. ed. 41; *The Majestic*, 166 U. S. 375, 41 L. ed. 1039. In *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160, the court says: "On the trial the plaintiff made out a *prima facie* case by producing the bill of lading, showing the receipt of the coffee by the company at New York, and the contract for its transportation to Chicago, and by proving the arrival of the coffee . . . in a ruined condition, and the consequent damages sustained. The company met this *prima facie* case by showing that the loss was occasioned by one of the dangers of lake navigation." In *The Edwin I. Morrison*, 153 U. S. 199, *Bradley Fertilizer Co. v. The Edwin I. Morrison*, 38 L. ed. 688, the court says, on page 212, 153 U. S., and page 692, 38 L. ed.: "In any aspect, the real point in controversy is, Did the respondents so far sustain the burden of proof which was upon them?" etc. It further held that, even where the loss was caused by the dangers of the sea, the burden was still upon the owners of the vessel to show that it was seaworthy. In all these cases of limited liability the rule is invariably recognized that proof of shipment and injury makes a *prima facie* case for the plaintiff, and that then the bur-

den is always upon the carrier to show that the circumstances of the loss bring it within the excepted causes. When the carrier has shown this by a preponderance of testimony, then, and then only, does the burden shift to the shipper of showing that the loss, even if within the excepted classes, might have been avoided by diligence and care upon the part of the carrier. Therefore, under the most stringent rule, the plaintiff in the case at bar is entitled to a new trial, as the defendant did not prove to the satisfaction of the jury, by whom alone the fact could be found, that the circumstances of the loss brought it within the exception. The mere proof or admission of the terms of the bill of lading containing the stipulated exceptions is no proof that the loss comes within those exceptions. The necessary issues do not appear to have been submitted. Ordinarily parties cannot complain of the issues, in the absence of a special tender and exception; but this court has held in *Tucker v. Satterthwaite*, 120 N. C. 118, that the court below must, of its own motion, with or without suggestion, submit such issues as are necessary to settle the material controversies arising on the pleadings. If the issue as to the negligence of the defendant was intended to raise the question whether the loss came within the exception, then the burden of that issue rested upon the defendant in order to rebut the *prima facie* case already made out by the plaintiff. The defendant cannot be permitted, by the mere form of an issue, or a "broadside" stipulation of exemption, to change the rules of evidence, and practically destroy essential principles firmly resting upon public policy. At that stage of the proceedings the burden was admittedly upon the defendant. Has it been ever lifted or shifted? If so, we cannot see when or where.

It is contended for the defendant that it is exempted by this contract from all loss or damage not arising from its own negligence, and that therefore it cannot be required to prove the loss within the excepted classes without requiring it in effect to prove its own want of negligence. Even so. If, standing with the burden of proof upon it, it claims a total exemption, it must show every fact necessary to prove that exemption. It is not placed in any better condition than the ordinary defendant, merely by the unreasonable extent of its stipulations. The bill of lading, covering five printed pages, is full of the most stringent stipulations, all in favor of the carrier, among which is the broadside exemption from all risk "of loss or damage from any cause or thing not resulting from the negligence of the agents of said party of the first part." It then provides that, "in case the said party of the first part (the carrier) shall furnish laborers to assist in loading and unloading said stock, they shall be subject to the orders, and deemed employees, of the said party of the second part while so assisting." It gravely winds up by requiring the shipper, who has shipped nothing but horses and mules, to sign a written agreement that turkeys are reasonably worth only 12½ cents apiece in

Nashville. The "reasonableness" of such a bill of lading may well be questioned. These extraordinary stipulations strongly recall the pertinency of Mr. Justice Bradley's language in delivering the opinion of the court in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, where he says, on page 378: "It is a favorite argument, in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried."

Is it true that the public interest is not affected by individual contract of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers, in effect, by introducing new rules of obligation. The carrier and his customers do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents,—often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. In the present case, for example, the freight agent of the company testified that, though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough,—if they did not accept this, they must pay tariff rates. . . . Of course, no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected. If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy 44 L. R. A.

and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness."

The action of the court below seems to have been based on the opinion of this court in *Smith v. North Carolina R. Co.* 64 N. C. 235, which, on careful examination, does not seem to decide the question before us. The general principles were not elaborated, and the opinion was evidently based entirely on the particular facts of the case. There, the exemption claimed was not general, but special, being as to fire only. The contract was proved, and it was shown that the cotton was destroyed by fire. This brought the loss within the exception. What the court evidently intended to say was that then the burden of proving negligence rested on the plaintiff. The opinion cites but two authorities, namely, 1 Parsons, Contr. 1, 704 (perhaps meaning volume 1, p. 704) and *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 344, 12 L. ed. 465. In *New Jersey Steam Nav. Co. v. Merchants Bank* the question of the burden of the proof of negligence arose only incidentally, but the court clearly recognized the prior burden of the carrier, on page 383, where it says: "The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties." For the same reasons, the case of *Selby v. Wilmington & W. R. Co.* 113 N. C. 588, does not conflict with the principles now discussed. The only case that we can find in our reports that seems to settle the point now in question, and to settle it apparently in favor of the plaintiff, is *Morganton Mfg. Co. v. Ohio River & C. R. Co.* 121 N. C. 514, where this court has laid down the rule, without dissent, that "among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption." For the reasons given above, a new trial should be ordered.

Fairecloth, Ch. J., dissenting:

The plaintiff shipped live stock from Tennessee to Newbern, North Carolina, over several railroad lines, including the defendant's line. One mule was found dead in the car. The plaintiff sues for its value, and alleges negligence as the cause of loss of the mule. The plaintiff had a right to ship his stock over the railroads, as common carriers, by paying the usual charge for transportation, or to ship by special contract, and he elected to take the latter course. He, by special contract, for a consideration in reduced rates for transportation, agreed to relieve

the carriers from their liability of common carriers in the transportation, and agreed that their liability should be only that of a private carrier for hire, and he assumed all risk of injury by the animals to each other, or of heat or suffocation or other ill effects of being crowded in the cars, etc. We then have the case of a carrier liable for want of ordinary care; in other words, for negligence. The liability of common carriers is harsh, but upon the ground of public policy it is not unjust. After the parties closed the examination, his honor explained the rights and liabilities of carriers, and instructed the jury that there was no evidence

in this case that the defendant was negligent in transporting the stock, to which the plaintiff excepted. I have carefully read the evidence, and I see no error in the charge of the court. The mule seems to have died of colic or from some natural cause, which may have been induced and accelerated by the crowded condition of the car. I think the burden of showing negligence on the part of the defendant rested on the plaintiff, and that the special agreement was a valid contract. *Smith v. North Carolina R. Co.* 64 N. C. 235; *Selby v. Wilmington & W. R. Co.* 113 N. C. 588.

OHIO SUPREME COURT.

BALTIMORE & OHIO RAILROAD COMPANY, *Plff. in Err.*, v.

Walker FULTON, Admr., etc., of Charles B. Fulton, Deceased.

(59 Ohio St. 575.)

- *1. Where a case that may be is duly removed from a state to a Federal court, the jurisdiction of the state court over the cause at once ceases, and it can take no further step therein; and if thereafter the case is disposed of in the Federal court, otherwise than on the merits, the plaintiff cannot recommence the action in the state court, although, under like circumstances, he might have done so had the cause not been removed.
2. In such case, whatever right the plaintiff may have under any remedial rule, statutory or otherwise, to recommence the action, must be pursued in the Federal court, as after removal it alone has jurisdiction of the cause and the parties.

(January 17, 1899.)

ERROR to the Circuit Court for Belmont County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Mr. J. H. Collins for plaintiff in error.
Messrs. C. L. Weems, A. H. Mitchell, and W. Mitchell, for defendant in error:

The petition properly states a cause of action, and avers that the time of bringing the action is saved from the bar of the statute of limitations by reason of the facts therein stated.

We failed otherwise than on the merits;

*Headnotes by the COURT.

NOTE.—The decision that the removal of a case from a state to a Federal court transfers to the latter court the exclusive jurisdiction not only of the action brought but of the cause of action itself, so that no subsequent action can be brought thereon in the state court, even after the former action is terminated by dismissal without determining the merits, creates a new precedent, although it cites a decision denying 44 L. R. A.

the case is not still pending in the United States circuit court.

It is possibly true that court had no authority to do more under the fifth rule than to strike the case from the docket. Yet the court did more; it dismissed the case under a rule that only authorized the striking of the same from the docket. Can it be claimed that such a decision is upon the merits?

Minshall, J., delivered the opinion of the court:

The question we shall consider in this case arises upon the petition and a demurrer thereto. The petition by sufficient averment states that a cause of action against the defendant for the recovery of damages by the administrator of Charles B. Fulton for wrongfully causing his death, on the 13th day of January, 1889. The suit was commenced January 19, 1894; and, as it thus appeared that the action had not been commenced within two years, as prescribed by the statute giving the right (§§ 6134 and 6135, Rev. Stat.), the plaintiff, to obviate this, further averred that on July 7, 1891, he, as such administrator, commenced a civil action in this court, against defendant, for the benefit of said parents and brothers and sisters, for causing the death of said Charles B. Fulton, as aforesaid, by the wrongful act, neglect, and default of defendant heretofore explained, the cause of action herein being identical with that set forth in this petition. Such proceedings were had in said action that on August 3, 1891, in pursuance of the statute of the United States providing for the removal of causes from the state to Federal courts, the defendant filed in this court a petition and bond for the removal of said cause into the circuit court of the United States in and for the southern district of Ohio, eastern division,

the right after nonsuit in a Federal court to renew the action in a state court within a certain statutory period so as to avoid a statute of limitations.

As to pendency of actions in both state and Federal courts sitting in the same state, see *note to Willson v. Milliken* (Ky.) 42 L. R. A. 448.

in which last-named court said cause was so removed and filed, and remained pending until the 6th day of December, 1893. The plaintiff failed therein, otherwise than upon the merits, by the same being disposed of by said court as follows, to wit: Said court dismissed said cause "under the fifth rule of said court, said rule providing that cases which have been upon the docket for three general terms shall be stricken therefrom, unless good cause be shown to the contrary." The defendant demurred, on the ground that the petition does not state sufficient facts to constitute a cause of action, and that it is insufficient in law. This was overruled, and the defendant excepted.

A number of errors are assigned upon the record; but, as indicated, the only one we shall consider relates to the sufficiency of the petition to entitle the plaintiff to relief on the facts stated in it. This, in fact, presents two questions: (1) Whether the limitation of two years is a part of the right of action, or is merely a limitation of the remedy, so that, if the plaintiff failed in the circuit court otherwise than on the merits, he might, under § 4991, Rev. Stat., recommence the suit within a year thereafter, although the limitation of two years for bringing the action had then expired; and (2) whether, the cause having been duly removed to the Federal court, the plaintiff could, after it had been disposed of in that court, otherwise than on the merits, again, for any purpose, resort to the state court for relief on the same cause of action, whether the limitation of two years had or had not expired.

1. Much can be said in favor of the proposition that the provisions of § 4991, Rev. Stat., do not apply to a case of this kind; for while it may be admitted that the plaintiff failed in the circuit court otherwise than on the merits, still there is much reason and authority for saying that the limitation of two years, fixed for bringing an action, for causing death by wrongful act, is a part of the right of action itself, and not merely a limitation of the remedy, and that the action cannot therefore in any case be brought after the time limited has expired. *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613; *Taylor v. Cranberry Iron & Coal Co.* 94 N. C. 525; *Cavanagh v. Ocean Steam Nav. Co.* 19 N. Y. Civ. Proc. Rep. 391; *Hanna v. Jeffersonville R. Co.* 32 Ind. 113; *Pittsburg, C. & St. L. R. Co. v. Hine*, 25 Ohio St. 629, 634. As apparently *contra*, see *McCase v. McCoy*, 17 Ohio St. 225, though the point was not there made. But, as we do not dispose of the case on this ground, no further consideration will be given it.

2. The case as originally commenced has been properly removed to the United States circuit court of the district in which it was brought, the cause of action therein being, as averred, identical with the cause of action now sued on; and it had there been disposed of, not, it is true, on the merits, but had been dismissed for want of prosecution under a rule of the court. It has been repeatedly decided that, where a case has been properly removed from a state to a Federal court, the jurisdiction of the former over the case im-

mediately ceases, and it is its duty, in the language of the statute, to proceed no further in the cause. Its jurisdiction in that case ends with the removal. Any steps thereafter taken are said to be *coram non judice* and void. *Kanouse v. Martin*, 15 How. 198, 14 L. ed. 660; *Fisk v. Union P. R. Co.* 6 Blatchf. 362, 380; *Hatch v. Chicago, R. I. & P. R. Co.* 6 Blatchf. 105; *Clark v. Chicago, M. & St. P. R. Co.* 11 Fed. Rep. 355; *New York Silk Mfg. Co. v. Second Nat. Bank*, 10 Fed. Rep. 204; *Shaft v. Phoenix Mut. L. Ins. Co.* 67 N. Y. 544, 23 Am. Rep. 138; *Gordon v. Longest*, 16 Pet. 97, 10 L. ed. 900; *Desty, Removal of Causes*, §§ 108a, 108c; *Dill. Removal of Causes*, § 75a; *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354; *Home L. Ins. Co. v. Dunn*, 19 Wall. 214, 22 L. ed. 68; *Hadley v. Dunlap*, 10 Ohio St. 1; *Herryford v. Aetna Ins. Co.* 42 Mo. 148.

We fail to perceive any good reason for holding that this only applies so long as the suit removed is pending, and that if the case should be dismissed by the Federal court for any reason, other than on the merits, it loses the jurisdiction acquired by the removal, and the plaintiff is at liberty to recommence the action in the state court, where, under like circumstances, he might have done so had the cause not been removed. The reason of the statute should be kept in view in giving it a construction. It is remedial, and must be construed liberally. *Home L. Ins. Co. v. Dunn*, 19 Wall. 214, 224, 22 L. ed. 68, 69. The Constitution of the United States contains, it is true, no direct provision authorizing the removal of a case by a defendant to a Federal court. It, however, does authorize a plaintiff, in a "controversy" between himself and a citizen of another state, to bring the suit in a Federal court; and Congress acting upon the reasonable presumption that the same reason applies where a defendant is sued out of the jurisdiction of the courts of his own state, has given the defendant the right to remove the cause to a Federal court. The validity of the various acts of Congress authorizing the removal of a cause, though once questioned is now well settled. The policy of the provision authorizing a removal on the ground of a diversity of citizenship is based upon the recognized fact that litigation between citizens of different states must be more or less affected by local influences, and therefore, in the interest of fair and impartial justice, the right is conferred on a defendant, sued out of the jurisdiction of the courts of his own state, to remove the cause, in analogy to the provision of the Constitution conferring the right on a citizen of one state to sue a citizen of another state in a Federal court. Thus, the spirit and policy of the statute authorizing a removal on the ground of a diversity of citizenship applies as well to any renewal of the action, after it has been disposed of in the Federal court, as to the period of its pendency. The Federal court, having acquired jurisdiction of the action by its removal from the state court, must, on principle and the reason of the statute, retain it for all purposes,—for the purpose of determining whether it should be reinstated or

recommended after it has been dismissed by it or stricken from its docket, as well as for its determination on the merits. Its jurisdiction in such case does not merely embrace the suit brought and removed, but any suit thereafter brought on the identical cause of action, after the former suit has been dismissed by it, until the cause of action has been extinguished by a judgment on the merits; the cause of action—the “controversy” between the parties—remains subject to the jurisdiction of the Federal court, and is forever excluded from that of the court from which it was removed, unless remanded with the consent of the defendant; and there are cases which make this a doubtful proposition, where the cause is a removable one. No one would claim that, after the case has been stricken from its docket by the Federal court, the state court could determine whether it should be reinstated; and by a parity of reasoning, the state court cannot pass on the right of the plaintiff to recommence the action after it has been dismissed by the Federal court. In either of these cases the question can only be determined by the court that had full and exclusive jurisdiction of the case at the time. And if there be any remedial rule, statutory or otherwise, by which a case that has been dismissed for failure to prosecute can be reinstated after the time fixed by the statute of limitations has expired, the remedy must be sought in that court. It is properly a step or proceeding in the same case. If this were not so, it would not only open the way to a violation of the policy of the statute authorizing removals, but be productive of a very inconvenient practice, and much abuse. It would enable a party to permit his case to be dismissed by failing to prosecute in the Federal court, with the purpose of recommencing it in the state court, and thus com-

pel the defendant to be at the trouble and expense of again causing it to be removed, or submit to the jurisdiction of the state court.

The view we have taken finds support in the well-considered case of *Cow v. East Tennessee, V. & G. R. Co.* 68 Ga. 446. It is there held that, “when a case has been removed from a state court to the circuit court of the United States, the jurisdiction of the former ceases, and, after nonsuit in the Federal court, the case cannot be renewed in the state court within six months, so as to avoid the statute of limitations.” Such right is given by statute on a nonsuit in the courts of that state, a nonsuit not being a decision on the merits. Referring to the statute which reads as follows: “If a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing as to limitation with the original case,”—the court said: “To be thus renewed, it must be the same case as to cause of action and parties; and this is identically the same case in both respects. So that the question is, Can a case which has been removed to the United States circuit court be renewed in the state court? We think not, because the act of removal *ipso facto* transfers the jurisdiction of the cause to the circuit court of the United States, and devests that of the state court,”—citing *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354. In the case before us the plaintiff averred that the cause of action in the case removed was identical with the cause of action in his present petition. If it had not been, he could not have been within the provisions of § 4991, Rev. Stat., under favor of which he claimed the right to recommence his action in the state court.

Judgment reversed, and petition below dismissed.

OREGON SUPREME COURT.

N. J. BLAGEN *et al.*, *Appts.*,
v.

Robert C. SMITH, *Respt.*

(.....Or.....)

1. Testimony introduced on an immaterial matter not in issue cannot be considered on appeal in an equity case tried *de novo*, although no exception was taken to its admission.
2. Equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of a private person who suffers therefrom a special and peculiar injury distinct from that suffered by him in common with the public at large.
3. The rule that an injunction will not be granted against the continuance of a nuisance in a locality mainly occupied for business does not apply where the nuisance is *malum in se*, such as a house of ill fame.

4. Owners of property so near to a house of ill fame that their enjoyment of their property is affected by disgusting scenes and sounds in such house sustain an injury different in kind from that suffered by the public at large, which entitles them to an injunction against the maintenance of the nuisance.

(March 18, 1899.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Multnomah County dismissing a suit brought to enjoin the continuance of a public nuisance. *Reversed.*

Statement by Moore, J.:

This is a suit by private parties to enjoin the continuance of a public nuisance. The transcript shows that the plaintiff N. J. Blagen is the owner of two lots at the southeast corner of Couch and First streets, in the city of Portland, upon which he erected a large

NOTE.—This case is possibly distinguishable from that of *Neaf v. Palmer* (Ky.) 41 L. R. A. 219, by reason of the existence in this case of 44 L. R. A.

See also 40 L. R. A. 552.

offensive sights and sounds on the premises of the plaintiff, which did not appear in the Kentucky case.

four-story brick building in 1890, expending in the purchase of the land and the improvement thereof about \$80,000; that upon the completion of this building it was leased to the plaintiff, the W. C. Noon Bag Company, a corporation which is engaged in the manufacture of bags, tents, awnings, and sails, employing from 40 to 60 men and women; that the other plaintiffs own or are in possession of certain real property having stores, warehouses, or factories erected thereon, and all situated in the immediate vicinity of Blagen's said building; that defendant R. C. Smith, having leased two lots diagonally across Couch street from Blagen's building, and two lots at the southwest and two at the southeast corners of the intersection of Davis and First streets, changed thereon various small wooden buildings into what are known as "cribs," for the purpose of renting them to dissolute women, to be used as bawdy houses. The plaintiffs substantially allege that if defendant leases these cribs, to be used for the purpose for which they were designed, it will depreciate the value of their property, render it less desirable for rent, and result in a private, special, and direct injury to them. The plaintiff the W. C. Noon Bag Company avers that from the windows in the Blagen building said cribs are in plain view; that its employees, in coming to and returning from their labor, must necessarily pass by or between these buildings, which, if they are permitted to be used for immoral purposes, will bring to the vicinity in which they are situated drunken, disorderly, and disreputable persons and criminals, the effect of which will be to endanger the lives and morals of its employees, and interfere with, disturb, and injure its business, resulting in a private, direct, and special damage to it. Whereupon plaintiffs prayed that a temporary injunction might be issued, restraining the defendant from proceeding further in the construction or repair of any building upon the said premises for the purposes of prostitution, from renting any of said cribs, or allowing any persons to occupy the same, for that purpose, and from transferring or selling said buildings to any person to be used for immoral purposes, and that upon the final hearing said injunction be made perpetual. The defendant, after denying the material averments of the complaint, alleges in substance, that he had expended in repairing said buildings the sum of \$5,000, and that the only manner in which he could be reimbursed for the outlay, and for the rent which he had agreed to pay for the use of the premises, was by subletting these houses, not for immoral purposes, but to any persons who might wish to rent them; that they are cheap, and desirable only to a class of people who would be liable to want to live in that part of the city, which, by reason of its contiguity to the wharves on the Willamette river, and the liability of that stream to overflow its banks, would never be occupied as residence property, except by the poorest class of people, who are compelled by necessity to seek cheap rents; that in June, 1894, the backwater from said river stood

6 feet deep over all said property, since which time none of it had been desirable for any purpose; that said section of the city is remote from public travel, without retail stores, and that ladies have no occasion to visit it, and never have gone into that neighborhood. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, and from the evidence taken thereat the court found the facts, in substance, as above given, and also that five or six Japanese prostitutes had moved into some of these buildings since this suit was commenced, notwithstanding a temporary injunction restraining defendant from leasing them to such persons had been issued and served, and that the proximity of these cribs to the property of said Blagen may somewhat depreciate its value; that the alterations made by defendant upon said buildings have not in any manner injured plaintiff's property, or been any damage to their business; and that, if these houses be rented and used for immoral purposes, neither of the plaintiffs will suffer any special or peculiar injury therefrom, different from that sustained by the community at large. The court also made the following findings: "Tenth. That long prior to January 1, 1897, there was situated directly across the street from said property of N. J. Blagen a house of prostitution kept by one 'Liverpool Liz,' and on the corner of First and C streets, diagonally across the street, there was what was known as the 'Bella Union Theater,' a mixed saloon, where women resorted and sold liquors; that next to the building occupied by Liverpool Liz there stood a sailor boarding house, kept by Jim Turk; that this part of the town is known as part of Whitechapel district. Eleventh. That at the time of bringing this suit there were and still are, situated within two blocks of said property of N. J. Blagen fifteen saloons, and over twenty-eight houses of prostitution, called 'cribs,' and that said cribs or houses of prostitution and saloons have been standing on said property for several years prior to January 1, 1897." The court thereupon dissolved the temporary injunction and dismissed the suit, from which plaintiffs appeal.

Messrs. Williams, Wood, & Linthicum, for appellants:

The remedy provided by § 333 of Hill's Code, in cases of nuisance, is not exclusive, and does not limit the remedy for nuisances to actions at law.

Fleischner v. Citizens' Invest. Co. 25 Or. 119.

A court of equity has jurisdiction to prohibit, by injunction, a party from creating or erecting the public nuisance of a bawdy-house, upon a bill filed by private individuals, alleging that the close proximity of such nuisance will deprive the complainants of the comfortable enjoyment of their property, and greatly depreciate and lessen its value.

Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184; *Cranford v. Tyrrell*, 128 N. Y. 341; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092; *Hayden v. Tucker*, 37 Mo. 214; *Wood*,

Nuisances, §§ 30, 31; *Williams v. Smith*, 22 Wis. 596; *Green v. Oakes*, 17 Ill. 249.

The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights.

Port of Mobile v. Louisville & N. R. Co. 84 Ala. 115; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092; *Cranford v. Tyrrell*, 128 N. Y. 341.

Messrs. Hume & Hall and Gearin, Silverstone, & Brodie, for respondent:

This is simply a suit brought by a party considering himself aggrieved, and alleging that his property will be damaged by certain acts threatened to be done by the defendant, and asking for a restraining order.

The fact of nuisance or no nuisance should be decided by a jury first.

Roseburg v. Abraham, 8 Or. 509.

If the statute contain words negativing or expressly taking away the previous equitable jurisdiction, or even if upon a fair and reasonable interpretation, the whole scope of the statute shows by necessary intentment a clear legislative intention to abrogate such jurisdiction, then the former jurisdiction of equity is thereby ended.

1 Pom. Eq. Jur. § 281; *Stadler v. Grieben*, 61 Wis. 504; *Remington v. Foster*, 42 Wis. 608; *Cohn v. Wausau Boom Co.* 47 Wis. 314; *Pennoyer v. Allen*, 51 Wis. 360; *Lohmiller v. Indian Ford Water Power Co.* 51 Wis. 688; *Denner v. Chicago, M. & St. P. R. Co.* 57 Wis. 221.

In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as, by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages.

16 Am. & Eng. Enc. Law, p. 959; *Wood, Nuisances*, § 646; *Duncan v. Hayes*, 22 N. J. Eq. 27; *Fogg v. Nevada-California Oregon R. Co.* 20 Nev. 429.

Injunctions against threatened nuisances will seldom be granted except in extreme cases where the threatened use of property is clearly shown to be such as leaves no doubt of its injurious results. The bill must set forth such a state of facts as leaves no room for doubt upon the question of nuisance, for if there is any doubt upon that point the benefit of it will be given to defendant.

Wood, Nuisances, § 797; *Shaubut v. St. Paul & S. O. R. Co.* 21 Minn. 502; *Barnum v. Minnesota Transfer R. Co.* 33 Minn. 365; *High, Inj.* 495, 496; *Cleveland v. Citizens' Gaslight Co.* 20 N. J. Eq. 206; *Waupun Trustees v. Moore*, 34 Wis. 450, 17 Am. Rep. 446; *Zabriskie v. Jersey City & B. R. Co.* 13 N. J. Eq. 314; *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790; *San Jose Ranch Co. v. Brooks*, 74 Cal. 465; *McCowan v. Whitesides*, 31 Ind. 237; *Hartshorn v. South Reading*, 3 Allen, 504; *Clark v. Chicago & N. W. R. Co.* 70 Wis. 597; *Wesson v. Washburn Iron Co.* 13 Allen, 101, 90 Am. Dec. 181; *Proprietors of Quincy Canal v. Newcomb*, 7 Met. 283, 39 Am. Dec. 778; *Brainard v. Con-* 44 L. R. A.

necticut River R. Co. 7 Cush. 510; *Stetson v. Faxon*, 19 Pick. 160, 31 Am. Dec. 123; *Houck v. Wachter*, 34 Md. 272, 6 Am. Rep. 332; *Marini v. Graham*, 67 Cal. 132.

Moore, J., delivered the opinion of the court:

It is contended by plaintiffs' counsel that the court erred in permitting defendant, over their objection, to introduce testimony outside the issues, and in making the findings thereon numbered, respectively, 10 and 11. Section 397, Hill's (Or.) Anno. Laws, as amended by the act of the legislative assembly approved February 20, 1893 (Or. Laws 1893, p. 26), in prescribing the manner in which findings shall be prepared in suits, reads as follows: "The court in rendering its decision shall set out in writing its findings of fact upon all material issues of fact presented by the pleadings, together with its conclusions of law thereon, but such findings of fact and conclusions of law shall be separate from the decree, and shall be filed with the clerk and incorporated in and constitute a part of the judgment roll of said cause; and such findings of fact shall have the same force and effect and be equally conclusive as the verdict of a jury in an action at law, except on appeal to the supreme court the cause shall be tried anew without reference to such findings." The transcript shows that counsel for defendant, on his cross-examination of W. C. Noon, referring to a period of two or three years prior to the commencement of the suit, propounded to him the following question: "Do you know, during that time, of such a place as the Bella Union Theater?" Whereupon the court, upon objection being made, said: "As to the injury of the property there, I think perhaps that would be admissible." The witness answered: "I think I have seen that on the door; yes." No exception to the ruling of the court upon the admission of this testimony was saved, nor can we find, from an inspection of the transcript, that any other objection was made or exception saved to the introduction of any of the testimony tending to support the findings complained of. This being so, and the cause coming before us for trial *de novo*, the question is presented whether, in the absence of any exception to the action of the court admitting testimony tending to show that houses of ill repute and other disreputable places of resort existed in the immediate vicinity of plaintiffs' property long before defendant constructed the cribs mentioned in the complaint, such testimony shall be considered on appeal, in view of the issues of fact to be tried. In *Newby v. Myers*, 44 Kan. 477, it is held that the findings of fact of a trial court must be based upon the issues made by the pleadings, and any finding outside such issues is a nullity. In *Marks v. Sayward*, 50 Cal. 57, it is held that findings of fact must be within the issues; otherwise, they will not be regarded. In *Reinhart v. Lugo*, 75 Cal. 639, it is held that the finding in an action of partition contrary to an admission made by the pleadings as to the plaintiff's interest in the lands in question is outside the issue and erro-

neous, and a judgment based thereon should be reversed. In *Hall v. Arnott*, 80 Cal. 348, it is held that findings upon issues not properly presented by the pleadings must be disregarded. There is no issue in the pleadings upon which findings numbered 10 and 11 can be predicated, nor was any motion made to amend the answer in this respect; and, this being so, the testimony introduced upon that subject was immaterial, and cannot be considered on appeal.

It is admitted by plaintiff's counsel that the cribs constructed by defendant and leased for immoral purposes constitute a public nuisance, notwithstanding which they contend that their clients suffered a special injury therefrom, distinct and different in kind from that sustained by the general public, and that the court therefore erred in not making the injunction perpetual; while defendant's counsel maintain that plaintiffs had a complete, speedy, and adequate remedy at law for the recovery of damages and the abatement of the nuisance, and hence a court of equity has no jurisdiction to grant the relief demanded, and that, such being the case, the decree should be affirmed.

The statute referred to as affording a legal remedy for the suppression of a nuisance substantially provides that any person whose property is affected by a private nuisance may maintain an action at law for damages therefor, and, if judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate such nuisance; and, if it appear on the hearing that such remedy is inadequate, the plaintiff may proceed in equity to have the defendant enjoined. Hill's (Or.) Anno. Laws, § 333. It will be seen that the remedy thus provided can be invoked only by the person whose property or right of possession and personal enjoyment thereof is affected by the maintenance of a private nuisance, and, as an incident to the compensation which the law awards for the injury sustained, the court may order a warrant to be issued, commanding the sheriff to abate the same, but the statute makes no provision whatever for any relief for an injury sustained from the maintenance of a public nuisance. It is urged with much reason that under the maxim, *Expressio unius est exclusio alterius*, the remedy prescribed by § 333, *supra*, is exclusive, and that the deduction is strengthened when the remedy thus afforded is considered with reference to the limitation placed thereon by § 380, Hill's (Or.) Anno. Laws, which, so far as applicable to the case at bar, reads: "The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law." In *Fleischner v. Citizens' Invest. Co.* 25 Or. 119, it was held that the remedy provided by the former section is not exclusive, and does not limit the relief for injury resulting from the maintenance of nuisances to actions at law; whenever a nuisance will cause irreparable injury, menace the life or health of the plain-

tiff or his family, or the guilty party is not able to respond in damages for the injury, or where numerous actions will be required, equity has "concurrent jurisdiction with courts of law," within the meaning of the latter section, and will enjoin the continuance of the objectionable conditions. "In regard to private nuisances," says Judge Story in his work on Equity Jurisprudence (vol. 2, § 925), "the interference of courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits." This learned author, after illustrating the doctrine that equitable interposition in the cases of private nuisances ought not to be granted except where the right is clear, says in the following section: "On the other hand, where the injury is irreparable, as where loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act or erection,—in every such case courts of equity will interfere by injunction in furtherance of justice and the violated rights of the party." The defendant against whom a judgment has been given in an action for damages resulting from a private nuisance may, upon motion therefor, obtain from the court or judge an order to stay the issuing of a warrant to abate the nuisance for such period as may be necessary, not exceeding six months, and allowing the defendant to abate the nuisance himself, upon giving the plaintiff an undertaking that he will abate it within the time specified in the order. Hill's (Or.) Anno. Laws, § 335. A private nuisance, however, may in some instances become so intolerable to the party whose property, or the enjoyment thereof, is affected thereby, that its discontinuance becomes an imperious necessity, in which case equity only can afford the immediate relief demanded, because the slow process of the law courts is not adequate to the occasion. It is the inadequacy of the legal remedy referred to in § 380, *supra*, that forms the exception to the general rule, and thereby confers upon a court of equity jurisdiction, in a case of private nuisance, to interfere in behalf of the injured party and to grant speedy relief.

Our statute having made no provision for the suppression of a public nuisance, except by indictment, any remedy beyond that, if it exist, must be found in the rules of the common law. "In regard to public nuisances, the jurisdiction of courts of equity," says Judge Story in his work on Equity Jurisprudence (vol. 2, § 921), "seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth." A court of equity therefore has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of a private person who suffers therefrom a special and peculiar injury, distinct from that suffered by him in common with the public at large. 3 Pom. Eq. Jur. § 1349, and cases cited in note 4; 2 Wood, Nuisances, § 819. "A house of ill fame, or 'bawdy house,' as it is more commonly called in the law," says Mr. Wood

in his work on Nuisances (vol. 1, § 29), "is a public nuisance, and the keeper thereof may be indicted therefor, whether the house is located in a city or a forest. It is *malum in se*, and the court does not need to be informed of its effects upon society, for the common experience of mankind shows that the probable and natural consequences of such an establishment will be detrimental to the moral and social welfare of the public." To the same effect, see also *Givens v. Van Studdisford*, 4 Mo. App. 498.

The plaintiffs having sought relief in the proper forum, and their complaint having stated facts sufficient to constitute a cause of suit, the remaining question to be considered is whether the evidence introduced at the trial conclusively shows that they are entitled to the relief which they invoke. The evidence tends to show, and the court below found, that the proximity of the cribs to Blagen's property may somewhat depreciate its value. The continuance of a nuisance, not such *per se*, which renders the adjacent property less salable, or prevents the owner from advantageously letting the premises, or limits his demise thereof to less reputable tenants, is not enough to entitle him to equitable relief; for the loss sustained in these particulars is capable of being compensated in an action for damages. 1 Wood, Nuisances, § 3; 2 Wood, Nuisances, § 789; *Ryan v. Copes*, 11 Rich. L. 217, 73 Am. Dec. 106; *Lansing v. Smith*, 8 Cow. 146; *Gibson v. Donk*, 7 Mo. App. 37; *Ballentine v. Webb*, 84 Mich. 38, 13 L. R. A. 321. In *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184, it is held that a court of equity had jurisdiction to prohibit by injunction a party from erecting a bawdy house, upon a bill, filed by private parties, alleging that the close proximity of such a nuisance would deprive them of the comfortable enjoyment of their property, and greatly depreciate and lessen its value. In *Cranford v. Tyrrell*, 128 N. Y. 341, suit was instituted to restrain the defendant from keeping a house of ill fame; and it was held that an unlawful use of property which renders the premises of a neighbor unfit for comfortable or respectable occupation and enjoyment, is a private nuisance, against which the protection of a court of equity may be invoked, although the use complained of also constitutes a public nuisance. In *Hayden v. Tucker*, 37 Mo. 214, suit was brought to enjoin the defendant from keeping jacks and stallions for service in a yard adjoining and in full view of plaintiff's premises, whereby it was alleged that they were depreciated in value and rendered unfit for habitation, and it was held that a court of equity was competent to grant the relief demanded. Mr. Justice Wagner, in speaking for the court, says: "A right of action may lie against a party for a nuisance, where a court would not be justified in interfering to remove it by injunction. To authorize the extraordinary interference, there must be such an injury as from its very nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring griev-

ance, which cannot otherwise be prevented but by injunction. And this remedy will be allowed where the injury is material, and operates daily to destroy or diminish the comfort and use of a neighboring house, and the remedy by a multiplicity of actions for the continuance of it would furnish no substantial compensation." These cases, however, related to enjoining nuisances which were *malum in se*, and maintained or threatened to be carried on in a neighborhood chiefly devoted to family residences. A court of equity will not interfere with the continuance of a lawful business in a locality where the buildings are mainly occupied for business purposes, because a few families may reside in the neighborhood. *Gilbert v. Showerman*, 23 Mich. 448; *Doellner v. Tynan*, 38 How. Pr. 176. "Where the nuisance," says Chancellor Green in *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335, "operates to destroy health or to diminish the comfort of a dwelling, an action at law furnishes no adequate remedy, and the party injured is entitled to protection by injunction." To the same effect, see also *Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112. These cases relate to nuisances which were not such *per se*, but the rule so announced can have no application, upon principle, to the continuance of a nuisance which is *malum in se* in a district devoted exclusively to business. If this were not so, a house of ill fame could be established and operated beside a church, in a district in which the buildings were devoted to business or trade, and a court of equity would be powerless to correct the evil. If it were possible for such a thing to exist unmoled in a civilized community, what measure of damages in an action at law would compensate outraged decency, dispel the blush of shame that flushes the cheek of modest virtue, or still the conscience of those who would worship in a sanctuary that was maintained in the least degree by money collected as indemnity from the maintenance of a brothel? All property in a city is affected by the maintenance of a bawdy house, just in proportion to its contiguity thereto, and the damage which such property sustains, while differing in degree, does not differ in kind; and, such being the case, the owner of any such property affected in the same general way as other property therein could not successfully invoke equitable relief to enjoin its continuance. But where, by reason of the proximity of such property to the public nuisance, disgusting scenes and sounds shock the sense of those whose property, or the enjoyment thereof, is affected thereby, the injury sustained is necessarily different in kind from that suffered by the public at large; and, this being so, such persons are entitled to an injunction restraining the same.

One of the witnesses who appeared on plaintiffs' behalf, in speaking of the occupant of a crib in the immediate vicinity of Blagen's property, in answer to the question, "What would the appearance of these women indicate was their occupation?" says: "Why, it is self-evident that they are on the town. For instance, several weeks ago I was walking along there about half past six or seven,

and the windows were out,—fully open,—and one of the Japanese women was standing around in undress uniform, and several Chinamen were standing around, negotiating, apparently, on the outside.”

This evidence, in our judgment, together with other like testimony, tends to show that plaintiffs are entitled to the relief demanded and hence *the decree is reversed*, and the temporary injunction made perpetual.

City of PORTLAND, *Resp't.*,

v.

PORTLAND BITUMINOUS PAVING & IMPROVEMENT COMPANY,
and

A. N. KING *et al.*, *Appts.*

(.....Or.....)

1. A bond to a city by a street contractor, which constitutes an independent undertaking by the latter to keep the street and pavement in repair for five years, and which covers in effect all injuries liable to arise from whatsoever source, is not authorised by statutory power to take security by bonds for the performance of the contract.
2. The fact that the bond is voluntary and founded upon a valid consideration will not enable a city to enforce a bond by a street contractor to repair a street for five years, when the contract is entirely beyond the general scope of the powers of the city, even if it has been fully executed by the city.
3. A municipality will be estopped to enforce the performance of a contract under the same or like conditions that an individual will be estopped to proceed against it.
4. A contract invalid as to one of the parties is invalid also as to the other.

(February 7, 1898.)

APPEAL by defendants King *et al.*, sureties on the bond of the corporation defendant, from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover upon a bond conditioned to keep a certain street in the plaintiff City in repair. *Reversed.*

Statement by Wolverton, J.:

The complaint herein, after setting forth the corporate character of the plaintiff and the defendant company, alleges, in substance: That said paving and improvement company

entered into a contract with the city, a copy of which is attached to the complaint, and marked "Exhibit A." That on June 29 and 30, 1891, Ordinance No. 6,718, providing for the improvement of Washington street from the west line of Second street to its intersection with B street, was passed and approved, § 3 of which treats of the general character of the work. Section 4 provides that the grading, sidewalks, and gutters shall conform, as nearly as practicable, to the requirements of §§ 6, 7, and 9 of Ordinance No. 2,839, and the paving, as nearly as practicable, to the provisions of Ordinance No. 6,715, relating to the manner of laying bituminous rock pavement, except as provided in § 3; and § 5, that the provisions of § 11 of said Ordinance No. 2,839 shall apply to lumber and all other material used in the improvement. Section 30 of said Ordinance No. 6,715 provides as follows: "The contractor shall give a good and sufficient bond to the city of Portland in an amount equal to the contract price of said improvement, conditioned that he will commence and complete the proposed improvement according to the specifications herein mentioned, and that, in addition to the foregoing, he will give a good and sufficient bond to the city of Portland, in amount equal to 25 per cent of the contract price of said improvement, conditioned that for the period of five years from the date of its completion, he will keep the payment in repair by immediately, upon proper notice, repairing at his own cost and expense any injuries or worn out places or other defects due to traffic, or on account of disintegration, or decay, or in any manner attributable to defective materials or workmanship. The sureties upon this bond shall justify to double the amount of such bond. Payment in full of the contract price shall not release the sureties until said period of five years shall have expired, said bonds to be approved as required by the city charter." That pursuant to the terms of said contract and the provisions of the ordinance therein referred to, and in consideration thereof, the said paving and improvement company, as principal, and the defendants A. N. King and D. P. Thompson as sureties, made, executed, and delivered their bond to the said city of Portland, a copy of which is attached, marked "Exhibit B," and made a part of the complaint. That the said company, pursuant to the terms of its agreement, completed said improvement on the 18th day of November, 1891. "That for a long time prior to the commencement of this action, and at the present time, the said pavement,

NOTE.—Power of city to bind contractor to repair pavement which he makes.

- I. When the question arises.
- II. Agreements including repairs.
- III. Agreements constituting mere guaranty.
- IV. Simple agreements for construction and repair.
- V. Separable agreements.
- VI. Express statutory authority.

I. When the question arises.

The question as to the power of a city to bind a contractor to repair a pavement which 44 L. R. A.

he makes, arises from the fact that the construction of pavements is generally regarded as a matter of local interest to be paid for by the owners of contiguous property benefited thereby, while the repair of streets is regarded as a matter of general interest which is to be paid for by a general tax upon the city in which the street is situated; and accordingly city charters and statutes under which cities are established have generally provided for payment for the construction of pavements by local assessments upon abutting property, and for payment for repairs upon streets by a general tax; and under such charters and statutes, when it is

within the limits of said improvement, was injured and defective and has been and now is, completely worn out, and the said pavement is full of deep and dangerous holes, and is almost impassable; all of which is due to traffic, disintegration, decay, defective material used in the construction thereof, and the workmanship of the same. That on or about the 10th day of September, 1894, and prior thereto, and before the commencement of this action, the said plaintiff duly notified the said Portland Bituminous Paving & Improvement Company of the condition of the said street as aforesaid, and duly requested the said company to repair the same, but the said defendant has failed and refused, and now fails and refuses to repair the same, or any part thereof; that by reason of said failure and refusal of the said company to comply with the terms of said bond to keep the street in repair as aforesaid, the city is and will be compelled to repair the same, so as to make it safe and passable, and suitable for the travel over the same, and to expend large sums of money therefor; whereby the city is and has been damaged in the sum of \$9,000."

The terms of the contract, marked "Exhibit A," are that the paving and improvement company shall, among other things, furnish the material and perform the labor necessary or required under the provisions of Ordinance No. 6,718 for the improvement of said Washington street, and complete said improvement on or before November 6, 1891, to the satisfaction of the city council, and do and perform all of said work in a good and workmanlike manner, and according to the provisions and requirements of said ordinance and other ordinances and parts of ordinances therein referred to. The consideration to be paid for such improvement is specifically stated, but it is further stipulated that the paving and improvement company shall be paid by warrants drawn upon a fund derived from local assessments upon the property adjoining and benefited, and it is expressly agreed that the said company shall look for payment only to such fund, and will not require the city to pay for the same out of any other fund by any process whatever. Exhibit B is in form a bond whereby the Portland Bituminous Paving & Improvement Company, as principal, and A. N. King and D. P. Thompson, as sureties, have bound themselves unto the city of Portland in the sum of \$9,000, conditioned as follows: "Now, if said con-

tractor shall, for the period of five years next following the date of completion of the work of improvement hereinabove referred to, keep the said street and pavement in repair from the said west line of Second street to the intersection of Washington and B streets, in said city, by immediately, upon proper notice, repairing, at its own cost and expense, any injuries or worn-out places, or other defects due to traffic, or on account of disintegration or decay, or in any manner attributable to defective materials or workmanship, then this obligation to be void; otherwise to remain in full force and virtue." A demurrer to the complaint was overruled, and judgment entered for plaintiff after trial before the court.

Messrs. J. C. Moreland, Richard Williams, and E. B. Williams, for appellants:

The charter is the measure of the city's power.

Hend v. Providence Ins. Co. 2 Cranch, 169, 2 L. ed. 243; *McCracken v. San Francisco*, 16 Cal. 620; *Dill. Mun. Corp.* 3d ed. § 89; *Webster v. People, Binkert*, 98 Ill. 343.

It is a matter of law, and not of fact whether an act to be done be within the power of the corporation.

Bissell v. Michigan, S. & N. I. R. Cos. 22 N. Y. 281.

Where a city is empowered by its charter to do a particular act in a particular way, authority and right to perform the act depend upon the strict observance of the thing specified necessary to be done.

Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659; *Lake v. Williamsburgh*, 4 Denio, 521.

A tax levied or authorized to be levied for one purpose cannot be collected or used for any other. The city having authority only at the time this was made to make the improvement cannot couple with it a bond or condition to repair.

Brown v. Jenks, 98 Cal. 10; *Buckley v. Tacoma*, 9 Wash. 253; *Verdin v. St. Louis* (Mo.) 27 S. W. 447; *State, Wilson, v. Trenton*, 60 N. J. L. 394; *People, Hall, v. Maher*, 56 Hun, 81; *Verdin v. St. Louis*, 131 Mo. 26; *Excelsior Paving Co. v. Leach* (Cal.) 34 Pac. 116; *Fehler v. Gosnell*, 99 Ky. 380; *Boyd v. Milwaukee*, 92 Wis. 456.

This is not an action for liquidated damages.

Kemble v. Farren, 6 Bing. 141; *Burr v. Todd*, 41 Pa. 206; *Robeson v. Whitesides*, 16

sought to bind a contractor to repair the pavement he makes, the question at once arises whether or not the burden of paying for repairs of streets which should rest upon the city is thereby imposed upon the abutting owners subject to assessment for construction of the pavement on the theory that, being bound to repair, the contractor must have included the estimated cost of repairs in the amount charged for construction. The question whether contracts and ordinances requiring the contractor to repair or maintain the pavement made by him is illegal or legal, therefore depends upon whether the contract or requirement is really one to correct and repair that which had formerly existed in proper condition, or is a mere guaranty 44 L. R. A.

that the work is properly done and will last as long as such pavement ought to last.

II. Agreements including repairs.

An agreement by a contractor constructing a pavement will not be deemed a mere warranty of the quality of his work as disingulshed from an agreement to keep in repair so as to relieve it from invalidity, growing out of the fact that abutting owners were to pay for the pavement and the municipality was required to pay for repairs, where the contract expressly provided that he was to keep the street in good condition and repair. *People, Hall, v. Maher*, 56 Hun, 81, *dictum*.

Serg. & R. 320; *Chase v. Allen*, 13 Gray, 42; *Spear v. Smith*, 1 Denio, 464; in notes to *Graham v. Bickham* (Pa.) 1 Am. Dec. 331; *Wilhelm v. Eaves*, 21 Or. 194, 14 L. R. A. 297.

If liquidated damages were contemplated the whole amount would be forfeited for a single breach.

Sanford v. First Nat. Bank, 94 Iowa, 680; *Cheddick v. Marsh*, 21 N. J. L. 463.

Numerous breaches of the bond were contemplated; some might be serious, some trifling.

Parker v. Jeffery, 26 Or. 186; *Cohwell v. Lawrence*, 38 N. Y. 71; *Lampman v. Cochran*, 16 N. Y. 275; *Berry v. Wisdom*, 3 Ohio St. 241.

It is not sufficient to aver a liability; actual payment must be averred and proved in order to entitle the plaintiff to recover.

Sedgw. Damages, 5th ed. 307, 311, 8th ed. § 393; 2 *Sutherland, Damages*, 602, note 4; *Aberdeen v. Blackmar*, 6 Hill, 324; *Lott v. Mitchell*, 32 Cal. 23; *American Bldg. & L. Assn. v. Waleen*, 52 Minn. 23; *Proprietors of Locks & Canals v. Lovell Horse R. Corp.* 109 Mass. 221; *Little v. Little*, 13 Pick. 426; *Jeffers v. Johnson*, 21 N. J. L. 73; *Kelley v. Seay*, 3 Okla. 527; *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359; *Willson v. McEvoy*, 25 Cal. 169; *Wicker v. Hoppock*, 6 Wall. 94, 99, 18 L. ed. 752, 753.

If the obligee in the bond was under no obligation to repair the street, or to do the thing against which the indemnity is given, then it could suffer no injury by a failure to repair the street.

Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; *King v. Whitely*, 10 Paige, 465.

If the plaintiff can with trifling cost prevent damage or injury, and thus relieve a defendant from liability, it is its duty to do so.

1 *Sutherland, Damages*, 148.

Mr. W. M. Oake for respondent.

Wolverton, J., delivered the opinion of the court:

It is important at the outset to ascertain and determine the proper interpretation to be given the language of the condition of the

bond relating to repairs. The respondent contends that the condition is effective only as a guaranty that the work and materials will be done and furnished according to the stipulations of the contract and hence that the bond stands as security for the faithful performance thereof. The language of the ordinance and the condition are very nearly identical, so that the consideration of the purpose of the former must necessarily aid us in arriving at the true construction of the latter. By the ordinance the contractor is required in the first place to give a good and sufficient bond, in amount equal to the contract price, conditioned, among other things, that he will commence and complete the proposed improvement according to the specifications. In addition to this, another bond, in a sum equal to 25 per cent of the contract price, is required to be given, conditioned as is the one in suit. Now, the evident purpose of the common council in requiring the larger bond was to secure a faithful performance of the contract in all its details, as by its terms it is equivalent to a requirement that the improvement shall be completed according to specifications, and this, we assume, comprehends the quality of the materials stipulated for, as well as the manner of the workmanship. So there would appear to be no need of the lesser one, except to subserve some other purpose; and it is not reasonable to suppose that the two bonds were intended to afford to the city cumulative remedies for the accomplishment of one and the same end. The language and grammatical arrangement of the ordinance and condition are in harmony with this thought. The obligation is to repair injuries arising from several causes, among which are such as may arise from defective materials and workmanship. A guaranty against injuries for a reasonable time after completion, which may be attributable to these specific causes, might be regarded as a suitable, and perhaps proper, test of substantial compliance on the part of the contractor, and therefore might be held to operate as a guaranty of faithful performance, for it is sometimes argued that, if the work is well done, it would need no repairs within such

And a contract for paving a street, by which the contractor agrees to keep the pavement in repair for seven years, compels the property owners to pay the contract price, not only for laying the pavement, but also for seven years' repairs, and is invalid where it is the duty of the city to make repairs. *Ibid.*

So, a contract pursuant to an ordinance directing the paving of a street, requiring the contractor to keep the street in repair for five years, and retaining 10 per cent of the contract price as a guaranty or security for the faithful performance of that undertaking, is illegal, and the stipulation for keeping the street in repair is not enforceable, and the sum set apart for repairs cannot be collected from the abutting owners. *Bullitt v. Selvage*, 20 Ky. L. Rep. 599.

A city bound to repair its streets cannot, by forcing a bargain on a contractor for a cheap rate of repaving as a condition for letting a contract for the reconstruction of a street, impose on the adjoining property as a special tax for reconstruction an uncertain and unascertainable portion of the expenses properly charge-

able to the city for the repairs. *Vardin v. St. Louis*, 131 Mo. 26.

And an ordinance for the paving of a street, requiring the contractor to agree to keep the pavement in repair for seven years from and after its acceptance by the city, without expense to the city or abutting property owners, in effect imposes the cost of keeping the pavement in repair for that time upon the abutting property owners. *Schenectady v. Union College*, 66 Hun. 179, *dictum*.

And see **PORTLAND V. PORTLAND BITUMINOUS PAVING & IMPROV. CO.**

And a provision in a contract for paving a street binding the contractor to give bond to maintain the pavement in good order for five years after its completion and acceptance, and to make the repairs which may become necessary within such time by reason of any imperfection in the work or material, or which may become necessary by reason of any crumbling or disintegration of the material generally, without limiting it to any particular cause, where the duty of repaving a street once paved is

time. Still it is not a felicitous way of stating the guaranty for sound and good work. *Covington v. Boyle*, 6 Bush, 204. However that may be, such could not be the purpose of the bond in suit, because the city took another looking to that end. The causes assigned are so broad and comprehensive in their scope as to include injuries arising from every substantial source, and, in effect, subjoins an independent condition, not covered by the contract. So that the undertaking is simply to keep and maintain the street and pavement in repair for a designated period of time, regardless of the quality of the material stipulated to be furnished or supplied, or the workmanship to be employed. Upon the other hand, it is urged that the bond is invalid, because it was given as a guaranty that the contractor shall make and keep up the repairs upon the street and pavement, the expenses for which the city has, without power or rightful authority, assessed against the adjoining property. The city is empowered by charter provisions to improve its streets, and to assess the cost thereof against the adjacent property. Charter City of Portland, §§ 94, 100. It may also repair any street, or part thereof, whenever it deems it expedient, and assess the cost against such property; but before doing the same it must be declared by ordinance whether the cost shall be so assessed or paid out of the general fund. When it is declared that the proposed repair shall be made at the cost of adjacent property, thereafter it is to be deemed an improvement, and shall be made accordingly. Id. §§ 122, 123. So that we find here authority to make both improvements and repairs, and to assess the expense thereof against adjacent property. The manner of procedure in either instance is somewhat different, but the power remains. The repair contemplated, however, is such as the council may deem expedient to be made; that is, the necessity therefor must exist by the consideration of that body. Like an improvement the probable cost of making it must be ascertained and determined, and this forms the basis for the assessment. As it pertains both to the improvement and re-

pair, the council is empowered to make provisions for present exigencies, and it may charge the expense thereof against the property supposed to be benefited. Beyond this it would appear that it is not authorized to act. We have not been referred to any provision in the charter authorizing it to make contracts for keeping or maintaining streets or highways, or any improvements thereon, made or to be made, in repair, or to levy the estimated cost of anticipated future repairs against property of individuals. It is manifest that the letting of the contract upon condition that the contractor should bind himself to keep up repairs for a period of five years, due generally to traffic, disintegration, and decay, defective materials and workmanship, was calculated to increase the amount of the bid by the estimated cost of such repairs. At least, the condition imposed an additional burden, which would not be assumed or undertaken without compensation. And the contractor would very naturally be expected to demand a higher price, in consideration of the obligation to assume the additional burden. Thus, by exacting the bond, a burden was undeniably imposed upon the adjacent property beyond such as was authorized by the charter. Such, in effect, is the holding of the court in *Brown v. Jenks*, 98 Cal. 10, wherein the court says: "This act contains no grant of authority to the city council for keeping a street in repair. Section 2 authorizes the council to contract for different kinds of street work. In all cases the work authorized is such as is necessary to make and complete a street, or to repair existing defects. The bond is not only unauthorized by the words of the statute, but the requirement changes, and may increase, the burdens of the property owner. It is manifest that the obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore a contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense undertaken is indefinite, and the property owner must pay for them in advance, whereas the statute provides for repairs after the necessity for

thrown upon the city at large, is not a mere guaranty that the work will be done in accordance with the terms of the contract, and a pavement constructed which will last five years without the necessity of repairs, but is a contract for repairs rendering the assessment against the abutting lotowners to pay the cost thereof illegal and void. *Kansas City v. Hanson* (Kan. App.) 55 Pac. 513.

And an ordinance and a contract pursuant thereto for the paving of a street, requiring that the contractor shall keep the pavement in good repair for a period of five years from the completion of the work and its acceptance by the city, and deposit bonds amounting to 10 per cent of the contract price as security therefor, charges the property holders with the cost of repairs to the street for that period in addition to the cost of original construction, and is therefore invalid under Ky. Stat. §§ 2883, 2884, providing that improvements by original construction are to be made at the cost of the owners of the abutting lots, and that improvements by reconstruction or repair are to be 44 L. R. A.

provided for out of taxation upon the city at large. *Fehler v. Gosnell*, 99 Ky. 380.

In the above case *Louisville v. Henderson*, 5 Bush, 520, *infra*, III., was distinguished upon the ground that that case was decided upon the theory that the thing stipulated was that the contractor would keep his work in repair, but not that he would repair all injuries to the street which might result from causes other than defects in his work, and *Covington v. Dressman*, 6 Bush, 214, *infra*, III., was distinguished upon the ground that the contract to keep in repair for six months in that case was simply a guaranty that the work was well done, so that it would not need repair in that time. Though the method of expression of the guaranty was perhaps an unfortunate one.

So, a provision in a contract for paving a street, that the contractor will be required without additional compensation to keep in good order and repair all the work done thereunder for a period of five years after the date of completion, and to guarantee that during that time neither the authorities nor property owners

them appears. Then it being contingent, he will be paying for repairs which may never be required." In *People, Hall, v. Maher*, 56 Hun, 81, it appears that by the provision of the charter of the city of Albany, New York, the expenses for ordinary repairs of a certain avenue to be paved with Trinidad asphalt were to be borne by the city. But the city council, in its ordinance providing for the pavement, required the contractor to agree "to keep the said pavement in repair for seven years from and after its acceptance by the city, without expense to said city or abutting property owners," which provision was inserted in the specifications under which bids were received for the work, and pursuant to which the contract was made. It was held, on the question of its validity, that the necessary effect of the contract was to charge upon property owners the cost of keeping the avenue in repair in violation of the charter regulations, and the contract was therefore adjudged to be illegal. To the same effect, see *Fehler v. Gosnell*, 99 Ky. 380; *McAllister v. Tacoma*, 9 Wash. 272; *Boyd v. Milwaukee*, 92 Wis. 456; *Verdin v. St. Louis (Mo.)* 27 S. W. 447, 131 Mo. 26. *Schenectady v. Union College*, 66 Hun, 179, illustrates the distinction drawn by the authorities touching the effect of the condition. In that case the undertaking was to "do all the work required by such ordinance and this contract in such good and substantial manner that no repairs thereto shall be required for the term of five years after its completion." And it was held, distinguishing *People, Hall, v. Maher*, 56 Hun, 81, that the clause referred to had reference solely to the substantial character of the work performed and materials used in the performance of the contract. A like distinction is observed in *Cole v. People, Barnecolt*, 161 Ill. 16. But the bond in question is distinctly an independent undertaking to keep the street and pavement in repair, made so both by the ordinance and the language thereof, covering, in effect, all injuries liable to arise, from whatsoever source. It is clear that under the authorities, based upon what we believe to be sound reasoning, the assessment against property to meet the additional expense of such repairs was unwarranted by the char-

ter. But it does not follow that, because the assessment is void in so far as it may provide for the especial fund which forms the consideration for the bond, the bond itself is invalid and illegal, and not capable of being enforced, if authority is found elsewhere for the city to enter into such a contract with the paving company. *Portland Lumber & Mfg. Co. v. East Portland*, 18 Or. 21, 6 L. R. A. 290. But there was an evident lack of statutory power for entering into a contract for keeping and maintaining the street and pavement in repair, and consequently a want of legal authority to use the public moneys for that purpose. Under the charter the council was required to provide for taking security by good and sufficient bonds for the faithful performance of any contract let under its authority. City Charter 1891, § 116. It was authorized to let contracts for the repair of streets where present necessities required, or which may have been deemed expedient by the common council, but not to expend the funds of the public or the property owners of the municipality, and let contracts for anticipated future repairs. And this is just what it has attempted to do. Upon the other hand, it is strongly urged by plaintiff that the bond can be enforced as a common-law obligation, and of this we will now inquire. It has been held by this court that bonds or undertakings intended to be given in compliance with statutes, although having failed in substantial compliance therewith, will, if entered into voluntarily, and founded upon a valid consideration, and they do not violate public policy or contravene any statute, be enforced as common-law obligations. *Bunneman v. Wagner*, 16 Or. 433. The rule is, perhaps, more tersely stated by the Supreme Court of the United States, that, if a contract is entered into by competent parties, and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law. *United States v. Tingey*, 5 Pet. 115, 8 L. ed. 66; *United States v. Linn*, 15 Pet. 290, 10 L. ed. 742. That the bond in question was entered into voluntarily cannot be gainsaid, and the sufficiency of the consideration must also be conceded.

The question remains, Is the obligation

shall be under any expense whatever for repairs made necessary on account of any defective workmanship, material, or other reason, with certain specific exceptions, and that there will be retained until the expiration of such time out of the money payable to the contractor a designated per cent as a guaranty that he will conform to such requirements, is illegal, and an assessment based thereon is invalid, under a charter containing no provision for levying assessments against abutting property for repairs of a pavement or a street, but specifically providing that the expense of maintaining and keeping streets in repair shall be paid out of the ward fund. *Boyd v. Milwaukee*, 92 Wis. 456.

In the above case *Morse v. West Port*, 110 Mo. 502, *infra*, VI., was distinguished upon the ground that in that case the contract was held valid because the charter expressly authorized assessments upon adjoining lots for repairing streets, and *Schenectady v. Union College*, 66 Hun, 179, *infra*, III., was disapproved but distinguished upon the ground that the contract in 44 L. R. A.

question, though in somewhat similar terms, was not so broad and sweeping as the one in hand.

So, in the *Verdin Case*, 131 Mo. 26, it was held that a requirement by ordinance that a contractor should maintain a pavement built by him for a term of years could not be distinguished from a contract for repairs within the meaning of a charter provision that a contract for repairs is required to be let to the lowest bidder.

A requirement in a street-paving contract that the contractor shall keep the streets in repair for five years imposes an additional burden on the property owners, and so vitiates the assessment unless expressly authorized by statute. *Excelsior Paving Co. v. Leach (Cal.)* 34 Pac. 116.

And a contract by a board of public works for the construction of a street, exacting a bond from the contractor guaranteeing the pavement for five years, has the effect of making the abutting property owners pay for all repairs

void as against the sureties of the obligor, for it is they who are prosecuting this appeal? It is a general rule of law that, where the obligor has obtained and availed himself of the benefits to be derived from the execution of the bond, neither he nor his sureties can defeat their liability because of some irregularity in the proceeding in which the bond originated. Having obtained the benefit, they are estopped from setting up the irregularity. *Carlon v. Dixon*, 12 Or. 148; *Johnson v. Weatherwaa*, 9 Kan. 75; *Nunn v. Goodlett*, 10 Ark. 89. So it has been held that an obligor will not be permitted to defeat his liability by showing want of jurisdiction in the court before whom the action was pending, or the unconstitutionality of the law by virtue of which the bond or obligation had its inception. *McDermitt v. Isbell*, 4 Cal. 113; *State, Cantrell, v. Stark*, 75 Mo. 566; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187. In the latter case an action was sustained upon a bond given under and by virtue of an ordinance of the state of Virginia, which was held by the national courts to be unconstitutional and invalid by reason of the treasonable motive and purpose by which its authors were animated in passing it. Mr. Justice Swayne, speaking for the unanimous court, says: "It is well settled, as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect." The following, among other, cases are cited in support of the doctrine: *Ferguson v. Landram*, 5 Bush, 230, 96 Am. Dec. 350; *Burlington, C. B. & M. R. Co. v. Stewart*, 39 Iowa, 267; *Van Hook v. Whitlock*, 26 Wend. 43; *Burlington v. Gilbert*, 31 Iowa, 356, 7 Am. Rep. 143; *United States v. Hodson*, 10 Wall. 409, 19 L. ed. 940. But here another and a different principle is involved. A municipality with limited and circumscribed

powers and authority is a party to the contract, and the validity thereof depends for its support upon the requisite power of the city to enter into and enforce it. It is a doctrine of all the authorities that, if a municipality acts wholly beyond the scope of its express or implied authority, it is not estopped to set up that fact to defeat any alleged claim or demand arising by virtue of such unauthorized acts, and it is said that neither the doctrine of estoppel, of ratification, nor of bona fide holding can be invoked to support such a transaction. *Sutro v. Pettit*, 74 Cal. 332. "This doctrine," says Dillon, "grows out of the nature of such institutions, and rests upon reasonable and solid grounds." 1 Dill. Mun. Corp. § 457. It is essential to the welfare and protection of citizens and taxpayers who contribute to the revenues, and whose property is subject to the laws and ordinances of municipalities, that they should be held to the exercise of such powers only as have been delegated to them through legislative enactment. They possess no powers but such as are delegated, or may be necessary to their exercise, and thereby implied, and the courts have been solicitous that they exercise none that they do not possess. Their creation being by public statute, and for definite and legitimate objects, to which their funds are to be applied, contracts which have no connection with such purposes, or which, by natural intendment, will cause an illegal or wrongful application of their funds or the funds of their citizens with which they are intrusted by chartered powers, or an application to other or foreign objects, are *ultra vires*, and void. 2 Dill. Mun. Corp. § 936. In *Newbery v. Fox*, 37 Minn. 141, it is said: "The doctrine of *ultra vires* has, with good reason, been applied with greater strictness to municipal bodies than to private corporations, and, in general, a municipality is not estopped from denying the validity of a contract made by its officers, when there has been no authority for making such a contract. . . . A different rule of law would in effect, vastly enlarge the power of public agents to bind a municipality by contracts, not only unauthorized, but prohibited, by law.

in advance for five years, and is unauthorized where there is nothing in the charter on the subject of repairs, the presumption in such case being that ordinary repairs will be taken care of by the city. *McAllister v. Tacoma*, 9 Wash. 272.

In the above case, *Schenectady v. Union College*, 66 Hun, 170, *infra*, III., was distinguished upon the ground that in that case the contract was that the work should be done in such a manner that no repairs would be needed for five years, and that if any should be required the contractor would make them, which was held to be a mere guaranty of the quality of the work.

So, an obligation imposed upon a contractor for the paying of a street to give a bond to keep the street so improved in thorough repair for a term of five years from the completion of the contract, is a burden which would lead a contractor to charge a higher price for the work than he would do if he were not also forced to contract for repairs; and as the amount of repairs required is unknown, and the ex-

pense is indefinite and contingent, and the property owner must pay for them in advance, and possibly might be required to pay for repairs which were never needed, it is invalid under a statute providing that needed repairs shall be made by the owners of frontage when the repairs are required. *Brown v. Jenks*, 28 Cal. 10.

A city council cannot provide for repairs by requiring a contractor paving a street to give bond conditioned for its maintenance in good order for a designated time after its acceptance, and to make all repairs which may be necessary from imperfection in the work or material in anticipation of their necessity, but can only provide therefor as the necessity arises. *Kansas City v. Hanson* (Kan. App.) 55 Pac. 513.

And the fact that a bid for the construction of a pavement in a street did not include any item for repairs does not relieve an ordinance providing for the construction of such pavement, requiring the contractor to agree to keep it in repair for seven years, from invalidity on account of such agreement, as other bidders

It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents, and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent." A distinction is recognized between acts of the municipality or governing body, which are not within the scope of their general powers, and such as may be open to the objection that they are lacking in some technical and formal regularity in their adoption, or that there has been a nonobservance of some collateral act or formality prescribed, not jurisdictional in its character. The former are clearly and always void, while the latter, if they lead to a perpetration of a fraud upon contracting parties acting upon the faith of laws and ordinances apparently regular and valid, will be held to bind the municipality upon the principle of having received and appropriated benefits derived on account of them, and it will be estopped to deny their validity. *Moore v. New York*, 73 N. Y. 245, 29 Am. Rep. 134. Thus, in *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659, it was held that, where the municipality had the power to contract for the improvement of the sidewalks, but in making such a contract it agreed to pay by giving its bonds, which it had no authority to do, and, having received benefits at the expense of the other contracting party, it could not object that it was not empowered to make payment in the mode sought to be adopted, and that, while the city could not be held to a specific performance of its undertaking, yet that it was liable to pay the contractor under the contract. The principle is recognized, and pertinently discussed, by Mr. Justice Strahan in *Portland Lumber & Mfg. Co. v. East Portland*, 18 Or. 21, 6 L. R. A. 290, wherein a technical defect in a notice required by the statutory procedure in levying a local assessment was urged as a defense. He says: "I do not think, under the charter, this technical defect in the notice destroyed or impaired the power of the city to contract. . . . The defendant's claim is not that the general power did not exist, but there was a slight departure from the authority

conferred in the particular already pointed out, and for that reason the whole proceeding was *ultra vires* and void. Under the circumstances of this case, I am unable to accede to this argument." It must be conceded that a municipality will be estopped to enforce the performance of a contract under the same or like conditions that an individual will be estopped to proceed against it. If it has exceeded its general powers in attempting to enter into contractual relations with an individual, and if, because of its exercise of such excess of authority, the individual, who is charged with knowledge of its just powers, is left without remedy, there is no good or sufficient reason why the city should not, under like circumstances, be estopped to proceed against the individual. The contract is invalid by reason of the lack of power to enter into it, and, if invalid as to one of the contracting parties, it is also invalid as to the other. "So, on the other hand," says Mr. Dillon, "a party making with a city a contract which is *ultra vires* is not estopped, when sued thereon by the corporation for damages, to set up its want of authority to make it." 1 Dill. Mun. Corp. § 458. It is sometimes asserted that a contract made by a municipal corporation, where there exists a defect of power, or even a want of power to so contract, yet if not made in violation of charter regulations of any statute prohibiting, is not illegal; and, if such a contract has been executed, and benefits have been received and appropriated, the party receiving them is estopped to deny its validity. *St. Louis v. Davidson*, 102 Mo. 149; *State Bd. of Agri. v. Citizens Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702, is to the same effect as applied to a private corporation. This doctrine has been criticised as too broad and unsound, and contrary to the great weight of authority. 1 Beach, Pub. Corp. §§ 217, 218. But, however this may be, it is not thought to be entirely applicable to the case at bar. It, as we have seen, was clearly beyond the express or implied powers granted to the city to contract for keeping and maintaining the street and pavement in repair against injuries that might arise from all causes for the period

may have thought it necessary to make their prices higher because of such requirement, and if no such requirement had been made they might have made proposals lower than that of the contractor whose bid was accepted. *People, Hall, v. Maher*, 56 Hun. 81; *Excelsior Paving Co. v. Leach* (Cal.) 34 Pac. 116; *Brown v. Jenks*, 98 Cal. 10.

A provision in a contract for the paving of a street requiring the contractor to give bond for keeping the street in repair for a term of five years, cannot be upheld as a guaranty that the work would be well done and would not require repairs, as such a requirement might increase the charge for which the work is undertaken. *Brown v. Jenks*, 98 Cal. 10.

And a proprietor of a lot abutting upon a street cannot be made to pay for a guaranty by a contractor paving the street that it shall last for a designated number of years and an agreement to keep it in repair for that time, where such guaranty may become worthless before the time has elapsed, and it is the duty of the officers of the city to see that the work is properly

done. *Kansas City v. Hanson* (Kan. App.) 55 Pac. 513; *Brown v. Jenks*, 98 Cal. 10.

III. Agreements constituting mere guaranty.

A contract for paving, requiring the contractor to keep the pavement in repair for a year, might not be held invalid, since a year might reasonably be considered a reasonable time within which to test the pavement, as defects may not appear immediately. *People, Hall, v. Maher*, 56 Hun. 81, *dictum*.

And such a contract to keep the work in repair for six months merely binds the contractor to make good any work which may have been defectively done, and is not invalid. *Louisville v. Henderson*, 5 Bush, 521.

And that case was followed in a case of a contract to keep in repair for two years, in *Covington v. Dressman*, 6 Bush, 210.

So, an agreement by the contractor, in a paving contract in which the pavement was guaranteed for five years, to keep the pavement in repair for an additional term of five years at a fixed price, and to turn the pavement over to the

of five years. If it could contract for this length of time in the future, why not for a much longer, or even an indefinite, time, and use the funds of the city or abutting property owners for payment in advance? It is undoubtedly a duty which is due to the public, and enjoined upon the city, to see that the streets are kept in reasonable repair. But the mode of making repairs is specifically pointed out, and limited to present necessities, and thereby constitutes the measure of power; and, being the only manner designated, must be construed as a prohibition of any other method. That is to say, the city is not only powerless to adopt any other mode or method, or to expend the public moneys in its promotion, but it is prohibited from proceeding in any other manner. While the contract has been fully executed on the part of the city, yet it cannot, by reason of its invalidity, recover damages on account of a breach thereof. In further support of these views, see *McDon-*

ald v. New York, 68 N. Y. 23, 23 Am. Rep. 144; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 30; *Nash v. St. Paul*, 8 Minn. 172 (Gil. 143); *Covington & M. R. Co. v. Athens*, 95 Ga. 367; 1 Beach, Pub. Corp. § 217; *Durango v. Pennington*, 8 Colo. 257.

We have come to this conclusion after much and careful deliberation, because of the importance of the matters involved, but we are satisfied that the rule adopted touching the invalidity of the acts of a municipal corporation where entirely beyond the general scope of its powers is the only safe one, in view of the safeguards which should always be maintained against the unauthorized acts of the authorities and the illegal use of the funds of municipalities.

The judgment must, therefore, be reversed, and the cause remanded, with directions to the court below to sustain the demurrer.

Rehearing denied.

NEBRASKA SUPREME COURT.

Edward L. ROBERTSON, *et al.*, *Appts.*,
v.

City of OMAHA *et al.*

(55 Neb. 718.)

- *1. Under the provisions of § 69, chap. 12a, Comp. Stat. 1891, the costs of making "ordinary repairs" in street pavements cannot be assessed against the abutting lotowner, but must be paid by the city.
2. A paving contract which binds the contractor to bear the expense for the term of ten years of "all repairs which may, from any imperfection in the said work or material, become necessary within that time" does not include "ordinary repairs," nor is said stipulation in violation of said chapter 12a.
3. The contract mentioned in the opinion construed, and held not to cast the burden on the abutting lotowner to make "ordinary repairs."

*Headnotes by NORVAL, J.

city at the end of such additional term in good order and condition, forms no barrier to the collection of a special tax imposed for the first cost of the improvement, where it is not shown that such provision for additional maintenance had any bearing on the original cost, or that it added in any way to the expenses properly authorized by charter to be imposed as a special tax on neighboring property. *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543.

And a requirement in an ordinance and a contract for the improvement of a street pursuant thereto, that the pavement and materials composing it should be kept in good repair for a period of five years from the completion and acceptance of the work, binds the contractor to remedy defects in his work, as they may appear or develop, but does not require him to keep the street in repair, as he cannot be presumed to have added the expense of repairs to his estimate, and the assessment therefor is not illegal as the abutting owner will not be deemed to have been required to pay either directly or indirectly for repairs. *Gosnell v. Louisville*, 14 44 L. R. A.

4. This court will not disturb a finding of fact based upon conflicting evidence.

5. Where, in case of a street paved with wooden blocks laid on a concrete base, such blocks have become worthless, and are entirely removed in pursuance of a contract entered into with the city, and replaced with vitrified brick laid on the old base, such new improvement is not an "ordinary repair," within the meaning of the statute, but is a repavement of the street, and to pay the costs thereof a special assessment may be made against the abutting real estate.

(September 23, 1898.)

A PPEAL by plaintiffs from a decree of the District Court for Douglas County in favor of defendants in a proceeding to restrain the levying of a special tax upon the plaintiff's property for the cost of repaving a certain street. *Affirmed.*

The facts are stated in the opinion.

Ky. L. Rep. 719. And see also *ROBERTSON v. OMAHA*.

So, a provision in an ordinance for the paving of a street that the contractor shall furnish a bond as a guaranty that he will faithfully perform the work in accordance with the agreement, and, without further compensation, keep in continuous good repair all pavements laid thereunder for a period of five years, will be deemed a mere warranty or a guaranty of the fitness of the material for the use intended, where there is nothing to indicate that any of the money raised by special taxation was to be applied to the purposes of maintaining the pavement and keeping it in repair. *Cole v. People*, *Barnewolt*, 161 Ill. 16.

And the fact that the plans and specifications for the improvement of a street are, by reference, made a part of the ordinance, and that one of the specifications requires the contractors to furnish a bond to faithfully perform the work and to keep the pavement laid by them in good repair for five years, does not necessarily make the ordinance one which provides for the main-

Messrs. J. C. Cowin and W. D. McHugh for appellants.

Mr. E. H. Scott, for appellees:

Repairs which may from any imperfection in the said work or material become necessary are not ordinary repairs.

People, Hall, v. Maher, 56 Hun, 81; *Schenectady v. Union College*, 66 Hun, 179; *State, Wilson, v. Trenton*, 60 N. J. L. 394.

There being no evidence of fraud or corruption on the part of the city officials in accepting the pavement in question, the court will not inquire as to whether the same was or was not in conformity with the requirement of the contract, or as to whether the same was or was not a satisfactory pavement.

Liebstein v. Newark, 24 N. J. Eq. 201; *State, Vanderbeck, v. Jersey City*, 29 N. J. L. 441; *Cooley*, Taxn. 1st ed. p. 468; *Ricketts v. Hyde Park*, 85 Ill. 113; *Powers v. Grand Rapids*, 98 Mich. 393.

This action is brought to enjoin the city council from levying an assessment against the property of the plaintiffs to pay the cost of the paving in question. The passage of the contemplated ordinance would constitute an exercise of the legislative function of the municipal body with which the court as a co-ordinate branch of the government will not interfere. Courts have no jurisdiction or power to restrain the passage of an ordinance, nor can they interfere with the legislative discretion of the mayor and city council.

Des Moines Gas Co. v. Des Moines, 44 Iowa, 508, 24 Am. Rep. 756; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 18 L. R. A. 832; *Alpers v. San Francisco*, 32 Fed. Rep. 505; *Beach*, Modern Eq. Jur. § 677; 1 Dill. Mun. Corp. p. 308, note p. 387; *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 4 L. R. A. 616.

Mr. W. J. Connell also for appellees.

Norval, J., delivered the opinion of the court:

The object of this action is to perpetually restrain the city of Omaha from levying a special assessment or special tax upon the

premises described in the petition to pay the costs of repaving Leavenworth street, in said city, between Sixteenth street and Twenty-Ninth avenue. From a decree for the city, plaintiffs appeal.

It is disclosed by the record that there was duly created in said city street improvement or paving district No. 447, including Leavenworth street, and the property abutting thereon on each side to the distance of 132 feet, between Sixteenth street and Twenty-Ninth avenue, and that said Leavenworth street in said improvement district was paved with cedar blocks, laid on a concrete foundation. Prior to April 12, 1892, this pavement had become in such a dilapidated and worthless condition as to require said portion of Leavenworth street to be repaved, and on said date an ordinance was duly passed declaring the necessity of repaving said portion of the street, and authorizing the property owners in said improvement district within thirty days to designate the kind of material to be used in making the improvement. A petition was filed with the city clerk, signed by plaintiffs and other owners of lots abutting upon Leavenworth street within said improvement district No. 447, and representing a majority of the feet frontage thereon, and a majority of the area within said district, asking the repavement of said street in said improvement district, and designating vitrified brick as the material desired to be used in such repaving. An ordinance was subsequently passed and approved, providing for the repavement of said Leavenworth street with vitrified brick, and ordering the board of public works to contract therefor. A contract was duly made with one Hugh Murphy to repave said street, who performed the work, and the city authorities accepted the improvement. Afterwards the city council sat as a board of equalization, due and legal notice thereof first having been given, for the purpose of equalizing the proposed levy of special taxes to meet the costs of said improvement, and at such meeting adopted a plan of assessment. This suit was instituted to prevent the levy of the special taxes in accord-

tenance and repair of the street for five years by special taxation, and therefore invalid as imposing upon abutting owners a burden which should be borne by the city at large. *Ibid.*

And specifications in a contract for paving, curbing, and improving a street, providing that the contractor shall without any extra compensation keep in repair the curb and gutter for a period of two years after final acceptance by making good any settlement or derangement of lines or grades of curbs, gutters, and crossings, and by replacing defective materials or work in curbs, gutters, crossings, and pavements, is no more than a guaranty that the work has been properly done and that the contractor will repair it if defective, where in estimating the cost of the improvement, the cost of repair was not taken into consideration, and such provision is not invalid as imposing on abutting owners the cost of repairs which should be paid for by the city. *Latham v. Wilmette*, 168 Ill. 153.

But see *Kansas City v. Hanson* (Kan. App.) 55 Pac. 513; *Fehler v. Gosnell*, 99 Ky. 380; *Boyd v. Milwaukee*, 92 Wis. 456; *Excelsior Paving Co. v. Leach* (Cal.) 34 Pac. 116; *Brown v. 14 L. R. A.*

Jenks, 98 Cal. 10; *McAllister v. Tacoma*, 9 Wash. 272. — *supra*, II.

So, a provision in a contract for paving a street by which the contractor guarantees to put down a pavement which shall remain in good condition for at least five years, and if it gets out of order during that period he will restore it at his own expense, is merely an added precaution for insuring good workmanship and the use of good material, and a method of enforcing the guaranty of the contractor by a speedier and less expensive method than by suit, and does not have the effect of imposing upon abutting owners any burden other than that of having the pavement well constructed at the outset, and is not subject to the objection that they are thereby required to pay for repairs which are chargeable generally to the city. *State, Wilson, v. Trenton*, 60 N. J. L. 394. Affirmed on appeal, *STATE, WILSON, v. TRENTON*.

And a provision in a contract for paving, curbing, and guttering a street that the contractor will be required at any time within two years after the acceptance of the work with-

ance with such plan. The contract with Hugh Murphy, under which the improvement was made, contained the provisions following: "(15) The contracting party of the second part hereby expressly guarantees the above work for the full period of ten years from approved acceptance of the work, and said party binds himself and his heirs and assigns for the entire expense of all repairs which may, from any imperfection in the said work or material, become necessary within that time. (16) And it is hereby agreed that the amount reserved, and accruing interest, by the city of Omaha, as guaranty, for the maintenance of the work herein specified, shall be used as a special fund for making repairs or reconstruction as deemed necessary by the board of public works, in the manner provided, as follows: If at any time within the period of guaranty, after the completion and acceptance of the work herein contracted for, the said work shall, in the judgment of the city engineer and board of public works, require to be repaired and resurfaced or reconstructed, the board of public works shall notify the said second party to make the repairs required, and, if the said second party shall neglect to proceed with such repairs within three days from the date of the service of such notice, then the board of public works shall have the right to cause such repairs or reconstruction to be made in such manner as they and the city engineer shall deem best; and the whole cost thereof, both for labor and material, shall be paid out of the special fund before mentioned, or, if necessary, at the expense of the contractor and sureties. (17) . . . Failure or neglect on the part of the inspector to condemn inferior work or material at the time it is being supplied or done shall not be construed to imply an acceptance of any work. If it becomes evident to the board of public works, at any time prior to the payment of the 15 per cent reserve, that improper material has been furnished or inferior work done upon said improvement, it shall have the right to order the removal of such material or work, and to require that suitable material be supplied, and proper work done in lieu thereof by said contractor,

out an additional compensation to replace any soft, disintegrated, or defective tile, curbing, or brick, or any material which proves to be inferior in quality, and to make good any settlement or derangement in the surface of the roadway, gutter, or curbing which may occur within such period, is simply a guaranty of the work and durability of the materials, and not a provision for repairs, the expense of which is imposed upon the city by the provisions of Iowa Code 1873, § 465. *Allen v. Davenport*, 107 Iowa, 90.

And a provision in such a contract by which the contractor guarantees that the curbing, guttering, and paving shall be done and completed according to contract, and that the same shall remain, except as to certain defects not caused by the contractor or his employees, at the end of five years in as good condition as when completed, and that any necessary repairs, with the same exception, shall be made by the contractor, is not a provision for repairs within the provision of a statute requiring the city to pay for repairs, but is in effect a guaranty that the

without expense to the city. (18) As a basis of interpretation of the acceptable condition of pavements at the expiration of the period of guaranty, it is hereby agreed and understood that, if the paving material is found, and the wearing surface of the roadway shall possess no less than 75 per cent in the thickness of the specified depth of the original paving material, in a reasonably smooth condition for travel, it shall be considered as meeting the requirements for final acceptance." The contract, under the head of "Guaranties," contains this stipulation: "All pavements embraced in these specifications and bidding specifications are based upon a guaranty that the pavements will be well and substantially constructed, as heretofore provided, and that such pavements will be maintained by the contractor in a condition of continuous good order and repair for the period of ten years from and after the date of their approved acceptance. All securities held as reserves, and accruing interest thereon, shall be subject to use for such maintenance and repairs by the city of Omaha in the event of the failure of the contractor to keep such pavements in proper condition, it being expressly understood and agreed that the board of public works and city engineer shall determine when repairs or reconstruction are necessary; and failure by contractor to comply with a written order, or to enter upon such work within ten days, and complete the same within a reasonable time, shall be held as sufficient authority on the part of the city of Omaha to execute the work, and draw upon the reserve fund to defray the expenses thereof, or at the expense of the contractor and sureties or both. . . . It is distinctly understood, and hereby agreed, that all guaranteed pavements shall receive prompt attention in their maintenance, and, when repairs shall fail to be made within twenty days of written notice from the board of public works, a charge of ten cents per square yard of the entire area within the block requiring repairs shall be made against the contractor for every month or fraction thereof that the repairs of said pavement shall be neglected."

It is argued by counsel for plaintiffs that

improvement shall be of such a character that it will remain in the condition it was in when first completed for the term of five years, and does not therefore vitiate the contract. *Osburn v. Lyons*, 104 Iowa, 160.

In the above case, *Boyd v. Milwaukee*, 92 Wis. 466; *Brown v. Jenks*, 98 Cal. 10; *Verdin v. St. Louis*, 131 Mo. 28; and *Fehler v. Gosnell*, 99 Ky. 380, *supra*, II.,—were distinguished upon the ground that the contract in those cases was held to include a charge for repairs, and to that extent to have been unauthorized.

So, a covenant by a contractor in a contract for the paving of a street that he will do all the work required by the ordinance authorizing the contract, and in such good and substantial manner that no repairs thereto shall be required for a term of five years after its completion, is a mere guaranty that the work shall conform to the requirement of the ordinance, and not an independent obligation, and is not therefore unauthorized as imposing upon the abutting property owners the burden of paying for keeping the pavement in repair for the design-

the proposed levy of the special taxes in question is illegal, for the reason that it includes the costs and expenses of repairing the pavement for ten years. This argument is predicated upon the provisions of the contract already set out, and a clause contained in § 69, chap. 12a, Comp. Stat. 1891. This section, after authorizing the levy and collection of special taxes and assessments upon the lots or pieces of ground abutting upon or adjacent to any street to defray the costs and expenses of improving or repairing such street, declares "that the above provision shall not apply to ordinary repairs of streets or alleys, and one half of the expense of bringing streets, avenues, alleys, or parts thereof to the established grade shall be paid out of the general fund of the city except as otherwise hereinafter provided." It would seem that this clause places the burden upon the entire city to make ordinary street repairs, and that special assessments cannot be levied upon the real estate abutting upon any street to cover the expenses of making the ordinary or usual repairs of the pavements thereon. If, therefore, the contract with Murphy obligated him to make the ordinary repairs required to maintain in good condition the pavement laid by him on Leavenworth street, in said district No. 447, there would be much force to the argument of plaintiffs that this special assessment is invalid, at least to the extent that such assessment included the costs of all ordinary repairs, since the expense of making them is a burden assumed by the city, and cannot be assessed upon adjacent lotowners. An examination and consideration of the paving contract entered into by the city with Murphy are necessary to determine whether the proposed assessment requires the property owners to pay more than can be properly chargeable to them under the law. It will be observed that paragraph 15 of said con-

tract merely makes it the duty of the contractor to bear "the entire expense of all the repairs which may, from any imperfection in said work or material, become necessary." It requires no argument to show that this provision does not cover usual or ordinary repairs, or the expenses incident to the natural wear of the pavement, or its destruction by floods or causes other than those resulting from defective workmanship or materials. Manifestly, said paragraph was merely a guaranty on the part of the contractor for the faithful performance of his contract, and required him merely to make good any defects arising from bad materials or the improper manner in which the work was performed. Such stipulation or guaranty cast no unlawful burden upon the adjacent property owners. They are required to pay for the kind of materials and workmanship designated in the contract, and it is perfectly proper for the city to stipulate that the contractor shall be at the expense of making all the repairs occasioned by the improper construction of the pavement, either in work or materials, or both, so that the abutting lotowner shall receive what he is required to pay for. There are other provisions in the contract, other than those found in paragraph 15, quoted above, which relate to the subject of repairs, but it would be a strained and unnatural construction to hold that they refer to what is termed "ordinary repairs." If it had been the intention to require the contractor to bear the expense of all the repairs, whether resulting from use of the pavement or defective materials, or any other cause, then language expressive of such purpose doubtless would have been employed, instead of the stipulation found in said paragraph 15. Applying the usual rules of interpretation to the contract, and construing all the provisions together, it is reasonably certain that no obligation was

nated time. *Schenectady v. Union College*, 66 Hun, 179.

In the above case, *People, Hall, v. Maher*, 56 Hun, 81, *supra*, II., was distinguished upon the ground that in that case there was an express contract to keep the pavement in repair for seven years.

And a guaranty in a paving contract of the pavement for five years, and an agreement by the contractor to keep the same in repair during the period of such guaranty, and at the end of said period of five years to turn it over to the city in good order and condition, is not an agreement to repair which would charge the abutting owners with the cost of repairs properly chargeable to the city, but a mere guaranty that the work shall be properly done, where it appears that the guaranty involves no extra charge against the abutting property otherwise than would be justly payable for a lasting pavement, and that the term for keeping the agreed work in repair free of cost is no longer than the reasonable period such work should last if properly done at the outset. *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543.

In the above case, *Verdin v. St. Louis*, 131 Mo. 26, *supra*, II., was distinguished upon the ground that in that case the petition for injunction made a showing which was considered to substantially charge a scheme for forcing a bargain on the contractor for a cheap rate of

repairs as a condition of letting a contract for reconstruction of a street.

So, in *Brookfield v. Reed*, 152 Mass. 568, an agreement made by individuals with a town that they would raise a road and the abutments of a bridge to a designated height, and keep and maintain said road and abutments in good repair free of all expenses to the town forever, in consideration for which the town on its part agreed to build and forever maintain a suitable bridge over and upon said abutments, was upheld; but the question as to the effect of the agreement to keep in repair, or whether it had any effect, was not raised.

It is to be observed that as between the cases in this subdivision and those of the one preceding it there is an apparently irreconcilable conflict of authority, opposite decisions having been made in different states upon contracts almost, if not exactly, alike, and in cases involving nearly, if not quite, the same state of facts. But a close study of the cases leads to the conclusion that one uniform principle has been applied in all cases, and the diversity has arisen from the application of the principle to the facts of the different cases, the rule being that where the contract amounts to no more than an agreement to make the work what it ought to have been if properly done in the first instance, it is a mere guaranty of the quality of the work, and is not unauthorized, but anything in excess

imposed upon Murphy to make what is denominated "ordinary repairs." As suggested by counsel for the city, by paragraph 15 he guaranteed the work for a specified period, and was to bear the whole expense of replacing defective work and material during the time; and the references elsewhere in the contract on the subject of repairs should be read in the light of said guaranty, since they are intended to secure the enforcement of the stipulation against defective workmanship and materials. The conclusion is irresistible that the contract does not contemplate the making of ordinary repairs such as the act incorporating metropolitan cities relieves the abutting lotowner from making. Upon this branch of the case counsel for plaintiffs and appellants have cited, to support their position that the contract we are considering is void, the decisions in *People, Hall, v. Maher*, 56 Hun, 81; *Brown v. Jenks*, 98 Cal. 10, and *Verdin v. St. Louis* (Mo.) 27 S. W. 447. An examination of those cases will disclose that each was based upon a provision in the contract materially different from those in the one we have been considering, in that in those cases the stipulation relating to repairs was independent in character, covering usual repairs, and not intended merely as a guaranty of the faithful execution of the paving contract by the contractor. The proposition that the contract with Murphy is not rendered void by the provisions therein relating to repairs is sustained by the adjudications elsewhere. In *Schenectady v. Union College*, 66 Hun, 179, the stipulation of the paving contract there under consideration by the court was essentially the same as the one before us, and the court, in the opinion, says: "The provision to which objection was made reads as follows: 'The party of the second part hereby covenants and agrees that it will do all the work required by such ordinance

and this contract in such good and substantial manner that no repairs thereto shall be required for the term of five years after its completion.' If the contract had stopped here, it would hardly be claimed that the contract went further than the ordinance and was anything more than a guaranty that the work should conform to the requirements of the ordinance, and no one would doubt the power of the common council to prescribe the quality of the work to be done by an ordinance; and yet, if the contract had stopped there, it can hardly be doubted that the contractor would be liable to the city to keep and make good to the city the conditions of the warranty that no repairs thereto shall be required in five years after its completion. The covenant, therefore, to keep in repair for five years is not an independent obligation, but only a guaranty of the quality of the work contracted to be done. In this respect we think it essentially different from the contract under consideration in *People, Hall, v. Maher*, 56 Hun, 81, and that this case does not come under the condemnation of that decision." The precise question was passed upon by the supreme court of New Jersey in an able opinion rendered in *State, Wilson, v. Trenton*, 60 N. J. L. 394. The court observed: "The first ground upon which it is urged that this contract should be declared invalid is that, by its terms, Montgomery is made to guarantee the endurance of the pavement for a period not less than five years from the date of its completion and acceptance by the city, and to maintain the pavement in good condition at the finished grade of the street at his own cost and expense during said period, and that, upon his failure to do so, the city is authorized to make such repairs as may become necessary, and deduct the cost thereof from such moneys as it may have in hand belonging to

of this would be a contract for repairs which would be unauthorized if the duty to repair rested upon the municipality at large.

IV. *Single agreements for construction and repair.*

The action of a city in letting a contract for the reconstruction of a street and for its maintenance together is unlawful where the cost of construction is to be assessed against the property owners, while the cost of maintenance is to be paid by the city, as in such case the lettings must necessarily be separate and upon different estimates. *Verdin v. St. Louis*, 131 Mo. 26.

And such a contract is invalid as to the part with reference to the maintenance, where it fails to specify the material to be used in such repairs and include an estimate of the cost of such maintenance, under a charter provision requiring such specification and estimate in an ordinance for a public work. *Ibid.*

And the fact that a contractor is required by his contract for the construction of a pavement to give bond for its maintenance for a period of years does not legalize a contract for both the construction and maintenance, as the construction of a street and its maintenance after construction are entirely different matters, having no immediate or necessary connection with each other. *Ibid.*

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But letting a contract for paving a street and one for maintaining it under one bid under a charter provision making property adjacent to a street chargeable with the cost of the constructed pavement, and providing that the costs of repairs are payable out of the general revenue of the city, is not subject to the objection that it gives the contractor and the city the opportunity by collusion to impose upon the property a part of the cost of maintenance in the absence of evidence tending to prove that the contract price for reconstruction was not fair and reasonable, where provision was made for separating the cost of construction and the cost of maintenance, and separate bids or estimates were required for each. *Seaboard Nat. Bank v. Woesten* (Mo.) 48 S. W. 939.

In the above case, the *Verdin* Case, 131 Mo. 26, *supra*, was distinguished in the fact that the evidence shows that the word "maintenance" as used in the ordinance and contract has not the same application as the word "repairs" used in the charter, the obligation to maintain as required by the ordinance being imposed as a mere guaranty of the perfection of the work when completed, and the duty to preserve from decay and ordinary use, and that the work of repairs required by the charter to be let to the lowest bidder is a restoration of a street already defective from use and decay. And it was also distinguished upon the ground

the contractor. This provision of the contract, it is claimed, imposes upon the abutting owners, who are liable to assessment for the cost of this work in proportion to the benefit received by them therefrom, not only the burden of paying for the improvement, but also the cost of keeping it in repair for a period of five years after its completion. If this be the effect of the provision, it is clearly illegal, for, by the 87th section of the charter of the city of Trenton, 'after any street shall have once been paved, then the city shall take charge of and keep the same in repair at the general expense.' Pamph. Laws 1874, p. 376. We are referred to the following cases, which it is said support the prosecutors' contention: *People, Hall, v. Maher*, 56 Hun, 81; *Verdin v. St. Louis*, 131 Mo. 26; *Brown v. Jenks*, 98 Cal. 10; *Excelsior Paving Co. v. Leach* (Cal.) 34 Pac. 116; *Fehler v. Gosnell*, 99 Ky. 380; *Boyd v. Milwaukee*, 92 Wis. 456. The theory upon which these cases are decided is that when by the terms of the contract the contractor is required, not only to lay the pavement, but also to maintain and keep it in repair for a certain period after its completion, the abutting owners are necessarily required to pay a higher price by reason of the provision to maintain and keep in repair, and that a contract which throws upon abutting owners anything more than the burden of having the pavement well constructed in the outset is invalid, so far as they are concerned. The contract in each of the cases referred to differed, however, in an important particular from that now before us. In those cases the provision for maintaining or repairing was treated as an independent one, while in the one under consideration it is merely an appendant to the guaranty of the durability of the pavement. What the contract, in effect, says, is this: The contractor guarantees to put down a pavement which shall remain in good condition for at least five years. If

it gets out of order during that period, the contractor must restore it at his own expense; and, if he fails to do so, the city may make the repairs, and retain the cost thereof out of the contract price. It does not require him to make all the repairs which shall become necessary during the period named, but only those which arise from lack of durability of the pavement. Certainly, it cannot, with reason, be contended that a provision in the contract requiring the contractor to guarantee the durability of his work for a reasonable period imposes upon the adjacent property owners the burden of keeping the street in repair. It is merely an added precaution for insuring good workmanship, and the use of good material. And if the contractor, notwithstanding the guaranty, failed to lay a durable pavement, it cannot be doubted that the city would have a right to recover from him, in a suit for breach of his guaranty, the cost of restoring the same to a good condition. It seems to me that the provision in the contract relating to the maintenance of the pavement is a mere method of enforcing the guaranty of the contractor by a speedier and less expensive method than by suit, and that it does not have the effect of imposing upon abutting owners any burden other than that of having the pavement well constructed at the outset. In the case of *Schenectady v. Union College*, 66 Hun, 179, a similar view was taken by the supreme court of New York to that here expressed in construing a contract like that now before us; and, although the judgment in that case was afterwards reversed by the court of appeals (144 N. Y. 241, 26 L. R. A. 614, it was on another ground altogether, nothing being said by the appellate tribunal which casts doubt upon the correctness of the construction put by the lower court on the contract in that case."

It is also insisted that the pavement in

that it does not appear from the evidence in this case that the bid for construction was higher on account of the maximum bid fixed by the board for maintenance than it would have been for perfect work without the guaranty.

V. Separable agreements.

A provision in an ordinance for the improvement of a street requiring the contractor to give bond to perform the work in accordance with the agreement, and keep it in good repair for five years, if regarded as objectionable, will not invalidate the ordinance where it is complete in itself and detachable from the objectionable provision. *Cole v. People, Barnewolt*, 181 Ill. 16.

And where an agreement in a paving contract to keep the street in repair for a designated number of years is not so interwoven with other provisions as to be inseparable and vitiate the whole, the contractor may recover except to the extent that the assessment is increased on account of the provision for repairs; and he will recover for the whole amount claimed where there is nothing to show that there has been an increase. *Gosnell v. Louisville*, 14 Ky. L. Rep. 719.

And where an ordinance and contract are made for the paving of a street, providing that the contractor shall keep the street in repair 44 L. R. A.

for five years after its completion at the expense of the lotowners, judgment against them for the actual cost of the construction, omitting the cost of repairs, may be rendered in an action by the contractors against them to recover on such contract, under Ky. Stat. § 2834, providing that no error in the proceedings of the general council shall exempt from payment after the work has been required, either by ordinance or contract, but the general council or the court in which the suit is pending may make all corrections, rules, and orders to do justice to all parties, and make the necessary corrections in apportionment warrants. *Louisville v. Clark*, 20 Ky. L. Rep. 1265.

Such a provision in such a contract, which is not so interwoven with the contract as to be inseparable, will not invalidate the whole under that statute. The contractor is still entitled to recover except to the extent that assessments therefor have been increased on account of the provision for repairs, and where there is nothing to show that there has been an increase on that account a full recovery may be had. *Fehler v. Gosnell*, 99 Ky. 380.

But where a contract is made for the reconstruction of a street and its subsequent maintenance for a period of years, and the two charges for reconstruction and maintenance are so blended by the scheme of taxation adopted

question was so worthless that it would be a fraud upon the property owners to compel them to pay the assessment. The evidence adduced on the trial on this issue, as well as to establish collusion between the contractor and the city authorities in the matter of the construction and approval of the work, is conflicting and irreconcilable. Suffice it to say that the lower court specially found that the material was furnished and used in the construction of the improvement in question in substantial conformity with the terms of the contract; that the repavement, after it had been finished, was accepted by the city engineer, the board of public works, and the city authorities; that in doing so they acted in the utmost good faith, without either fraud or collusion; and the bill of exceptions contains ample proof to repel all inference of fraud, and to establish that the pavement was constructed in conformity with the terms of the contract. In declining to disturb a finding of fact made upon conflicting testimony, we merely observe a

well-settled rule, which has been frequently applied.

The final argument presented is that the work done by Murphy under the contract was not a repavement of Leavenworth street but was merely a repair of an existing pavement, and, therefore, the city was liable therefor, and it possessed no authority to impose a special assessment against the real estate of plaintiffs to pay the same. This contention is grounded upon the single fact that the concrete foundation of the former cedar-block pavement was utilized in making the improvement in controversy. The entire wearing surface of wood of the old pavement was removed, and replaced with vitrified brick, and the mere using of the old base of concrete did not constitute the work an "ordinary repair," within the meaning and contemplation of the statute.

The assessment assailed was made for the repavement of the street, and, the invalidity thereof not having been shown, *the decree is accordingly affirmed.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE of New Jersey, *ex rel.* Samuel K. WILSON, *Plff. in Err.*,
v.

Inhabitants of TRENTON *et al.*

(.....N. J.....)

*1. It is not unlawful for municipal authorities, contracting for paving a street, to embody in the same contract provisions binding the contractor to guarantee the durability of the pavement for five years, and to repave at a stated price all openings made in the street during the same time.

*Headnotes by DIXON, J.

that the valid charge for reconstruction cannot be definitely ascertained and severed from the invalid charge for repairs, the assessment for reconstruction cannot be enforced. *Verdin v. St. Louis*, 131 Mo. 26.

VI. Express statutory authority.

An ordinance and contract in pursuance thereof for the paving of a street are not invalid because they require that the work shall be executed with a guaranty to keep and maintain it in a state of perfect repair for a period of five years from and after the completion and acceptance of the same, under Mo. Laws 1889, p. 42, § 4992, which gives express authority for levying taxes for repairing streets, etc., as well as for grading, curbing, and paving. *Morse v. West Port*, 110 Mo. 502.

In the above case *People, Hall, v. Maher*, 56 Ill. 81, *infra*, 11., was distinguished upon the ground that in that case the charter distinctly provided that the repairing should be charged against the city.

So, a contract for the construction of a street, containing a provision that the contractor should keep the curbing and guttering in good repair and in proper position for six months after the acceptance of the work, is not rendered invalid by such provision where the cost was a charge upon the abutting owners, and under the laws in force at the time the cost of repairs of curbing and guttering was chargeable against 44 L. R. A.

2. When a special assessment is levied for the pavement laid under such a contract, property owners may show that the price nominally charged for paving was really charged in part for the guaranty and the repaving, and thus may keep the assessment within the fair value of the paving itself, beyond which they are not chargeable.

3. The decision of municipal authorities, as to who, among several bidders, is the lowest, cannot, if resting on legal evidence, be reviewed in this court.

(May 16, 1898.)

ERROR to the Supreme Court to review a judgment in favor of defendant in an

abutting property. *Gibson v. Owens*, 115 Mo. 258.

And requiring a guaranty from a contractor in a contract to pave a street, for the maintenance of the pavement constructed by him for a reasonable number of years, rests within the discretion of the mayor and assembly of the city in the exercise of sound business sagacity, under a charter conferring power upon them generally to pave or otherwise improve streets and provide for the payment of the cost thereof, and also to provide for cleaning and repairing the same. *Barber-Asphalt Paving Co. v. Hesel*, 76 Mo. App. 135.

In the above case, the *Verdin Case*, 131 Mo. 26, *supra*, 11., was distinguished on the ground that it does not appear from the evidence that the bid for reconstruction was higher on account of a maximum bid fixed by the board of public improvements for maintenance than it would have been for perfect work without the bid for maintenance.

So, an assessment for a street improvement is not void because the contract under which the work to be paid for was done contained a provision requiring the contractor to keep the pavement and foundations in perfect repair for five years from the time of its completion, and providing that the compensation for such keeping in repair should be included in the contract price on the ground that it imposes on abutting property expenses for the repair of streets which should be payable out of the funds of the

action brought to set aside a contract for the paving of Hamilton Avenue, in defendant City. *Affirmed.*

The facts are given in the opinion.

Mr. John H. Backes, for plaintiff in error:

The contract adds an additional and unlawful burden upon the property owners by requiring the contractor to keep the street in repair for a term not less than five years after the completion of the contract.

The power of the city to "improve an owner out of his property" extends only to the charge for the costs of the original construction.

People, Hall, v. Maher, 56 Hun, 81; *Vardin v. St. Louis*, 131 Mo. 28; *Brown v. Jenks*, 98 Cal. 10; *Excelsior Paving Co. v. Leach* (Cal.) 34 Pac. 116; *Fehler v. Gosnell*, 99 Ky. 380; *Boyd v. Milwaukee*, 92 Wis. 456.

The contract was not awarded to the lowest bidder.

The proposals were referred to the street committee of council, who, without offering to receive proof of the lowest bidder's statutory qualifications, and without an examination into the facts, and without a semi-judicial consideration, recommended to council, without assigning a reason therefor, to award the contract to one not the lowest bidder.

This action was unreasonable, arbitrary, and in violation of the charter.

State, Shaw, v. Trenton, 49 N. J. L. 339.

The specifications are uncertain in that they do not state definitely the kind of asphaltum required.

State, Van Reipen, v. Jersey City, 58 N. J. L. 262.

The specifications are uncertain in that they do not definitely state the period during which the work was to be guaranteed.

State, Shaw, v. Trenton, 49 N. J. L. 339.

Messrs. John Bellstab and George W. Macpherson for defendants in error.

Dixon, J., delivered the opinion of the court:

The plaintiff in error, owning land on

city at large, where under the charter the city council was authorized to raise a sum by taxation to repair city streets, one half of which was to be expended on paving streets, and it does not appear that the common council would not have the right to provide that for making all other and necessary repairs to pave streets requiring more than such one half, the expense should be assessed upon the property benefited. *Gilmore v. Utica*, 131 N. Y. 27.

In the above case, *People, Hall, v. Maher*, 56 Hun, 81, *supra*, II., was distinguished upon the ground that in that case the law provided that the city should make all repairs to pavements in streets paved with a certain kind of pavement, and that the language was not the same nor necessarily of the same import.

And a guaranty in a paving contract to maintain at grade and surface in good order the work of reconstruction for a period of nine years commencing one year after the work of reconstruction is completed and accepted, and to make all repairs necessary within that time from any imperfection in such work or materials, is not prohibited by a charter provision that the assembly shall have no power directly

Hamilton avenue, in the city of Trenton, sued out a writ of certiorari to set aside a contract which the city had made for paving that avenue with Trinidad Lake asphaltum. The supreme court having adjudged the contract legal, he has brought the matter to this court by writ of error.

The first reason urged by counsel for the plaintiff for holding the contract unlawful is that, besides requiring the contractor to lay a good pavement, it binds him to guarantee the durability of the pavement for five years, and during that period to maintain the pavement in good condition, and also binds him to repave, at a price stated, all openings made in the street during the same time. The effect of these provisions, it is argued, has been to enhance the price nominally charged for laying a good pavement, by making it cover the cost of maintenance and the cost of repaving beyond the stated price, which is said to be inadequate, and thus will be to increase the assessment to be levied upon the property owners, who are legally assessable for laying the pavement, but not for maintaining or relaying it. This contention, we think, ignores the principle on which assessments for municipal improvements are levied in this state. Property owners are not chargeable with the price of such improvements, but only with an equivalent for the special benefits they derive therefrom. Such an equivalent cannot exceed the reasonable value of the improvement, and hence the municipality itself, not the assessable property owners, must bear the excess of price beyond fair cost. If, therefore, the commissioners, who levy an assessment for this improvement, charge upon the property owners anything beyond the fair cost of laying a good pavement, their assessment will to that extent be illegal. The same evidence which would now show that the nominal price for paving includes compensation for the guaranty and for repaving will be then available for the same purpose, and, if produced, will result in reducing the assessment to such sum as would have secured a proper pavement with-

to contract for any public work or improvements or repairs thereof contemplated by such charter, or to fix the price or rate therefore, but the board of public improvements shall in all cases, except of necessary repairs, requiring prompt action, prepare and submit to the assembly estimates of costs of any proposed work, and under direction of an ordinance shall advertise for bids and let out said work by contract to the lowest bidder. *Seaboard Nat. Bank v. Woesten* (Mo.) 48 S. W. 930.

In the above case, it was said that the *Ullman Case*, 137 Mo. 543, *supra*, III., was distinguishable from it in that the landowner is not chargeable with the cost of maintenance.

A bond required of a contractor for the paving of a street, conditioned to keep the street so improved in thorough repair for the term of five years from the completion of the contract, however, is unauthorized by Cal. act March 18, 1885, § 2, authorizing the city council to contract for different kinds of street work, the work authorized being such as is necessary to make and complete a street or to repair existing defects. *Brown v. Jenks*, 98 Cal. 10.

F. H. B.

out the added stipulations. The plaintiff's complaint, if well founded in fact, must be reserved until the assessment is levied.

This point being thus decided, we see no reason for denying the power of the municipal authorities to include in the same contract the three stipulations above mentioned. The preparation and laying of asphaltum as a pavement require special skill, and the quality of the pavement cannot well be ascertained by municipal authorities without the test of time. It is therefore reasonable that those who lay such pavement should submit it to this test in order to insure its goodness. And since the contractors who engage in this kind of work obtain their crude asphaltum from different sources, and subject it to various processes of preparation, there is a manifest fitness in providing that those who lay the original pavement should relay it whenever openings are made, so that uniformity of work and materials may be secured. It thus appears that the guaranty of durability and the stipulation for repaving are but incidents of the principal object of the bargain, dictated by prudence, and therefore rightly included with it in a single contract.

Another contention of the plaintiff is that the contract was not awarded to the lowest

bidder, as section 107 of the city charter, with some reservations, requires. It appears from the evidence in the case that the contract was awarded to the person whom the city authorities, taking into consideration all the provisions of the agreement, found to be the lowest bidder. This determination of fact the supreme court did not overturn, and, on examining the testimony, we cannot say that it is without legal support. The question who was the lowest bidder was primarily submitted by the law to the city authorities, and their decision must stand until legally reversed. On writ of error this court does not interfere with lawful conclusions on disputed questions of fact, and therefore we must accept it as settled that this contract was awarded to the lowest bidder. Hence we need not consider under what circumstances a contract may be given to one who is not the lowest bidder.

With regard to the other objection, that the specifications on which bids were invited were uncertain, we think the specifications are reasonably definite, in view of the desirability of competition among the various pavements in use.

The judgment of the Supreme Court is affirmed.

PENNSYLVANIA SUPREME COURT.

C. Colket WILSON and Wife

v.

Joseph W. ANDERSON *et al.*, *Appts.*

(186 Pa. 531.)

1. A trust deed prompted by intemperate and improvident habits of the grantor, creating a trust to pay the income to him during life and at his death to convey to certain persons, without reserving any power of revocation, makes an irrevocable trust.
2. An intent to revoke a trust created by deed is not shown by a will which does not mention it but revokes "all other wills," where the testator has for years treated the deed as in full force, and has other real and personal estate not covered by the deed on which the will operates.
3. Loose declarations of a grantor, made twenty years after the date of a deed, cannot be proved to impeach it.

(July 21, 1898.)

APPEAL by defendants from a judgment of the Court of Common Pleas for Montgomery County in favor of plaintiffs in an action brought to enforce rights under an alleged deed of trust. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. Whittaker Thompson and N. H. Larzelere, for appellants:

The deed of trust of 1868 was in effect a

will so far as the provisions taking effect after the grantor's death were concerned, and as such was duly revoked at the grantor's death by the will of 1877.

Whatever the form of the instrument, if it vests no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument.

Turner v. Scott, 51 Pa. 126; *Frew v. Clarke*, 80 Pa. 170; *Wilson v. Van Leer*, 103 Pa. 600; *Tozer v. Jackson*, 164 Pa. 373; *Frederick's Appeal*, 52 Pa. 338, 91 Am. Dec. 159; *Nace v. Boyer*, 30 Pa. 99; *Rife's Appeal*, 110 Pa. 232.

There is a distinction between the doctrine in *Frederick's Appeal* and those cases where a present beneficial interest is given to third persons, and it will be found that in no case in which the instrument was parallel with that of the case in hand, was it doubted that such an instrument was testamentary.

Rick's Appeal, 105 Pa. 528; *Mack's Appeal*, 68 Pa. 231; *Ritter's Appeal*, 59 Pa. 9; *Fellows's Appeal*, 93 Pa. 470; *Merriman v. Munson*, 134 Pa. 114; *Neal v. Black*, 177 Pa. 83, 34 L. R. A. 707; *Reidy v. Small*, 154 Pa. 505, 20 L. R. A. 362; *Ashhurst's Appeal*, 77 Pa. 464; *Ash's Appeal*, 80 Pa. 500; *Wilson v. Van Leer*, 103 Pa. 301; *Cable v. Cable*, 146 Pa. 451; *Tozer v. Jackson*, 164 Pa. 373; *Frew v. Clarke*, 80 Pa. 170; *Wolford v. Morgenthal*, 91 Pa. 30; *Rife's Appeal*, 110 Pa. 232; *Dreisbach v. Serfass*, 126 Pa. 32, 3 L. R. A. 836; *Scott v. Scott*, 70 Pa. 244; *Jordan v. McClure*, 85 Pa. 495; *Meck's Appeal*, 97 Pa. 313.

The testator explicitly revoked all wills

NOTE.—As to revocability of voluntary trust, see note to *Ewing v. Jones* (Ind.) 15 L. R. A. 75; *Reidy v. Small* (Pa.) 20 L. R. A. 363; and *Neal v. Black* (Pa.) 34 L. R. A. 707.

theretofore made by him, and if the conveyance of 1868 was a will it would be included in those general terms.

Hancock's Appeal, 112 Pa. 532; *Ellis's Appeal*, 22 W. N. C. 135; *Weidman's Appeal*, 42 Phila. Leg. Int. 338; *Teacle's Estate*, 153 Pa. 219; *Price v. Maxwell*, 28 Pa. 23; 1 Jarman, Wills, 153-333.

Dr. Anderson's treatment of the will would have no bearing whatever on the intent of the testator.

Magee's Estate, 30 W. N. C. 478.

Dr. Joseph W. Anderson and Corona Anderson were competent witnesses.

Karns v. Tanner, 66 Pa. 297; *Bowen v. Goranflo*, 73 Pa. 357; *Greenawalt v. McCenlley*, 85 Pa. 352; *King v. Humphreys*, 138 Pa. 310; *Crothers v. Crothers*, 149 Pa. 201; *Van Horne v. Clark*, 126 Pa. 411; *Frew v. Clarke*, 80 Pa. 170; *Brose's Estate*, 155 Pa. 619; *Wallman v. Herdic*, 90 Pa. 459; *Royer v. Ephrata*, 171 Pa. 429.

The declarations of the settlor, Ultimus Adjutor Anderson, as to the circumstances under which he made the deed of trust and its purposes, and the advice under which he was acting, are clearly evidence.

Smith v. Loafman, 145 Pa. 628; *Rice v. Rice*, 127 Pa. 181; *Chess v. Chess*, 1 Penn. & W. 32, 21 Am. Dec. 350; *Irish v. Smith*, 8 Serg. & R. 573, 11 Am. Dec. 648; *Wilkinson v. Pearson*, 23 Pa. 117.

Messrs. Montgomery Evans and Louis M. Childs for appellees.

Dean, J., delivered the opinion of the court:

In 1858 Dr. James Anderson died, leaving to survive him a widow, who was his second wife, and children by her as follows: Joseph W. Anderson, John F., A. Jackson, Ultimus Adjutor, and Corona B. By his last will he devised all his land in Montgomery county, consisting of about 100 acres at what is now Ardmore, in that county, with the personal property on it, to his widow, for life, and at her death to his two sons, John F. and Ultimus Adjutor. All his other estate, which was considerable, was given in equal shares to all his children. The widow declined to take under the will, and after some litigation a family settlement was had, by which the Ardmore land passed to John F. and Ultimus Adjutor, subject to a dower interest of one third to their mother for life. Afterwards, in 1866, John F. Anderson conveyed his interest in the Ardmore tract to his brother Dr. Joseph W. Anderson. On April 8, 1868, Ultimus Adjutor conveyed his undivided half to his brother in trust as follows: (1) Joseph to collect the income, and pay it over, less expenses, to the grantor, during his lifetime. (2) After the death of the grantor, to convey the land to his brothers and sisters of the whole blood, or, if any were deceased, then to their descendants, in equal shares, *per stirpes*. (3) The trustee to convey during the life of the grantor, with his written consent, any part or the whole of the land; the proceeds of such sales to be invested or held for the purposes of the trust. The deed contained no power of revocation. Ultimus Adjutor did

not marry. With his brother Joseph and his sister, Corona, he lived on the property until his death, December 28, 1895. His brother managed the property in the meantime, and, so far as appears, kept account of, and paid over, the income. Sales were made also of small parts of the land in lots by the trustee, and Ultimus Adjutor signified his approval by formally, in writing, assenting to the conveyances. He had other property, outside the land,—of the value, probably, of \$5,000 to \$7,000. At his death the land had greatly appreciated in value, and was worth then about 150,000. About nine years after the date of the trust deed (in February, 1877), Ultimus Adjutor formally executed a will, in which, after directing payment of his debts and funeral expenses, he devised and bequeathed all the rest and residue of his estate to his brother Joseph W., his trustee in the deed, and to his sister, Corona, and appointed them his executors; further, by express words, revoked all former wills by him theretofore made. The will was proved, and letters thereon issued, after the death of testator. About a year afterwards, on petition of this plaintiff, Mrs. Wilson, a daughter of A. J. Anderson, one of the beneficiaries of the trust, averring the liability of Joseph W. to account as trustee up until the death of Ultimus Adjutor, a citation was issued to him to file his account. He answered by admitting his accountability, but prayed for time, and afterwards did file his account as trustee up until 1890. Not long after, Mrs. Wilson filed this bill against Joseph W., the trustee, and Corona Anderson; averring the trust deed, the death of her father and John F. Anderson, and praying for partition. The defendants filed an answer admitting the execution of the trust deed, but averring that it was made by Ultimus Adjutor at the suggestion of A. J. Anderson, who had neglected to advise him of the importance of inserting a power of revocation, and that the grantor never had surrendered possession or power over the property to the trustee, the latter being a mere agent for his brother; then averred that the will revoked the deed, and that no estate passed to plaintiff by reason of the provisions of the latter, but that the entire interest in the land passed by the will to defendants. This constituted, in substance, the issue between the parties. After full hearing and consideration of all the evidence the court below concluded that the deed was made with a full knowledge of its effect, and was a conveyance in the nature of a spendthrift trust, irrevocable, and not a testamentary disposition of the settlor's property; that by the will there was no intention to revoke the prior deed, even if the latter was testamentary. Two very material facts in aid of this construction of the papers are found by the court; First, that the deed was prompted by intemperate and improvident habits of the grantor at the date of it, when he was a young man, only twenty-six years of age, which habits continued without reformation until his death, twenty-eight years afterwards; second, that at the dates of both deed and will he was possessed of

very considerable property, both real and personal, on which the will would operate without affecting the grant specified in the deed. The appellants allege manifest error in both these findings of fact. But we think taking into view the other evidence in the case, with the testimony of Dr. Joseph W. Anderson, one of the respondents, it is sufficient to establish both findings. These being facts, the only question remaining, under the assignments of error, is, Were the legal conclusions warranted? On the answer to this interrogatory hinges appellants' case.

The deed contains no power of revocation. By its terms, the legal estate at once vested in the trustee, with a power of alienation, subject to the approval of the settlor, but no power to convey by the settlor himself was reserved. Nor, in case of conveyance of the whole or any part of the land, were the proceeds to pass to the control of the grantor. On the contrary, by its express terms the subject of the trust was still to remain in the hands of the trustee for investment and reinvestment to abide the purpose of the trust. There was an absolute vesting of the equitable estate in his brothers and sister, subject only to his life enjoyment of the income. This estate did not depend on a contingency,—something which might or might not happen. The commencement of the period of enjoyment was uncertain only because, while the fact of his death was certain, the date of it was not. A present equitable title vested in the beneficiaries immediately, which in the future would merge with the legal title, which latter was to be conveyed to them on the grantor's death. Every word in the deed is an apt one, as expressing a present intention to irrevocably convey a present estate to be enjoyed in the future. There is no ambulatory quality in a deed. The postponement of enjoyment does not make the instrument ambulatory, when such postponement is in express terms, and does not result from the nature of the instrument. A will is ambulatory, revocable, subject to change, because it is a will, and takes effect only at death of testator. A deed takes effect when delivered to the grantee. And the estate granted vests at once in the beneficiaries, in the absence of negative words, even if the period of enjoyment be postponed. In this case the grantor could have reserved a power of revocation, but he did not. Considering the absence of this power in connection with the motive which prompted the execution of the deed, and the language of it, we think the court was clearly right in its conclusion that the instrument was an irrevocable deed, and intended to be such by the grantor. The case relied on by the appellant as determining that this deed should be construed a will (*Frederick's Appeal*, 52 Pa. 338, 91 Am. Dec. 159) does not by any means hold that a deed of trust, reserving to the grantor the income of the trust estate for life, and postponing until his death the enjoyment by the beneficiaries of the principal, is necessarily testamentary, without regard to the manifest intent of the grantor. The decision in 44 L. R. A.

that case proceeds wholly upon an ascertainment of the intention of the testator from the instrument itself. After a careful analysis of the expressed purpose, in view of the surroundings, and the fact that during his lifetime the grantor had, by a second formal deed, revoked the first, a subsequent testamentary disposition was sustained. The deed was not made to preserve the estate of the grantor from depletion by vicious habits. From his express language, it was made for his own convenience merely. He was old and feeble, and, in the preamble to the deed, declares that it is made to exempt him from the vexation of management and sales of his property to pay debts. Therefore he appoints three trustees, who are to make sales of his land, apply the money received to his debts, account to him annually, and any balance remaining in their hands is to be securely invested; the grantor to be maintained therefrom during his life, and any balance remaining at his death to be divided equally among his children. The deed was not intended by the grantor to be irrevocable. That there would be any estate for the children at the grantor's death was altogether uncertain; for that depended on the value of the estate, amount of his debts, the expenses of administration, and the cost of his support during the remainder of his life. Chief Justice Woodward, who rendered the opinion, expressly says he declines to consider the authorities bearing on the subject of voluntary trusts, because the deed was made for the grantor's personal convenience merely, and therefore revocable. He follows this with a remark that "a disposition of property, to take effect after the grantor's death, is testamentary, and therefore revocable." But this was unnecessary in the disposition of the case, for it was the very subject (that is, whether it was a testamentary disposition of the property, or an irrevocable trust deed) which he had declined to discuss or consider in the former part of his opinion. A careful reading of the opinion will show that the judgment was based on the fact that the deed was made wholly for the convenience of the grantor, in that it relieved him from the management of his estate. Besides, there was nothing in the deed itself, or in the circumstances attending its execution, manifesting an intention that it should be irrevocable. On its peculiar facts, that case stands by itself. It is not authority, as argued by appellants, for the sweeping proposition that every voluntary trust conveyance of property, which reserves to the grantor a life interest, with a direction to convey to others the principal of the estate at his death, is a testamentary instrument, and therefore revocable by a subsequent will. In *Rick's Appeal*, 105 Pa. 528, also cited by appellants, the decision is rested on the ground that the deed was obtained by undue solicitation from an aged woman on the part of the beneficiary, and was actually improvident. In *Rife's Appeal*, 110 Pa. 232, also cited by appellants, the intent of the testator that the instrument, in form a deed, should constitute his will, in case he made none other, is manifested by

his language in the deed. The decision in *Chestnut Street Nat. Bank v. Fidelity Ins., Trust & S. D. Co.* 186 Pa. 333, is put upon the ground that testatrix intended the instrument to be revocable, and, if she had been advised of its importance, would have inserted a power of revocation.

We do not favor an extension of the doctrine of *Frederick's Appeal*, 52 Pa. 338, 91 Am. Dec. 159,—an exceptional case,—to cases not clearly within it on their facts. The general rule, commencing with *Reese v. Ruth*, 13 Serg. & R. 435, and adhered to through all the subsequent cases, of voluntary deeds of trust intended to be irrevocable by the grantor, is the one within which falls this case. In the case last cited, the grantor, because of intemperate habits, conveyed all her property to trustees, reserving to herself such comfortable support therefrom during life as the trustees should judge proper; to be transferred after her decease to such parties as she might by will appoint, and, in default of appointment, to such persons as by law were entitled thereto. Alleging failure on part of trustees to support her, she sought to annul the deed. This court held she could not avoid the deed, unless fraudulently procured; nevertheless holding that she could recover for her support. This was followed by *Greenfield's Estate*, 14 Pa. 489. There an absolute deed was accompanied by a declaration of trust on part of the grantees, that they held the same to apply the income as directed by the grantor during her life, and at her death to apply proceeds of the trust property to payment of certain legacies and annuities. The trustees took charge of the estate under the trust, and managed it from the date of the deed (December 15, 1834) until her death, on July 9, 1845. About two years before her death, she executed a will making a different disposition of her property than provided in the trust, of which will she appointed an executor, who filed bill against the trustees to have the trust declared void,—among other complaints, alleging the deed and declaration of trust constituted a testamentary disposition of her estate, which was revoked by the subsequent formal will. The case was heard by Gibson, Ch. J., at *nisi prius*, who as to this averment, speaks thus: "As to its being in fact a testamentary act, and therefore revocable, the argument is scarce worth an answer. 'Tis true a deed containing a posthumous disposition has been proved as a will; but here the trust was not entirely posthumous, for the legal title was vested in the trustees, in order to let them manage the property in her lifetime, and to pay as much of the produce as she should desire into her hands. There was nothing testamentary in that. But, according to all the proofs, the very object of resorting to a trust deed was to make disposition unalterable. And, if the owner of property cannot tie up his hands in regard to it by such an instrument, he cannot do it at all." On appeal to this court, these remarks were approved, and it was said there was not "the slightest pretense for saying the settlement must be accepted as a testa-

mentary disposition." This case has been followed in a large number of cases since, down to *Knoulson v. Fleming*, 165 Pa. 10. The general rule is that, if the intention of the grantor at the time he delivered the deed was to part with the legal title, the trust will be enforced in favor of the beneficiaries, even though their enjoyment of the estate is postponed until the death of their benefactor. Equity, because of exceptional facts, in rare cases, has revoked the trust, or held it revocable by the grantor, because plainly a testamentary instrument; but the general rule has remained without change. But not only is this instrument, by its terms and purpose, not revocable by a subsequent will, but it is manifest the grantor never intended to revoke it. After its execution, in 1869, for a period of nine years both grantor and trustee acted under it, assuming it was a deed. Then, on 7th of February, 1877, the grantor made a will, in which he devises and bequeathes, after payment of debts and funeral expenses, all the rest and residue of his estate to these two defendants, and declares, "I hereby revoke all other wills at any time by me heretofore made." Plainly, by his conduct, he had not considered the first instrument a will, but a deed; but he also indicates, by the absence of any mention of it, an absence of intention to revoke it. But, still further, he and his trustee, after this alleged revocation, go on for eighteen years, until the grantor's death, acting under this revoked deed, and treating it as in full force. Even after his death, when cited, the trustee files his account as if the trust continued in existence up until the grantor's death. An intention not to revoke could not have been manifested by more significant conduct. But as further indicating that the grantor intended the deed and will as distinct and separate instruments, operating on different property, the court, on ample evidence, has found as a fact that the grantor was possessed of both real and personal estate not covered by the deed to the value of between \$5,000 and \$7,000. Hence, in view of all the facts, and the expressions of both instruments, is it not obvious that he intended the will not to revoke the deed which had disposed of the particular land described in it, but to operate only on that property which was still in his power? We think, in any impartial view of the testimony and the law, the decree of the learned judge of the court below was right.

As to the assignments of error covering the rejection of testimony of Joseph W. Anderson and his sister, Corona: As concerns that of Joseph, the objection was withdrawn, and the testimony considered by the court. The testimony of Corona, without regard to her competency or incompetency as a witness, was inadmissible, because it consisted of loose declarations of the grantor made twenty years after the date of the deed, and tending to impeach it. Such testimony is inadmissible.

All the assignments of error are overruled, and the decree affirmed, at costs of appellants.

Susan KEATOR *et al.*

v.

SCRANTON TRACTION COMPANY, *Appt.*

(191 Pa. 102.)

1. The breaking of a trolley pole while being manipulated in the usual way to reverse the direction of the car imposes upon the carrier the burden of proving its lack of negligence in an action by a passenger injured by the accident.
2. A woman with a transfer ticket, approaching a street car to get on, when she is struck by a piece of the trolley pole, which breaks while the motorman is trying to change it to the other end of the car, is a passenger to whom the high degree of care which a common carrier owes to passengers is due.

(April 24, 1899.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Lackawanna County in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Edward N. Willard, Everett Warron, and Henry A. Knapp for appellant.

Mr. S. B. Price, for appellees:

The appellee was a passenger.

Hutchinson, Carr. § 559, p. 637, § 560, p. 638, 2d ed. § 561; *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608; *Patterson, Railway Accident Law*, § 220, p. 214.

Dean, J., delivered the opinion of the court:

Appellant operates two lines of electric passenger cars running out from the city of Scranton,—one north, the other south. The terminus of the one running north was at the corner of Penn and Lackawanna avenues; of that running south, in front of the Wyoming House, a block distant. The company provided a continuous passage on both lines by transfer tickets. On August 30, 1894, Susan Keator, plaintiff, got upon a car of the north line to go to Mountain Lake, a pleasure resort on the south line. She paid her fare, and, when the car stopped at the corner of Penn and Lackawanna avenues, got off. Before she left the car, the conductor gave her a transfer ticket, which read: "Good upon next south-side car within thirty minutes from nine o'clock." She then walked to the starting point of the south-side car, in front of the Wyoming House. While standing on the pavement, the trolley car pulled up, and stopped. As it would proceed to its destination in an opposite direction, the motorman attempted to change the trolley pole to the other end of the car. In doing so it broke, and a piece of it struck Mrs. Keator on the head

and shoulder, inflicting a severe injury. When struck, she had moved from the pavement to a point midway between the curb and car. The distance from car to curb was about 10 feet. At the time, the seats had been reversed in the car, which was an open one, and she was approaching it to get on. On the trial in the court below, two questions arose,—one of law for the court, and one of fact for the jury. On the undisputed facts, was plaintiff, at the time of the injury, in a legal sense, a passenger on defendant's road? If so, then she was entitled to recover, for defendant adduced no evidence of that high degree of care such as is incumbent on a common carrier of passengers when one has been injured by any of the machinery or attachments of the car or other vehicle in which the passenger is being transported. If she was not a passenger, then did the company exercise that ordinary care in manipulating its machinery which it owed to others occupying and using a common highway? The court decided the first question in favor of plaintiff, but, to save a second trial if such ruling should be error, it submitted the evidence bearing on the second question to the jury, directing them to make a special finding as to that branch of the case. On this question, the jury answered that defendant had not exercised ordinary care in changing the trolley; consequently there was a finding for plaintiff on both grounds. Her damages were assessed at \$4,670.83. Afterwards, in a very full opinion filed, the court overruled a motion for a new trial, and entered judgment on the verdict.

The case turns here on whether the court below was correct in holding, on the undisputed facts, that plaintiff, at the time she received the injury, was a passenger. We think grave injustice might have been done defendant by the method of trial, if its liability had depended on the answer of the jury to the second question. The court pointedly decided, and explicitly announced, as matter of law, that defendant owed to plaintiff, as a passenger, extraordinary care, and then submitted to them the evidence, to determine whether it had exercised towards her, as a traveler on the highway, ordinary care. A jury of lawyers would doubtless have clearly perceived the distinction so perspicuously pointed out by the court; but, with the large majority of laymen, it would not be comprehended, and, if comprehended, would in many cases not be heeded. In considering the second question, the jury would start with the conviction that defendant had violated its lawful duty to its own passenger, and probably, therefore, had neglected a less rigorous one to the general public. In the face of the law, as declared by the court on the first question, a corporation's chance for a favorable verdict on the second was a very remote one with the ordinary jury. We would hesitate to sustain the

NOTE.—On the question when a person intending to enter a vehicle becomes a passenger, see *note* to *Webster v. Fitchburg R. Co.* (Mass.) 24 L. R. A. 521; also *Wood v. Pennsylvania R. Co.* (Pa.) 35 L. R. A. 199; *Western & A. R. Co.* 44 L. R. A.

v. Vails (Ga.) 85 L. R. A. 655; *Illinois C. R. Co. v. O'Keefe* (Ill.) 89 L. R. A. 148; *Young v. New York, N. H. & H. R. Co.* (Mass.) 41 L. R. A. 193.

court's method of reaching a verdict, however commendable the motive, if the correctness of the judgment depended on the jury's answer to the second question. Defendant was entitled, in fairness, to an answer on the second from a jury unprejudiced by a decision against it on the first.

But, taking the undisputed facts, was the plaintiff's relation to defendant, at the time of the injury, that of a passenger? If so, then the burden was on defendant to show it had exercised a high degree of care towards her because of that relation. It offered no evidence as to the strength of the trolley pole,—whether it had been subject to inspection at any time, whether age and constant use had destroyed the tenacity of its fiber, or even whether it was ever safe for its purpose. The fact stood out, undisputed, that, in manipulating the pole in the usual way, it broke, and injured plaintiff. Unquestionably, defendant failed in its duty to her, if she was a passenger. It must be conceded, we think, that the transfer ticket, on its face, was an undertaking to carry her from the point where the car started, in front of the Wyoming House, to her destination on the south-side line. She was not a passenger while on the sidewalk going from one point to the other. Thus far the construction of the carrier's contract, from the undisputed circumstances and the ticket, is palpable. When did the obligation of the contract end with regard to her at this interval? It must be borne in mind, as so clearly pointed out by the learned judge of the court below, that the injury to her was from a defect in an indispensable attachment of the very vehicle in which defendant had undertaken to carry her. It was not a side-tracked car, or an unused one, which she had no right to get on, but, in the common phrase, it was "her car," that had been provided by defendant to carry her to her destination, which caused the injury. There is no definition of the duty of defendant to plaintiff which fits the facts of this case. That cited and relied on by appellant (1 Fetter, Carr. Pass. p. 605, § 233) applies to a different state of facts. The author says: "One who steps from a street car to the street ceases to be a passenger when he alights. The street is in no sense a passenger station, for the safety of which the street railway is responsible. When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk." And, again, on page 598, § 229, of the same book: "The special duty of a carrier to exercise a high degree of care begins only when, by coming upon his premises, or in the act of entering his vehicle, the actual relation of the passenger to carrier is assumed." The cases cited by the author amply sustain the text, but

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not one of them is a case where the passenger was injured by a defective attachment to the vehicle from which the passenger alighted or which he was about to enter. Unquestionably, the carrier is not answerable for the condition of the highway on which the passenger alights, or from which he stands or steps before entering the car; nor is it answerable for the conduct of third persons who, by neglect, cause injury in such situation to the passenger. But, in the case of these particular conveyances,—electric cars,—necessarily, and immediately on the car stopping at the end of the route, the motorman proceeds to reverse the trolley. Ordinarily, this is attended with no danger to anyone. The act is performed while some of the passengers have alighted and are on the sidewalk, out of reach of the trolley pole, some are between the curb and the car, and probably some yet in the car. Can it be argued with any plausibility that, in changing the trolley pole, the carrier owes no duty to its passengers who are not out of reach of danger from a part of the very vehicle in which they have been carried. Clearly the duty to the passenger, under such circumstances, with that kind of vehicle, does not end the moment the passenger's foot touches the street. And so with the next starting car. She has traversed the sidewalk, and is on the pavement in front of the Wyoming House; the car moves up to the end of the line in front of her, and stops; she steps outside the curb, and moves towards it; the seats are being reversed; two or three passengers are already in the car; when within 4 or 5 feet of it, she is struck by the broken pole, which of necessity is being changed. Why is she within reach of this peril? She is not a traveler on the highway, is not a resident who desires to cross the street, is not a mere spectator who, from curiosity or idleness, stands in that situation with reference to the car. She is there because, under the stipulations of the contract then in her possession, she has a right to take passage on that particular car at that point. In no sense is she one of the general public on the highway. She is at that point, at that particular juncture, because she could not receive the consideration of her contract, a passage to Mountain Lake, if she were anywhere else. If it were not for her contract, she would not be there at all. Surely, in such situation, under such circumstances, the carrier's duty to her was what it owed to a passenger,—as much so as if her injury had been caused by a rotten step on the car. When she came within reach of the vehicle provided for her transportation, the carrier's duty was that she should not be injured by the vehicle, if the highest degree of care could prevent it. Such care appellant was bound to show affirmatively. It did not attempt to show it. Therefore it is answerable in damages for her injury.

The judgment is affirmed.

TENNESSEE SUPREME COURT.

Harry WISE *et al.*, *Pliffs. in Err.*,
v.

I. C. MORGAN Admr., etc., of Ella Morgan,
Deceased.

(.....Tenn.....)

1. Questions made on a demurrer need not be embodied in a motion for a new trial in order to be saved for appeal.
2. Negligence in failing to put on a bottle a label marked "Poison" is the proximate cause of the death of an irresponsible child who gets the bottle from the mantel where its mother has left it, not knowing of its dangerous character, and drinks the contents.
3. The duty to put a label containing the word "Poison" on every poisonous liquid or substance, which is imposed on druggists by Shannon's Code, § 6745, does not extend to medicines compounded upon the prescription of a physician, though they contain poison.

(October 1, 1898.)

ERROR to the Circuit Court for Hamilton County to review a judgment in favor of plaintiff in an action brought to hold defendants responsible for the death of plaintiff's intestate because of their failure to label a prescription which they put up as poison by reason of which it was left where it was obtained and drank by plaintiff's intestate causing her death. *Reversed.*

The facts are stated in the opinion.

Messrs. Pritchard & Sizer, for plaintiffs in error:

It is not every result of a wrongful act that will give a right of action against the wrongdoer. To give such right of action it must appear, (1) that the injury was the natural consequence of the wrongful act, and (2) that the independent act of a third party has not interrupted the chain of causation set in motion by the wrongful act.

Sedgw. Damages, pp. 47-53.

In the present case neither of these conditions exists.

Consequences that by some unusual and extraordinary accident follow the doing of the wrongful or negligent act cannot be the ground of recovery.

Jackson v. Nashville, C. & St. L. R. Co. 13 Lea, 491, 49 Am. Rep. 663.

In each of the cases where it has been held that the druggist was liable for negligence he was held liable for the consequences that naturally followed from his negligent mistake.

McOubbin v. Hastings, 27 La. Ann. 713; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728; *George v. Skivington*, L. R. 5 Exch. 1.

NOTE.—As to negligence in sale of drugs, see note to *Craft v. Parker* (Mich.) 21 L. R. A. 139; also *Meyer v. King* (Miss.) 35 L. B. A. 474.
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One who does a negligent act is not responsible for consequences that do not naturally or probably follow such an act.

Davidson v. Nichols, 11 Allen, 514; *Poland v. Earhart*, 70 Iowa, 285; *Wood v. Pennsylvania R. Co.* 171 Pa. 306, 35 L. R. A. 199; *Meyer v. King*, 72 Miss. 1, 35 L. R. A. 474; *Mathiason v. Mayer*, 90 Mo. 585; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Enoch v. Pittsburgh, C. C. & St. L. R. Co.* 145 Ind. 635; *Henderson v. Dade Coal Co.* 100 Ga. 568, 40 L. R. A. 95; *Coley v. Statesville*, 121 N. C. 301.

In the absence of a provision making it so, a failure to comply with a statutory requirement is not negligence *per se*, but simply evidence tending to establish negligence.

16 Am. & Eng. Enc. Law, pp. 420 *et seq.*

Mr. William T. Murray, for defendant in error:

Section 4830, Code 1858, provides: "Any person who sells and delivers any poisonous substances, without having the word 'Poison' written or printed on the label attached to the vial, box, or parcel in which the same is sold, shall, on conviction, be fined not less than twenty or more than one hundred dollars."

Chapter 4, p. 14, act of 1870, 2d Sess., provides: "An Act to Preserve Life and Protect Property: § 1. Be it enacted by the General Assembly of the state of Tennessee, that any person who sells or delivers any poisonous liquid or substance, in addition to having the word 'Poison' printed or written on the label thereof as now required by law, shall note in a book kept by such person for that purpose the name of the person to whom such poison was delivered, the date of delivery, and the kind and amount of such poison so delivered, and shall keep such book open for public inspection. § 2. Be it further enacted, That any person violating the provisions of this act shall on conviction be fined not less than twenty nor more than one hundred dollars; Provided, that the provisions of this act shall not apply to the prescriptions of regular practising physicians."

The act of 1870 was properly carried into T. & S. Code as § 4830 "a," and § 4830 "b."

In Mill. & V. Code the compilers correctly quote the original section from the Code of 1858, the same being carried into this Code as § 5634. They then correctly set out the 1st section of the act of 1870 as § 5635. They then follow with § 5636, in which they report the 2d section of the act of 1870 incorrectly, as follows: Mill. & V. Code, § 5636. "Any person violating the provision of this article shall be fined not less than twenty nor more than one hundred dollars. This article shall not apply to the prescriptions of regular practising physicians."

No Code of the state of Tennessee has ever been adopted as the law of the land except the Code of 1858, hence this section of Mill. & V. Code is not the law, they not being able to change the act of the legislature.

Mr. Shannon brings this last section of the

act of 1870 into his Code as § 6747 and it reads as follows: Shannon's Code (6747). "Any person violating the provisions of the last section shall, on conviction, be fined not less than twenty nor more than one hundred dollars. This and the last section shall not apply to the prescriptions of regular practising physicians."

The law of Tennessee requires the vendor of poison without regard to the method of sale to label the package with the word "Poison."

When a statute requires a person to perform a duty which he omits to do with due care, he is liable for all of the consequences of his omission.

Whittaker's Smith, Neg. p. 18; 1 Jaggard, Torts, pp. 78, 95, 98, 348, 372; *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L. R. A. 82; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 401, note.

The rule with reference to torts founded upon the violation of law is different from the rule where negligence only is alleged.

1 Jaggard, Torts, p. 75; Whittaker's Smith, Neg. p. 18; King's Dig. §§ 50-71; *Fleet v. Hollenkemp*, 13 B. Mon. 219, 56 Am. Dec. 563; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455.

The doctrine of proximate cause applicable in general to mere negligence does not apply in this case.

Jaggard, Torts, p. 372.

A party is liable for the consequences of his unlawful acts even to a third party.

Whittaker's Smith, Neg. pp. 9-11, and note.

The death of this child was proximately caused by the wrongful and unlawful omission of the defendant.

Scott v. Shepherd, 3 Wils. 403; *Vandenburg v. Truax*, 4 Denio, 464, 47 Am. Dec. 268.

Proximate cause is a question for the jury.

1 Jaggard, Torts, p. 77.

The cause was the want of label, though it was not the active agent.

Campbell v. Stillwater, 32 Minn. 308, 50 Am. Rep. 569, note; *White v. Conly*, 14 Lea, 51, 52 Am. Rep. 157, note; *Magoun v. New England Marine Ins. Co.* 1 Story, 161; *Ashby v. White*, 1 Smith, Lead. Cas. 132, note; *King v. Moore*, 3 Barn. & Ad. 184; *Tonawanda R. Co. v. Munger*, 5 Denio, 266, 49 Am. Dec. 239; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215; *Louisville, N. A. & O. R. Co. v. Luas*, 119 Ind. 583, 6 L. R. A. 193; *Campbell v. Lunsford*, 83 Ala. 513.

When the unlawful act is in its nature likely to produce the very events which have followed, the author of it may be treated as having caused each succeeding event, though they consist of the acts of third persons.

Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234; *Vandenburg v. Truax*, 4 Denio, 464, 47 Am. Dec. 268; *Scott v. Shepherd*, 2 W. Bl. 892; *Broom, Legal Maxims*, 1st ed. pp. 168, 169; *Dixon v. Bell*, 5 Maule & S. 198; *Lynch v. Nurdin*, 1 Q. B. 30; *Illidge v. Goodwin*, 5 Car. & P. 190; *King v. Moore*, 3 Barn. & Ad. 184; *King v. Pedly*, 1 Ad. & 44 L. R. A.

El. 822; *Roswell v. Prior*, 12 Mod. 639; *Wright v. Wilcox*, 19 Wend. 345, 32 Am. Dec. 507; *Fish v. Dodge*, 4 Denio, 317, 47 Am. Dec. 254; *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623; *Loddell v. Baker*, 3 Met. 469; *Langridge v. Levy*, 2 Mees. & W. 519; *Allen v. Addington*, 7 Wend. 9; *Addington v. Allen*, 11 Wend. 374; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215; *Wright v. Chicago & N. W. R. Co.* 27 Ill. App. 209; *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Pullman's Palace Car Co. v. Laack*, 41 Ill. App. 34; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11; *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602.

The want of a label was not only likely to mislead druggists and others into the mistakes which have followed in this instance, but such was its direct and almost inevitable tendency.

Southern v. How, Cro. Jac. 471; *King v. Moore*, 3 Barn. & Ad. 184; *Loddell v. Baker*, 3 Met. 469.

If the defendant's act had been done willfully, he would have been chargeable with the consequences, including the mistake of all third persons superinduced by his act, on the legal presumption that he intended them.

1 Greenl. Ev. § 18; *King v. Dixon*, 3 Maule & S. 14; 3 Inst. 348; *Gough v. St. John*, 16 Wend. 649.

The sphere of responsibility is the same when the wrong consists of negligent acts, though the measure of indemnity and punishment may be different.

Archbold, Crim. Pr. & Pl. ed. 1846, pp. 421, 422; *Rea v. Huggins*, 2 Ld. Raym. 1582; *King v. Moore*, 3 Barn. & Ad. 184; *King v. Dixon*, 3 Maule & S. 14; 2 Starkie, Ev. Am. ed. 1837, p. 526; *Dixon v. Bell*, 5 Maule & S. 198; *Broom, Legal Maxims*, 1st ed. pp. 168, 169; *Vandenburg v. Truax*, 4 Denio, 464, 47 Am. Dec. 268; *Lynch v. Nurdin*, 1 Q. B. 30; *Illidge v. Goodwin*, 5 Car. & P. 190; *Wright v. Wilcox*, 19 Wend. 345, 32 Am. Dec. 507.

The rule as to intervening cause does not apply where the intervening wrong, though actionable, is the natural and probable consequence of the defendant's act.

Ashby v. White, 1 Smith, Lead. Cas. 132, note; *Broom, Legal Maxims*, 1st ed. pp. 168, 169; *King v. Moore*, 3 Barn. & Ad. 184; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Lynch v. Nurdin*, 1 Q. B. 30; *Illidge v. Goodwin*, 5 Car. & P. 190; *Dixon v. Bell*, 5 Maule & S. 198; *Wright v. Wilcox*, 19 Wend. 345, 32 Am. Dec. 507; *Langridge v. Levy*, 2 Mees. & W. 519; *Tonawanda R. Co. v. Munger*, 5 Denio, 266, 49 Am. Dec. 239; *Vaughan v. Menlove*, 3 Bing. N. C. 468; *White v. Conly*, 14 Lea. 51, 52 Am. Rep. 157, notes; *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 569, note.

The injury being sufficiently connected with the defendant's wrongful act, it is no defense that he had parted with the poison under a formal sale, and placed it in the custody of others; this being the very mode

by which he caused the injury, and one of the reasons for his obligation to indemnify.

Roswell v. Prior, 12 Mod. 639; *Broom*, Legal Maxims, 1st ed. pp. 168, 169; *Dixon v. Bell*, 5 Maule & S. 198; *Lynch v. Nurdin*, 1 Q. B. 30; *Langridge v. Levy*, 2 Mees. & W. 519; *Wright v. Wilcox*, 19 Wend. 345, 32 Am. Dec. 507; *Illidge v. Goodwin*, 5 Car. & P. 190.

The inability of the defendant to prevent the injury at the time is not an excuse, but a part of the wrong.

Roswell v. Prior, 12 Mod. 639; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *King v. Moore*, 3 Barn. & Ad. 184; *Thompson v. Gibson*, 7 Mees. & W. 456; *King v. Pedly*, 1 Ad. & El. 822.

Besides, the want of a label was a continuing authority or direction by the defendant for the use of the poison, and he was bound to indemnify against the acts which it was likely to cause if left in that condition exposed.

Southern v. How, Cro. Jac. 471; *King v. Moore*, 3 Barn. & Ad. 184; *Lobdell v. Baker*, 3 Met. 469; *Roswell v. Prior*, 12 Mod. 639; *Albany v. Cunliff*, 2 N. Y. 180; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *King v. Pedly*, 1 Ad. & El. 822; *Wright v. Wilcox*, 19 Wend. 345, 32 Am. Dec. 507.

Wrongful and negligent sale of poisonous drugs renders the vendor liable to third parties for damages consequent.

Whittaker's Smith, Neg. pp. 9-11, note, pp. 232-234; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Walton v. Booth*, 34 La. Ann. 913; *Quin v. Moore*, 15 N. Y. 432; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Henry v. Dennis*, 92 Ind. 452, 47 Am. Rep. 378.

Affixing a false label to the poison, and sending it into market in that condition, so as thereby to mislead others and endanger human life, was an unlawful act, for which the defendant is responsible, whether he did it wilfully or negligently.

Dixon v. Bell, 5 Maule & S. 198; *Vandenburg v. Truax*, 4 Denio, 464, 47 Am. Dec. 268; *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *King v. Moore*, 3 Barn. & Ad. 184; *Scott v. Shepherd*, 2 W. Bl. 892; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *King v. Dixon*, 3 Maule & S. 11; *Loomis v. Terry*, 17 Wend. 499, 31 Am. Dec. 306; *Cole v. Fisher*, 11 Mass. 139.

On rehearing.

If the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, the meaning is conclusively presumed to be the meaning which the legislature intended to convey.

Black, Interpretation of Laws, pp. 35, 36, 56; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 209; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *Doe, Poor, v. Considine*, 6 Wall. 458, 18 L. ed. 869; *Woodbury v. Berry*, 18 Ohio St. 456; *Newell Universal Mill Co. v. Mualow*, 115 N. Y. 170; *Bradbury v. Wagenhorst*, 54 Pa. 180; *Carfoss v. State*, 42 Md. 403; *Allen v. Mutual F. Ins. Co.* 2 Md. 111; *Ezekiel v. Dixon*, 3 Ga. 146.
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The rule applicable to this class of statutes under consideration in this case is much more strict and rigid than the general rules quoted.

Carberry v. People, 39 Ill. App. 506; *Gunter v. Leckey*, 30 Ala. 591; *New Orleans v. Lockett*, 3 La. Ann. 99; *Ramsey v. Gould*, 57 Barb. 398; *Harrison v. Leach*, 4 W. Va. 383; *Harrison v. Smith*, 4 W. Va. 97; *Pendleton v. Barton*, 4 W. Va. 496; *Coleman v. Hart*, 37 Wis. 180; *Sprague v. Birdsall*, 2 Cow. 419; *Webb v. Baird*, 6 Ind. 13.

Courts have nothing to do with the policy, necessity, or expediency of the law. This is a matter for the consideration of the legislature.

Bopley v. State, 4 Ind. 264, 58 Am. Dec. 628; *Bow v. Stanford*, 13 Smedes & M. 93, 51 Am. Dec. 142.

A statute adopted from a sister state, or from England, which has received a settled and uniform construction by the courts of the country from which it has been taken, must be given a similar construction by the state adopting it. Such interpretation becomes part of the statute itself in effect.

Munson v. Hollowell, 26 Tex. 475, 84 Am. Dec. 582; *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280; *Woolsey v. Oade*, 54 Ala. 378, 25 Am. Rep. 711; *Myrick v. Hasey*, 27 Me. 9, 46 Am. Dec. 583; *Ballance v. Rankin*, 12 Ill. 420, 54 Am. Dec. 412.

The statute in question in this case was taken from the Alabama Code and by the Alabama Code from Code of New York. The construction placed upon the statute in New York, from whence it originally came, makes no exception whatever.

McAlister, J., delivered the opinion of the court:

Defendant in error recovered a verdict and judgment in the circuit court of Hamilton county against Harry Wise & Co. for the sum of \$3,000 damages for the negligent killing of his daughter, Ella Morgan, a child about three years old. The facts of the case are few, and practically undisputed. In August, 1894, the child, being troubled with her eyes, was taken by her mother to an oculist for treatment. After an examination of the child's eyes, the oculist handed her mother the following prescription, to wit: "Sulphate of atropia, one grain; acid boracic, two grains; water, two drachms. Mix. Label: Two drops in right eye, three times a day. Dr. F. T. S." This prescription was filled by the firm of Harry Wise & Co., druggists of experience and established reputation in the city of Chattanooga. It was filled in exact conformity with the formula, and a label was pasted on the bottle showing the ingredients of the prescription, its number, and the date it was filled. This bottle was taken home by the mother, and placed on the mantelpiece, some three or four feet from the floor. The medicine was used by the mother for four or five days in the treatment of the child's eye, and was then discontinued, but the bottle was still left on the mantelpiece. About two weeks after the treatment with this medicine was discontinued, the child, in the absence of its mother, and

while left alone in the room, got a chair, climbed up to the mantel, procured the bottle, and poured a portion of the mixture in a cup and drank it. In a short time thereafter she developed all the symptoms of atropia, or belladonna poison, and died on the following day. The father thereupon brought this suit as administrator against the defendants to recover damages for the death of the child. The gravamen of the action is that defendants failed to label the bottle "Poison," as required by the statute, and that the death of the child was the proximate result of this negligence or breach of duty on the part of defendants. The cause has been three times tried. The first verdict was for \$1,000, which was set aside by the circuit judge upon the ground that the negligence of defendants was not the proximate cause of the child's death. The second trial resulted in a verdict for \$500, which was set aside for the same reason. On the third and last trial plaintiff recovered a verdict for \$5,000, and pending the motion for a new trial he entered a remittitur of \$2,000, and thereupon the circuit judge overruled the motion for a new trial, and pronounced judgment for the sum of \$3,000. *Wise & Co.* appealed, and have assigned errors.

Plaintiff insists that assignments of error Nos. 1, 2, 4, 10, and part of 11 cannot be considered by this court, because not assigned on the motion for a new trial in the court below, as required by the rule of that court. The first assignment in this court is that the circuit court erred in overruling the demurrer to plaintiff's declaration; second, in sustaining plaintiff's demurrer to defendants' second and third pleas. Counsel are in error in supposing that it was necessary to embody the questions made on the demurrer in the motion for a new trial. The demurrers had been acted on prior to the trial, and the action of the court entered upon the minutes. Since the action of the court upon the demurrers was in no wise connected with the trial of the cause, it was not necessary that such matters should again be brought to the attention of the court on motion for a new trial. It is true that the matters presented in assignments Nos. 4, 10, and part of 11 were not presented on the motion for a new trial, as required by the rule of court, and they will not be considered by this court. *Bruce v. Hale* (Knoxville; Sept. term, 1898) — S. W. —.

The fifth assignment is that the court erred in refusing the following request, namely: "If, taking into consideration the intelligence of the person to whom the substance was sold, and the purpose for which it was intended to be used, the druggist had no reason to anticipate or presume that it would be taken internally, then the taking of it internally, and the death resulting therefrom, would not be such a probable or natural result of the failure to label the bottle as would make the defendant liable." The sixth assignment is that the court erred in refusing the following request, namely: "If the mother put this bottle where she thought the child would not get it, and the child, unexpectedly to the mother, got a

chair, and climbed up to the mantelpiece, procured the medicine, and drank it, then the drinking of the medicine and the death of the child were not the natural or probable result of the failure to put the poison label on the bottle, and the defendant would not be liable." The seventh assignment is that the court erred in refusing the following request, namely: "If the obtaining of the medicine by the child was not due to any fault or negligence of the plaintiff, and if the presence of the poison label would not have deterred the child from drinking the substance, then the failure to put on such label would not be the proximate cause of the child's death, and defendant would not be liable." The eighth assignment is that the court erred in refusing the following request, namely: "If the substance sold to Mrs. Morgan, from the drinking of which her child died, was not poisonous or dangerous when used for the purpose, or in the manner it was intended, as indicated by the prescription on which it was sold, then the defendant was not required, under the statute, to put a poison label on the bottle in which it was contained, and his failure to do so would not be negligence." It is argued in support of these propositions that, if it be conceded that the failure to affix the poison label was negligence *per se*, yet that act was not the proximate cause of the injury, for the reason that the chain of causation was broken, — First, by the fact that the drinking of the substance, was not the natural or probable result of the failure to put on the label; and, second, by the intervening negligence of the mother in leaving the bottle accessible to the child. It is well settled that a failure to perform a statutory duty is negligence *per se*, and, if the injury is the proximate result or consequence of the negligent act, there is liability. 2 Thomp. Neg. p. 1232, § 5; *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L. R. A. 82. But it is insisted that the mother's negligence in leaving the bottle accessible to the child was such intervening negligence on the part of a responsible agent as broke the chain of causation, and became itself the juridical cause. This might be so, if the mother had been aware of the poisonous character of the substance; but it is not claimed she had such knowledge, and her testimony is quite positive that she was ignorant of it. If the bottle had been labeled "Poison," the mother would thereby have been admonished of its dangerous character, and doubtless would not have left it exposed. The fact that the mother was ignorant of the ingredients in the mixture is made clear by the fact that when she discovered the child had swallowed it she was not alarmed, and did not deem it necessary at once to call in a physician. If the bottle had been labeled "Poison," the mother, on discovering the child had taken it, would have immediately taken steps to counteract the deadly potion. Nor can the act of the child in getting down the mixture from the mantelpiece, and drinking it, be invoked as an intervening and independent juridical cause. The child was an irresponsible agent. It had not reached years of discretion, and

negligence was not imputable to it. The case of *Meyer v. King*, 72 Miss. 1, 35 L. R. A. 474, cited by counsel for plaintiffs in error, and other like cases are easily distinguished from this one, in the important feature that each presented an intervening, responsible agent, that broke the chain of causation, so that the death could not be concatenated with the breach of the statute.

It is insisted, however, that the statute requiring druggists to label all poisonous substances does not apply to every substance that contains any amount of poison, regardless of the purpose for which it was intended, and that it does not apply where the substance is furnished on the prescription of a physician, which does not call for such a label. The statute is, viz.: "Any person who sells and delivers any poisonous liquid, or substance, without having the word 'Poison' written or printed on the label attached to the vial, box, or parcel in which the same is sold, shall, on conviction, be fined not less than twenty, nor more than one hundred dollars." Shannon's Code, § 6745. Does this statute apply to medicine, containing any ingredient of poison, compounded upon the prescription of a physician, or is it to be limited in its operation to the sale of poisons in original form? It is in proof that a large proportion of medicines and druggists' compounds contain ingredients of poison; and it is argued that if all medicines containing poison, no matter how minute in quantity, must be labeled "Poison," nervous and excitable persons would refuse to take the remedy prescribed, for fear of the consequences, or, if taken, its therapeutic efficacy would be destroyed by the mental excitement and uneasiness thus aroused. The question presented in respect of the proper construction of this act arose in the common pleas of Ohio on a similar statute. That act provided that whoever sells or gives away any poison without first having marked the word "Poison" upon the label or wrapper containing the same, etc., shall be fined, etc. The defendant in that case was a druggist, and was indicted for violating the statute in a sale of morphine then and there contained in a certain bottle, labeled "Mrs. Winslow's Soothing Syrup," without having the word "Poison" on the label or wrapper containing said article. The court said, viz.: "The construction given to this statute by the state was that it prohibited the sale, without the label 'Poison,' of any quantity of morphine, whether the same was sold in a free state, or in a mechanical mixture, or in the form of a proprietary medicine, or under prescription of a doctor, without regard to whether the mixture containing the morphine was a medicine, or was poisonous or nonpoisonous. By the construction contended for it would be impossible for the wit of man to conceive of the sale of any article belonging to the class usually denominated 'poison,' in any quantity, however small, or in any sort of a mechanical combination, if unlabeled, without violating the statute. . . . The construction adopted by the court below renders criminal millions of transactions that have occurred in Ohio 44 L. R. A.

during the past fifty years, and are occurring daily; for the prescription of every physician, containing morphine or opium or strychnine or arsenic, that is given as a medicine, and that is filled by the druggist, would have to be labeled 'Poison.' If the mixture or medicine so sold contains so little of the poison, the effects of which were beneficial, and not injurious, the statute would still be violated. Every sale of many a remedy that has been in use for years would have to be stamped 'Poison.' I instance Dover's powders and paregoric and syrup of ipecac. Others might be given. Is it possible that this statute is to be so construed that prescriptions of physicians and these ordinary remedies are to be labeled 'Poison?' Clearly not. Wherever a statute admits of two constructions, we are bound to presume that the legislature intended to do that which is clear, manifest, and just. The presumption against absurdity in the provision of a legislative enactment is probably a more powerful guide in construction than the presumption against unreasonable inconvenience or injustice. The legislature cannot be supposed to intend its own stultification. When, therefore, to follow the words of an act leads to absurdity in its consequences, that constitutes sufficient authority to depart from them. Endlich, Interpretation of Statutes, §§ 258-264. A construction leading to absurd consequences will be deemed not intended, and language will be restrained accordingly. *Moore v. Given*, 39 Ohio St. 661; *Toledo & O. C. R. Co. v. Jump*, 50 Ohio St. 651. The practical construction given to § 6957, Rev. Stat., for now nearly half a century, has been directly contrary to the construction urged. Until this case was prosecuted, no one ever thought that the law required the numerous prescriptions which druggists of Ohio have filled, containing morphine or other poisons, to be labeled as poisons, and a record to be kept as required by this statute. It is a fact beyond dispute that nearly one third—at least fully one fourth—of all the prescriptions given by physicians in Ohio contain poison; morphine and opium being common poisons prescribed. It is a fact, further, that these prescriptions, as a rule, contain more of such poisons, relatively, than the mixture sold by Marvin. There is scarcely a cough syrup prescribed by any physician which does not contain morphine or opium, or some other form of such poisons, which is the equivalent of morphine, in an equal proportion or greater than that contained in this mixture. No one has ever construed this statute as prohibiting the sale of such mixtures as poisons. Dover's powders have been a well-known medicine and remedy for one hundred and fifty years. The dose of Dover's powder is from five to fifteen grains. If we take the middle dose,—say, ten grains,—it is composed of one grain of opium, one grain of ipecac, eight grains of sugar of milk. U. S. Pharmacopeia, last edition. The U. S. Dispensatory gives one grain of opium, ordinarily, to be the equivalent of one tenth of a grain of morphine. Therefore a ten-grain Dover's powder contains exactly as

much poison, the equivalent of morphine, as an ounce of this mixture. The druggists of Ohio never construed this statute as requiring them to label Dover's powder a poison. Take another very common household remedy,—paregoric. It is prescribed by the most eminent physicians. The Pharmacopœia says that it is composed of opium, benzoic acid, camphor, oil of anise, alcohol, and glycerin. There are two grains of opium to every fluid ounce of the mixture. Therefore every fluid ounce of paregoric contains the equivalent in poison of one fifth of a grain of morphine, which is double the poison in an ounce of this soothing syrup. Has it ever been thought that the sale of paregoric by a citizen of Ohio without labeling it poison was a criminal act? Other instances could be given. These are all facts of common knowledge, and all proper for the court to consider in giving construction to this statute. Courts will take judicial notice of facts of common knowledge. The conclusion reached is that the statute in question is not a statute governing the sale of mixtures compounded as medicines, whether proprietary or prescribed by a physician, even

though such medicines contain poisons in solution or in a free state. This is a statute regulating the sale of poisons, and it governs the ordinary and common transactions of people in the selling of poisons in Ohio, and does not apply to the selling of poison in harmless mechanical mixtures, or in proprietary mixtures that are beneficial medicines, or to poisons contained in medicines prescribed by physicians for the cure of disease. It is never permitted—it is intolerable—to create offenses by mere construction. *Com. v. Cooke*, 50 Pa. 207.”

We have thus quoted at length from the foregoing opinion, not that it is authoritative or controlling, but for the manifest good sense it contains, and as illustrating the *reductio ad absurdum* if the literalism of the statute should be followed. We cannot assent to the construction of the statute given by the circuit judge, and hold that it does not apply to medicines compounded by druggists upon the prescriptions of physicians. In this view, there is no evidence to support the verdict of the jury.

The judgment is therefore, reversed, and the cause remanded.

TEXAS SUPREME COURT.

GALVESTON, HARRISBURG, & SAN ANTONIO RAILWAY COMPANY, *Appt.*,

V. F. ZANTZINGER *et al.*

(.....Tex.....)

1. The very question to be decided which the court of civil appeals is by statute authorized to certify to the supreme court is not an abstract question which may determine the issue as presented to that court, but the issue itself.
2. A boy upon whom a locomotive engineer throws hot water and steam to drive him off from the engine is entitled to recover from the railroad company for the assault regardless of injuries which resulted from his attempt to get off in consequence of such act.
3. The question of right of a boy to recover from a railroad company whose engineer turns hot water and steam on him to drive him from the engine, for the loss of his leg in attempting to get off, in the event that his action succeeding the assault was negligent, does not arise upon an instruction to find for plaintiff if the engineer's act was negligent without specifying whether the recovery was to be for loss of leg or for the assault so that it can be certified by the court of civil appeals to the supreme court, but the right of his mother to recover does so arise, since her recovery, if any, must be based on the loss of the leg.
4. The act of a locomotive engineer in throwing steam and water upon a trespasser standing upon a foot board between the engine and a flat car, in order to

make him get off, must be deemed to be wilful so that the negligence of the trespasser in placing himself there cannot deprive him of the right to recover for an injury received in attempting to get off.

5. One on whom a wilful injury is inflicted is not precluded by his mere failure to exercise reasonable care to avoid the consequences of the injury, from recovering for so much of the damage as results from that failure.

(December 22, 1898.)

QUESTIONS CERTIFIED by the Court of Civil Appeals for the opinion of the Supreme Court which arose upon an appeal by defendant from a judgment of the District Court of Wharton County in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Answers favorable to appellees.*

The facts are stated in the opinion.

Mr. A. L. Jackson for appellant.
Messrs. J. V. Meek, O. T. Holt, and J. H. Davenport, for appellees:

Where an allegation is defective, and the defendant fails to except to it, or to offer objection to the evidence offered thereunder, a trial and verdict cure the allegation, and it will be presumed that the court would not have charged the jury thereon unless it had been proved, the omissions in the allegations being such as can be implied from the other allegations by a fair and reasonable intentment. When there are two counts

NOTE.—For master's liability on account of servant's tort toward person having no contractual relations with the master, see note 44 L. R. A.

See also 44 L. R. A. 316.

to *Ritchie v. Waller* (Conn.) 27 L. R. A. 161. See also *Pierce v. North Carolina R. Co.* (N. C.) ante, 316.

in a petition, one defective and the other good, there being no exceptions to the defective count, a general verdict for the plaintiff cures the defective count.

Tex. Rev. Stat. 1895, art. 1453; *Gillies v. Wofford*, 26 Tex. 77; *Carter v. Wallace*, 2 Tex. 206; *Schuster v. Frendenthal*, 74 Tex. 53; 1 Chitty, Pl. 705; *Texas & P. R. Co. v. Kirk*, 62 Tex. 232; *St. Louis & S. F. R. Co. v. George*, 85 Tex. 155; *Davis v. Missouri, K. & T. R. Co.* (Tex. Civ. App.) 43 S. W. 44; *Smith v. Montes*, 11 Tex. 25; *Lambert v. Weir*, 27 Tex. 359; *O'Connor v. Towns*, 1 Tex. 107.

When the petition and answer, or either of them, and the evidence raises an issue in the case, it is the duty of the court to submit it in its charge to the jury.

Tex. Rev. Stat. art. 1317; *Blum v. Whitworth*, 66 Tex. 350.

It being shown that the engineer was in exclusive charge of the locomotive engine, and that he was responsible for its proper operation and preservation, he had implied authority to eject persons riding thereon, and it was not error for the court to submit the issue to the jury as to whether or not he had authority to eject persons riding upon the engine, and there could be no injury to appellant in submitting the question as a controverted fact, rather than in charging the existence of the authority as a matter of law.

International & G. N. R. Co. v. Anderson, 82 Tex. 516; *Carter v. Louisville, N. A. & O. R. Co.* 98 Ind. 552, 49 Am. Rep. 780.

The court charged upon the feature of contributory negligence as the same was raised under the pleadings and evidence in the case.

Texas & P. R. Co. v. Breadow, 90 Tex. 27; *Texas & P. R. Co. v. Staggs*, 90 Tex. 458; *Texas & P. R. Co. v. Watkins*, 88 Tex. 20; *Hays v. Gainesville Street R. Co.* 70 Tex. 602; *Sweeney v. Gulf, C. & S. F. R. Co.* 84 Tex. 433; *International & G. N. R. Co. v. Cocks*, 64 Tex. 158; *Houston & T. O. R. Co. v. Smith*, 52 Tex. 184; *International & G. N. R. Co. v. Neff*, 87 Tex. 303; *Texas & P. R. Co. v. Watkins*, 88 Tex. 20; Shearm. & Redf. Neg. chap. 3; Cooley, Torts, p. 674; Whittaker's Smith, Neg. p. 373.

Gaines, Ch. J., delivered the opinion of the court:

The court of civil appeals for the first supreme judicial district has certified for our decision the following questions:

"The plaintiffs, Mrs. E. S. Zantzinger, who is joined in this action by her husband, is the mother of Almer Campbell, a minor; and the suit is in her own behalf, as well as in behalf of her son, to recover damages for personal injuries sustained by him, as it is claimed, through the negligence of the appellant, who was defendant below. The evidence adduced at the trial showed that defendant had a train of cars attached to the front end of a switch engine, which was running backwards, pulling the cars after it, into the city of Houston, from a neighboring station. The switch engine had no pilot or cowcatcher in front of it, but attached at 44 L. R. A.

each end was a footboard, extending across the track. The car nearest the engine was a flat car, several feet intervening between it and the footboard. While the train was slowly moving, Almer Campbell, without permission of anyone, and contrary to the rules of the company, entered upon the footboard, for the purpose of riding into Houston, and stood upon it, between the engine and flat car. After he had ridden a short distance the cylinder cock of the engine was opened by the engineer, and hot water and steam were thereby thrown upon his legs and feet, whereupon he sprang from the footboard towards the flat car, intending to get upon the latter, but missed it and fell upon the track, and was run over and injured. There is evidence tending to show that the cylinder cock was opened by the engineer for the purpose of throwing the steam and water upon the boy, in order to make him get off the engine; but the evidence does not warrant the conclusion that the engineer intended more than this, or that he intended to injure Campbell in the way in which he was injured. The engineer had authority to eject persons wrongfully riding upon the engine. There is also evidence tending to show that the fright and pain caused to Campbell by the steam and water also caused him to lose his presence of mind, and to make the leap in order to escape. The steam and water caused pain and fright, but did not injure the skin. He testified that he was facing the engineer, with his back to the flat car, and that after the escape of steam and water commenced he turned and made the leap, calculating to reach the flat car with his feet, but not his hands; that after he fell between the cars he crawled forty or fifty feet in the direction in which the train was moving, in order to avoid the brake beam under the flat car, and then attempted to get across the rail, and was caught. There is also evidence tending to show that the engineer saw Campbell fall between the cars, knew his danger, and could have stopped the train in time to have avoided the injury. This we do not regard as affecting the questions certified. The evidence is undisputed that in getting upon the footboard Campbell was a trespasser, and was guilty of negligence, and the court below so instructed the jury. He was nearly seventeen years of age, and understood the dangers and risks of the situation. The charge given below submitted only two grounds upon which the plaintiffs could recover, and carefully restricted the jury to them. The first is stated in the charge set out below, and the second submits the question whether or not the engineer, after discovering Campbell's danger, used proper care to prevent the injury. As to the latter we deem it unnecessary to state more. The charge referred to is as follows: 'You are instructed that if you find from the evidence that, at the time and place stated in plaintiffs' petition, Almer Campbell got upon the footboard or runningboard attached to the engine then being operated on defendant's line of railway by its agents and servants, and that while the said Almer Campbell was

standing upon said footboard, and while said engine and train of cars were in motion, the defendant's engineer in charge of said engine, by means of the cylinder cocks attached to said engine, caused hot water or steam to be thrown upon said Almer Campbell's person for the purpose of frightening or scaring him off the engine, and that the opening of the cylinder cocks for the purpose of letting out the hot water or steam was done for the purpose of throwing the water upon said Almer Campbell, and not in the operation of the engine; and you further find that to eject Almer Campbell from his position on the footboard of the engine was within the scope of the duty of said engineer in operating the engine, and that he had implied authority to do so, and that said act on his part; of throwing the water or steam on Almer Campbell, was negligence, as herein defined; and if you further find that hot water or steam so thrown on said Almer Campbell so frightened him, or caused him such pain, that in order to escape therefrom he made an attempt to jump upon the flat car in front of the engine, and fell upon the track, where the wheels of said car passed over his leg, injuring him substantially as set out in the petition; and you further believe that the said act of the engineer in turning the hot water or steam upon the said Almer Campbell was negligence, as hereinafter defined, and was the proximate cause of the said accident,—you will find for the plaintiffs.'

"The questions certified are as follows: First. Should the act of the engineer in throwing out the steam and water for the purpose of ejecting Campbell from the engine be deemed wilful, in its relation to the result which actually followed, but was not intended, so that the negligence of Campbell in placing himself in such a position, without which he would not have received his injury, cannot be considered contributory negligence, or should such act of the engineer be regarded as only a negligent cause of such injuries, with which the negligence of Campbell may be considered as contributing to the result? Second. Should the court, in applying to the facts of this case as above stated the rule announced in *International & G. N. R. Co. v. Neff*, 87 Tex. 303, have assumed that Campbell's act in making the leap described was not contributory negligence, and that he was excused by the act of the engineer and the other facts of the situation from the exercise of ordinary prudence, or should it have submitted to the jury the question of the adequacy of such facts to produce a state of mind in which ordinary prudence should not be expected of him, and the further question whether or not such state of mind was produced?"

The statute which authorizes a court of civil appeals to refer an issue of law to this court for determination makes it the duty of the chief justice of that court "to certify the very question to be decided." Rev. Stat. 1895, art. 1043. By "the very question" we do not understand is meant an abstract question which may determine the issue as presented in that court, but the issue itself

as there presented. For example, if it be the correctness of the ruling of the court in sustaining or overruling an exception to a pleading, the substance, at least, of the pleading and of the exception ought to be set out in the statement, and not merely an abstract question submitted, which may, in the opinion of that court, determine the point. Such, as we think, is the rule, also, as to the giving or refusal of instructions, the admission or exclusion of evidence, and, in general, to all the issues of law which may be presented upon the appeal. It is the precise question ruled upon in the trial court, as shown by the record in the court of civil appeals, which that court is authorized to certify, and which we have jurisdiction to determine. In the certificate before us a portion of the charge of the court is set forth, and the questions certified seem to bear upon the correctness of the instruction quoted. It resolves itself, as it seems to us, into a question whether or not the charge be correct in the particulars indicated by the inquiry. We infer from the statement accompanying the questions that the action of the minor son to recover damages for his injuries, and that of his mother to recover for the loss resulting to her from the same cause, were prosecuted together in one proceeding without objection. We have had some doubt whether we ought to answer the second question, and we are now of opinion that, if we had the case of the son only, that question would be abstract, and should not be determined. So far as he is concerned, upon the hypothesis stated in the instruction he was entitled to recover, at least, for the assault made upon him, without reference to the injuries which subsequently resulted; and, therefore, as to him the charge was correct. The jury were not told that he had a right to recover for the injury to his leg. If such instruction was elsewhere given, the court of civil appeals has not so stated. Therefore it seems to us that the question of his right to recover for the loss of his leg, in the event that his action succeeding the assault upon him was negligent, does not arise out of the very question before the court of civil appeals. But the case of the mother is different. It is apparent from the statement of the case that no injury resulted to her simply from the throwing of the hot water upon her son. If it had stopped there, no loss would have resulted to her. Her right of action, if it exists at all, results from the injury to his leg, and the consequent expenses and loss of service. Therefore, unless, upon the facts hypothetically stated in the instruction of the court, she was entitled to recover the damages resulting to her from that injury, the charge is not correct as a whole. The charge makes no distinction as to the respective rights of the mother and the son, but instructs the jury that, if they find the facts as stated, to find "for the plaintiffs." We conclude that, in this aspect of the case, the question of the correctness of the charge presents both points upon which it seems the court of civil ap-

peals desired to elicit our opinion, and we therefore proceed to answer the question:

1. If the servants of the appellant company purposely threw the hot water upon Campbell, it was an intentional, and not a negligent, wrong. The fact that he was a trespasser upon the train did not justify the engineer's conduct. The latter had the right to remove him, and for that purpose to put his hands upon him, and to use such force as was necessary to accomplish that end. But the means adopted resulted in an assault. We answer the first question, in its first form, in the affirmative; and in its second form, in the negative.

2. The second question presents a novel and difficult point, and one upon which we have found no direct authority. It must be resolved upon principle. When the negligence of the plaintiff concurs with that of the defendant, and contributes to produce the damage for which he sues, he cannot recover. It is not so if the act of the defendant be wilful. In speaking of the rule of contributory negligence, the supreme court of Indiana says: "The doctrine, however, can have no application to the case of an intentional and unlawful assault and battery, for the reason that the person thus assaulted is under no obligation to exercise any care to avoid the same, by retreating or otherwise, and for the further reason that his want of care can in no just sense be said to contribute to the injury inflicted upon him by such assault and battery." *Steinmetz v. Kelly*, 72 Ind. 442, 37 Am. Rep. 170. See also *Ruter v. Foy*, 46 Iowa, 132; *Brownell v. Flagler*, 5 Hill, 282. The principles announced apply to the question of the original right of action. The question under consideration, however, involves rather an inquiry as to the duty of a party who has been injured by the fault of another to use reasonable precautions to avoid the consequences of his injury. 1 Sedgw. Damages, § 202. In negligence cases such duty is usually regarded as a part of the law of contributory negligence. The rule is that if a plaintiff, who has been injured by the negligent conduct of the defendant, fails to exercise reasonable care to avoid the consequences of his injury, he cannot recover for so much of his damage as results from that failure. But does this rule apply to the case of a wilful injury? We are of opinion that it does not. Since one who has committed an assault and battery upon another cannot urge in his defense that the plaintiff might by the use of due care have avoided the battery, we think where the injury is intentional he should not be permitted to say, in reduction of the damages, that the plaintiff might have prevented them, at least in part, by careful conduct on his part. If negligence contributing to the injury cannot be set up to defeat the action when the act of the defendant was wilful, by a parity of reasoning the defendant in such a case should not be permitted to say that, but for the negligence of the plaintiff in failing to avoid the consequences of the wrong, he would have suffered no damage, or only a part of the damages for which he claims a recovery. We

apprehend that a plaintiff cannot make a case by intentionally contributing to the injury which the defendant wilfully intends to inflict upon him. For example, should one intentionally hurl a missile at another, with the intent to injure, and should the other voluntarily place himself in its way, and thereby receive a battery which he would otherwise have escaped, the person so struck could not recover. So, when he has been intentionally injured, he should not be permitted to recover damages which might have resulted from his wilful omission to take reasonable precautions to avoid the consequences of the wrong. Since a negligent act of the plaintiff, contributing to a result brought about by the concurring negligent act of the defendant, exonerates the defendant from the consequences of his wrong,—*pro tanto*, at least,—so a wilful act of the plaintiff should have a like effect in case of an intentional injury. *Loker v. Damon*, 17 Pick. 284. In the case cited, Chief Justice Shaw says: "In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not the remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully and obstinately, or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain, without repairing, a great length of time after notice of the fact, and his furniture or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed that, as the trespass consisted in moving a few rods of fence, the proper measure of damage was the cost of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence. I do not mean to say that other damages may not be given for injury in breaking the plaintiff's close, but I mean only to say that, in the actual circumstances of this case, the cost of replacing the fence, and not the loss of an ensuing year's crop, is to be taken as the rule of damages for that part of the injury which consisted in removing the fence and leaving the close exposed." Where, in cases of an intentional tort, the plaintiff has purposely omitted to take reasonable steps to prevent an aggravation of his damages, or has been so grossly negligent in that regard as to be deemed guilty of a wilful omission on his part, he ought not to recover for the damages which might have been prevented by proper care; but, on the other hand, we think that he should recover his full damages where he has been guilty of ordinary negligence only. A party cannot voluntarily inflict an injury upon another, and then

claim that the party injured owes him the duty to exercise ordinary care to protect him from the consequences of his act. We answer the second question by saying that, in

our opinion, the trial court did not err in failing to submit the question of Campbell's contributory negligence in the charge set out in the statement.

WASHINGTON SUPREME COURT.

Maurice K. SMITH, *Respt.*,
v.

NORTH AMERICAN TRANSPORTATION
& TRADING COMPANY, *Appt.*

(.....Wash.....)

1. A steamer compelled to abandon for the season its trip from Seattle to Dawson after it reaches Ft. Yukon, because of the low stage of the water in the Yukon river, owes to a passenger whom it has agreed to transport to Dawson by September 15 of the current year the duty of bringing him back to Seattle without charge, and has no right to leave him where he will be forced to remain over winter in the Alaskan climate; to await the convenience of the carrier for completing the transportation the following summer.
2. It is the duty of a transportation company legitimately to inform itself concerning the stages of water on a route over which it contracts to transport a passenger, and he may rely upon the carrier's information concerning the practicability and feasibility of the trip.
3. To excuse nonperformance of a contract on the ground of an act of God, there must be no mixture of negligence or want of diligence, judgment, or skill on the part of the promisor.

(February 23, 1899.)

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages for breach of a transportation contract. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bausman, Kelleher, & Emory, for appellant:

Low water is the act of God.

Bennett v. Bryam, 38 Miss. 17, 75 Am. Dec. 90; *Silver v. Hale*, 2 Mo. App. 557; *Boner v. Merchants' S. B. Co.* 46 N. C. (1 Jones L.) 217.

The freezing of canals has always been held the act of God.

Beckwith v. Frisbie, 32 Vt. 559; *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; *Bowman v. Teall*, 23 Wend. 306, 35 Am. Dec. 502; *Empire Transp. Co. v. Wallace*, 68 Pa. 302, 8 Am. Rep. 178; *West v. The Berlin*, 3 Iowa, 532.

So of a snowstorm.

Ballentine v. North Missouri R. Co. 40 Mo. 491, 93 Am. Dec. 315.

NOTE.—As to effect of intervening impossibility of performance, to relieve from the obligation of a contract, see note to *Stewart v. Stone* (N. Y.) 14 L. R. A. 215.

As to act of God affecting carriers, see also *Wald v. Pittsburg, C. C. & St. L. R. Co.* (Ill.) 35 L. R. A. 356; *Pierce v. Southern P. Co.* 44 L. R. A.

The ticket is wholly silent as to time. If it is a contract, the law implies a reasonable time, conclusively presumes it, and will not permit an express date to be fixed by evidence.

2 *Parsons*, Contr. p. 661.

Is a ticket a contract? If it be a signed ticket, if the purchaser affixes his name to it, then it is a contract just like any other document that is signed.

Mosher v. St. Louis, I. M. & S. R. Co. 127 U. S. 390, 32 L. ed. 249; *Boylan v. Hot Springs R. Co.* 132 U. S. 140, 33 L. ed. 290.

The ticket, then, was a contract, the contract was silent as to time, the law allows no specific time to be fixed, and, if the time for performance was not fixed, a reasonable time is the result, and the carrier is entitled to the allowance for the act of God.

1 Am. & Eng. Enc. Law, 2d ed. p. 598, note 2, p. 599.

The carrier shows the act of God—the burden of proof that the carrier's negligence contributed to it or that he could have gotten through nevertheless devolves upon the passenger.

Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909.

Messrs. Byers & Byers, for respondent:

The act of God is not an excuse for a failure to perform a contract when the performance of the contract is possible or when the impossibility is one of the probable contingencies which a prudent man should have foreseen and provided for.

2 *Parsons*, Contr. 7th ed. p. 672; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Mississippi River Logging Co. v. Robson*, 32 U. S. App. 520, 69 Fed. Rep. 773, 16 C. C. A. 400; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 31 Fed. Rep. 440.

A contract for passage is an entire contract for the voyage, and if the voyage is broken up, and the passenger is not able to reach his destination, he is entitled to recover his passage money at least.

Fetter, Carr. § 274; *Brown v. Harris*, 2 Gray, 359.

In support of the judgment, see—

Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; *Turner v. Great Northern R. Co.* 15 Wash. 213; *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 1; *Angell*, Carr. § 531; *Hutchinson*, Carr. §§ 604, 608, 612; Fetter,

(Cal.) 40 L. R. A. 350; *Smith v. Western Railway of Ala.* (Ala.) 11 L. R. A. 619; *Long v. Pennsylvania R. Co.* (Pa.) 14 L. R. A. 741; *Lang v. Pennsylvania R. Co.* (Pa.) 20 L. R. A. 860; and *Libby v. Maine C. R. Co.* (Me.) 20 L. R. A. 812.

Carr. § 535, and cases; *Ryan v. Rogers*, 96 Cal. 349; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371.

Dunbar, J., delivered the opinion of the court:

The respondent sued the appellant, the North American Transportation & Trading Company, alleging an agreement by the defendant to take him from Seattle to Dawson by September 15, 1897, by way of St. Michael and the Yukon river. When the steamer *Cleveland*, on which he took passage, arrived at Ft. Yukon, it proceeded no further. It was claimed by defendant's officers that it could not proceed further by reason of low water, and the respondent was returned by the company to St. Michael, from whence, at his own expense he returned to Seattle, the respondent paying to appellant for passage money from Seattle to Dawson City the sum of \$200. The suit is to recover the passage money, the expense he was put to in returning to Seattle, and damages for loss of time. The jury returned a verdict in the sum of \$380.50 in favor of plaintiff. He was awarded \$200, the passage money; \$52.50, expense of return to Seattle; \$8, board paid by respondent at St. Michael; and \$120, for loss of time. Judgment was entered on this verdict, and an appeal was taken here.

It is alleged that the court erred in charging the jury that it was the duty of the company, if it could not take the respondent through, to bring him back to Seattle without charge. We think that, under the circumstances, this instruction correctly stated the law. This is not a parallel case with those in which passengers are delayed on railroads where cars are running on frequent and regular time, and delays are presumed to be and are purely temporary. There is no contention by the appellant in this case that the delay here would have been a temporary one, or that there was any probability that the passengers could have been forwarded before the next summer. There is no case that holds—and we would not follow it if there were—that passengers could be discharged from a steamer on which they had taken passage, and forced to remain over winter in an Alaskan climate, to await the convenience of a transportation company for their removal the next summer.

The second assignment of error embraces the same proposition, *viz.*, the court directed the jury that the company had no right to compel or require the passengers to get off and stop at Ft. Yukon or Munook, if they were not willing to do so.

The third assignment is that the court erred in refusing to give the following instruction asked by the defendant: "I instruct you, gentlemen, that if you shall find that the defendant company carried plaintiff to Ft. Yukon without any unreasonable delay, and at that place encountered a stage of water so low as to make a continuance of navigation towards Dawson impossible, that this constitutes the act of God, and that the company was excused from carrying him further towards Dawson until the stage of water should be sufficient." Conceding, with-

out deciding, that low water, under the circumstances mentioned in the instruction, is an act of God, this instruction does not contain the qualifications necessary to constitute it the law as applicable to this case. There is eliminated from the instruction the question of the duty of the transportation company to legitimately inform itself concerning the stages of water on the route. The passenger, when he buys transportation of a company, must necessarily rely upon the company's information concerning the practicability and feasibility of the trip contracted for. It is for the company to put on foot inquiries concerning the feasibility of the trip or probability of its being able to carry out its contract. For aught that appears in this instruction, it might have been known to the company that these passengers could not have been transported any further than the Yukon river; and yet, under the theory of the instruction, it would be justified in taking from travelers the full fare to Dawson, and leaving its passengers stranded on the route. This qualification was understood by the appellant, and acted upon in its answer to the complaint; for subdivision 3 of the answer is to the effect that the Yukon river was at that time so low as to be impossible of navigation between Ft. Yukon and Dawson City by the John J. Healy or any other craft plying in those waters propelled by steam, and engaged in the carriage of freight and passengers for hire; that this stage of the water between those places was utterly unforeseen by appellant, and could not have been foreseen, and was wholly unexampled. This qualification should have been incorporated in the instruction. But these instructions, together with the others, the refusal to give which is assigned as error here, are all rendered inapplicable by the undisputed testimony in the case. The court instructed the jury as follows: "Now, the defense here, really and strictly speaking, is that the defendant was prevented from taking the plaintiff from Ft. Yukon to Dawson City, by circumstances over which it had no control; in other words, it bases it upon the ground of an act of God. Now, I am not going to read to you the more accurate statement that I gave to you of another case of what constitutes the act of God. In order to excuse nonperformance of a contract on the ground of an act of God, there must be no mixture in that, first, of want of diligence; there must be no admixture of negligence; there must be no admixture of want of judgment or skill. In an act of God no amount of judgment or skill or wisdom can prevent the damage or injury. That is what distinguishes it from other things that have connected with them the agency of man." This instruction, while brief, we think, was explicit and correct; and the other instructions asked, as we have said before, are not applicable, for the reason that this was the only real contest in the case, *viz.*, whether the expedition failed by reason of the act of God. There is no pretext that there was any opportunity for this passenger to have reached Dawson by any other boat during the season of 1897. There was virtually an

abandonment of the trip by the company. This is shown by the testimony of the captain of the boat, Capt. Barr. His testimony is to the effect that the water was so low in the Yukon river that the boat could not proceed, and that there was no probability or expectation of any boat getting up the river that fall. In fact, it is conceded that the passengers understood that they had to disembark either at Munook, Tanana, Ft. Yukon, or Rampart City. Indeed, the captain stated that he posted a bulletin up showing the passengers how many pounds of provisions they could buy to sustain them during the winter; that they could get them there or at Rampart City; and he stated that, if they got off at either of those places, he would give them each their proportion of the load of the boat that consisted of provisions, divide the cargo up, and allow each passenger to take a ticket or an order for transportation on the boat the next trip it would make. And, showing conclusively that the next trip which was contemplated was the next season, and that it was not expected by the company that that or any other boat belonging to the company could go up the river later in that season, he stated that ice had already begun to form in the river. He testified on page 64 of the record as follows: "Why, they asked to see Mr. Weare, and Mr. Weare had a talk with them in the cabin of the boat. Took occasion to reprimand me for giving them tickets for next season." So that it plainly appears that the trip was abandoned at least for that year; and, that being the case, the instructions asked for by the appellant, even if otherwise constituting the law, were not in point, under the undisputed testimony in the case.

The last error assigned is for the sustaining of an objection to a question propounded to witness Barr, in which he stated that they had agreed to release the boat from all responsibility in case they were taken back to St. Michael. This statement was alleged to have been made to a Mr. Weare, and it was objected to on the ground that it was not responsive to the question asked. It is contended that this conversation should have been admitted by this witness, for the reason that it was testified to by the complainant's witnesses Overstreet and Lambert; but we think the testimony was properly ruled out by the trial court, for the reason that this conversation was not the conversation which had been testified to by the witnesses for the respondent. At least, it was not identified as such, and it was not shown that the respondent here had anything to do with or was in any way concerned in the propositions that were discussed in that conversation.

We think there were no prejudicial errors committed by the court in the trial of this cause, and *the judgment will be affirmed.*

Gordon, Ch. J., and Fullerton, Anders, and Reavis, JJ., concur.

Rehearing denied.

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PHILADELPHIA MORTGAGE & TRUST COMPANY, Appt.,

v.

P. B. M. MILLER, Resp't.

(.....Wash.....)

1. Evidence that a declaration of homestead was made is not admissible as tending to prove the intention with which articles in controversy, claimed to be fixtures, were affixed to the premises.
2. Stock mantels sold separately and made adaptive to any kind of a house, and which support themselves without any fastenings, or may be fastened merely by screws to render them more stable, and bath tubs resting upon legs and attachable to any heating system, and a hot-water heater attached to a building only by its plumbing connections, do not constitute fixtures as matter of law, but may be found by a jury to be removable.

(February 27, 1899.)

A PPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought to recover possession of certain articles which were alleged to have been fixtures to a mortgaged house and to have been wrongfully removed by the mortgagor. *Affirmed.*

The facts are stated in the opinion.

Messrs. Smith & Cole, for appellant:

The manner, purpose, and effect of annexation to the freehold must be regarded. If a building is erected for a definite purpose, or to enhance its value for occupation, whatever is built into it to further these objects becomes a part of it, even though there be no permanent fastenings, such as would cause permanent injury, if removed.

Cherry v. Arthur, 5 Wash. 788; *Wade v. Donau Brewing Co.* 10 Wash. 284; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *German Sav. & L. Soc. v. Weber*, 16 Wash. 95, 38 L. R. A. 267.

The intention with which the annexation is made is a controlling element in the decision of this question.

Washington Nat. Bank v. Smith, 15 Wash. 169.

The jury could have returned the verdict that it did only on the assumption that these articles were pieces of furniture. Neither authority, precedent, nor common sense will sustain this view.

Capehart v. Foster, 61 Minn. 132; *Woodham v. First Nat. Bank*, 48 Minn. 67.

Messrs. William C. Keith and Preston, Carr, & Gilman, for respondent:

The mortgagor's intention must be gathered from the circumstances surrounding the transaction, and from what was said and done at the time, and cannot be affected by his state of mind retained as a secret.

NOTE.—As to what part of the finishing of house will be regarded as removable fixtures, see also *German Sav. & L. Soc. v. Weber* (Wash.) 38 L. R. A. 267.

Washington Nat. Bank v. Smith, 15 Wash. 169.

This question of intent, and consequently the question whether a particular article is a fixture or not, is a mixed question of law and fact the determination of which must be left to the jury under proper instructions from the court.

9 Enc. of Pl. & Pr. p. 17; *Scobell v. Block*, 82 Hun, 223; *Traders' Bank v. First Nat. Bank*, 6 Kan. App. 400; *Ames v. Trenton Brew. Co.* 56 N. J. Eq. 309; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *National Bank v. North*, 160 Pa. 303.

The time, manner, and purpose of annexation, the use to which the property is to be put, the relationship of the various parties, and above all the intention with which the property is attached, are elements which must be taken into consideration.

Washington Nat. Bank v. Smith, 15 Wash. 169; *Chase v. Tacoma Box Co.* 11 Wash. 377; *Cherry v. Arthur*, 5 Wash. 787; *Loan v. Gregg*, 55 Mo. App. 581; *McKeage v. Hancock F. Ins. Co.* 81 N. Y. 38, 37 Am. Rep. 471.

In *National Bank v. North*, 160 Pa. 303, it was held that radiators and valves, which may be readily detached from the distributing pipes by which heat is supplied to a dwelling house, are not part of the realty, though the owner of the house when he put them in had an undisclosed intention of making them such.

Dunbar, J., delivered the opinion of the court:

The respondent borrowed \$6,000 from appellant, and secured payment of same by mortgage upon two lots in Seattle, on which was at the time a residence in which were domiciled respondent and family. At the time of the execution of the mortgage, there were in the residence four mantels. These mantels were of hardwood, the frames standing above the brick projection of the fireplace, and extending down each side to the floor. They were about 7 or 8 feet high, consisting of a large center plate mirror, and a series of small mirrors, brackets, and shelves. Subsequent to the execution of the mortgage, there was also placed in the residence a porcelain bathtub standing on four legs, and connected in the usual manner with the soil pipes. A hot-water heater was also connected with the building by the usual methods of plumbing. Appellant foreclosed its mortgage, and, upon the vacation of the premises by the respondent, he took from the house the mantels, the hot-water boiler, and the bathtub above described. The present action was brought to replevin the said mantels, bathtub, and heater. The matter was submitted to a jury, and a verdict was rendered in favor of the respondent. Judgment was entered, from which this appeal was taken. So that it will be seen that the question to determine here is whether or not these articles in dispute were fixtures or chattels.

There are three assignments of error: (1) That the court erred in refusing to allow the declaration of homestead to be admitted in evidence; (2) that the court erred in not

permitting testimony as to whether said residence was a finished residence without said articles annexed to it, and whether the value of the premises as a residence was impaired by their removal; and (3) that the evidence did not sustain the verdict. Plaintiff offered in evidence a certified copy of the record of declaration of homestead made by Eva J. Miller, wife of the respondent, which instrument, it is alleged, was offered for the purpose of indicating the intention of the respondent and wife to make said premises their homestead and any fixtures attached thereto permanent fixtures. To this offer counsel for respondent objected, and the objection was sustained. It seems to us that this evidence was incompetent and immaterial. There was no controversy over the fact that the house was built for the permanent residence of the respondent; and, if there had been, the fact of having filed a declaration of homestead would not tend to prove the intention with which the articles in controversy were affixed. The homestead declaration might have been filed at any time, and it might have been filed prior to or subsequent to the affixing of the hot-water boiler or bathtub to the building. We think that the evidence offered was absolutely immaterial, and was properly refused. Neither was it material under the theory that the intention of the mortgagor must govern whether the residence was a finished residence, without these disputed articles being annexed to it or not. The condition of the house was testified to, and the jury, if it was material to determine the question of whether the house was or was not finished, must have determined that question from the testimony submitted. And the offer to prove that the value of the premises as a residence was impaired by their removal was equally immaterial and irrelevant, for it is self-evident that the house would be of less value after the furniture was taken out than it would be with the furniture, conceding that the furniture was worth anything, and that concession or rather allegation of value is made by the complaint. So that the only remaining question is as to the character of these pieces of furniture.

There is a wilderness of authority on this question of fixtures, and a hopeless conflict of decision. We have examined the cases cited by the appellant which have been decided by this court, and are unable to conclude that they tend to sustain its contention; and other cases, as we have before indicated, are so conflicting that it would be profitless to undertake to review or harmonize them. The question of whether or not the particular piece of furniture or machinery is a chattel or fixture has been held by a majority of the courts to be a mixed question of law and fact. In this case the court instructed the jury. These instructions were not excepted to, and must be presumed to have correctly stated the law; and, the jury having found the facts in favor of the respondent, we would be loath to disturb their findings, unless we were compelled to say that, as a matter of law, the property sued for was a part of the realty. In investigat-

ing a question of this kind, we cannot shut our eyes to the many changes that have been wrought by time in the fashion and character of household furnishings. Anciently, mantels were uniformly built as a part of the house, and therefore became a fixture to the realty. The house was built with reference to the mantel, and the mantel with reference to the house. It was a part of the plans and specifications of the house, and could not have been removed without materially affecting, not only the appearance, but the real usefulness, of the house. But advancing mechanical science and taste have evolved an altogether differently constructed mantel, and mantels such as are described by the testimony in this case are now constructed without reference to any particular house or particular fireplace. They are what are called "stock" mantels, and are sold separately, and made adaptive to any kind of a house. They are, in fact, as much a separate article of merchandise as a bedstead or a table. So that, regarding the changed conditions in this respect, the rules of law must be changed and adapted to the changed character of the furniture. A few years ago, sideboards were constructed in, and were made a part of, the house, and were, of necessity, fixtures; while now they are ordinarily separate pieces of furniture, and, by common consent, are moved from one house to another. The same advancement has been made in bathtubs. The old-fashioned bathtub, that was sealed in and actually made a part of the bathroom, has largely given place to the more convenient bathtub, that rests upon legs, and can be attached to any heating system that happens to prevail in the house where it is used. And so with heaters or boilers. In this instance the boiler is in no way attached to the building, ex-

cepting by its plumbing connections. It could be detached without in any way injuring the realty; and we see no reason why it should be considered a fixture any more than the ordinary stove which is connected by pipes to the boiler and to the plumbing system generally. One could be as easily detached as the other, and yet we think it has never been held by any court or contended by anyone that a stove, though connected by pipes to the plumbing system, was a fixture which could not be removed. In this instance the testimony was to the effect that these articles were not placed in the building at the time of its erection and completion, nor for a long time thereafter; that the mantels were not contemplated in the plans or drawings for the erection of the premises, nor included in the specifications under which said building was afterwards completed; nor was there any provision made for the reception in said building of said articles. The testimony shows that the building back of the mantels, or that portion of it which was concealed by the mantels, was plastered and cal-cimined; that for about three years the mantels were not fastened to the wall in any way, but supported themselves in the position they occupied; and that, after that time, they were fastened to the wall by screws, to render them more stable, and keep them from toppling. The boiler and bathtub were not placed in the building for several years after the mortgage was given.

The question of fact having been submitted to the jury under proper instructions, and a verdict having been rendered in favor of the respondent, *the judgment will be affirmed.*

Gordon, Ch. J., and Anders, Reavis, and Fullerton, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Walter J. LAMBERT, *Appt.*,
v.

P. NICKLAS *et al.*

(.....W. Va.....)

- *1. One who keeps a horse or other live stock for compensation has a lien thereon for such compensation by Code 1891, chap. 100, § 15.
- *2. An innkeeper or keeper of livestock who has a lien on the property does not lose the lien by levying an attachment upon the property.

(December 7, 1898.)

A PPEAL by plaintiff from a decree of the Circuit Court for Berkeley County in fa-

*Headnotes by BRANNON, P.

NOTE.—The authorities on the effect of an attachment as a waiver of a lien are few and are well presented by the opinion and briefs of the above case. That levying an execution on

avor of defendants in an action brought to enjoin the levying of an execution upon property upon which plaintiff claimed a lien. *Reversed.*

The facts are stated in the opinion.

Messrs. W. H. Travers and Wisner & Woods, for appellant:

The first principle laid down by the courts was that whenever the law compelled a bailee to receive property, and made him responsible for it, it gave him a lien upon it for his charges.

M'Intyre v. Carter, 2 Watts & S. 392, 37 Am. Dec. 519, and note on 522; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 667, and note.

The inn-keeper and the common carrier were about the only bailees who could claim a lien upon this principle.

1 Jones, Liens, §§ 262, 498; 13 Am. & Eng. Enc. Law, 1st ed. p. 590.

mortgaged chattels, where the mortgage constituted only a lien, will not waive the lien upon exempt property included in the mortgage, see *Barchard v. Kohn* (Ill.) 29 L. R. A. 803.

The courts, however, soon extended the rule so as to give a lien to every bailee for hire, who by his labor and skill had added value to the property bailed to him.

2 Am. & Eng. Enc. Law, 2d ed. p. 12, and note 2; *Steinman v. Wilkins*, 7 Watts & S. 466, 42 Am. Dec. 254.

This included the bailee for hire of live stock who, by any means within his control, had added to the value of the live stock.

13 Am. & Eng. Enc. Law, 1st ed. p. 944; 2 Am. & Eng. Enc. Law, 2d ed. p. 13; *Steinman v. Wilkins*, 7 Watts & S. 466, 42 Am. Dec. 254.

But it did not include the bailee of live stock for hire who merely fed such live stock, but did not add to its value.

2 Am. & Eng. Enc. Law, 2d ed. p. 12, and note; 13 Am. & Eng. Enc. Law, 1st ed. p. 943; *Kelsey v. Layne*, 28 Kan. 218, 42 Am. Rep. 158; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663; 1 Jones, Liens, § 641.

The evident object of the statute, therefore, is to give to the bailee of live stock for hire the same lien that all other bailees for hire had, irrespective of the question of value added to the live stock. Statutes with like object have also been enacted in many other states.

1 Jones, Liens, §§ 648, etc.; 13 Am. & Eng. Enc. Law, 1st ed. p. 945, and note 5; 2 Am. & Eng. Enc. Law, 2d ed. p. 13; *Kelsey v. Layne*, 28 Kan. 218, 42 Am. Rep. 158.

The statute gives an inn-keeper's lien which extends to all goods brought to the inn by the guest.

1 Jones, Liens, §§ 498, 518; 11 Am. & Eng. Enc. Law, 1st ed. pp. 45, 46; *Cook v. Karne*, 13 Or. 482, 57 Am. Rep. 30.

The lien of the plaintiff, therefore, extends to all of Brown's property kept at his stables.

1 Jones, Liens, § 698; *Browne*, Bailm. 49; Am. Dig. (1891) 2808. § 2; *Caldwell v. Tutt*, 10 Lea, 258, 43 Am. Rep. 307.

The question of waiver is one of intention.

28 Am. & Eng. Enc. Law, 1st ed. pp. 526, 528; 1 Jones, Liens, §§ 999, 1013; *Warren v. Branch*, 15 W. Va. 38; *Bansimer v. Fell*, 39 W. Va. 454; *Hozie v. Home Ins. Co.* 32 Conn. 21, 85 Am. Dec. 240; *Townsend v. Newell*, 14 Pick. 332; *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507; *Kirkwood v. Hozie*, 95 Mich. 62.

The circumstances surrounding the plaintiff show that he did not intend to waive his lien by his attempt to attach the property upon which it rested.

1 Jones, Liens, § 999; *Townsend v. Newell*, 14 Pick. 332.

The mere taking of security for the amount of a debt for which a lien is claimed does not destroy the lien, unless there is something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien and destructive of it.

Singer Mfg. Co. v. Miller (Minn.) 21 L. R. A. 231, note; 11 Am. & Eng. Enc. Law, p. 49; 1 Jones, Liens, § 1011.

Plaintiff merely had a right to detain the property from its owner until certain charges upon it were paid.

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1 Jones, Liens, §§ 335, 1033, and note 1; 11 Am. & Eng. Enc. Law, p. 46; *Doane v. Russell*, 3 Gray, 382.

A waiver must operate by estoppel, or under an agreement based upon a valuable consideration.

1 Jones, Liens, § 999; 28 Am. & Eng. Enc. Law, 1st ed. p. 531, and note; *Muhleman v. National Ins. Co.* 6 W. Va. 510; *Ripley v. Etina Ins. Co.* 30 N. Y. 136, 86 Am. Dec. 362; *Lantz v. Vermont L. Ins. Co.* 139 Pa. 546, 10 L. R. A. 577.

To constitute a waiver, or loss, of the lien the change of possession must be from the holder of the lien to the owner of the property. It must be a delivery to the owner.

1 Jones, Liens, § 907; *Moore v. Hitchcock*, 4 Wend. 295; *Stickney v. Allen*, 10 Gray, 352; *Sears v. Wills*, 4 Allen, 212; *McFarland v. Wheeler*, 26 Wend. 467.

The true principle underlying the doctrine of the lien is not that the inn-keeper and the common carrier have a lien because they are compelled to receive goods and insure their safety.

The lien is not a consequence of the compulsion, nor of the insurance. Moreover, the inn-keeper and the common carrier may each demand payment of their charges before receiving the goods.

3 Minor, Inst. 289; 11 Am. & Eng. Enc. Law, 1st ed. p. 37, note 5; *Browne*, Bailm. 95.

Nor is it that all bailees who have added value to the property bailed to them have a lien upon it.

Steinman v. Wilkins, 7 Watts & S. 466, 42 Am. Dec. 254; *Kelsey v. Layne*, 28 Kan. 218, 42 Am. Rep. 158.

The true principle is, that the lien grows out of a contract of sale.

Ibid.

The seller of personal property has his lien until the property is delivered to the buyer.

2 Benjamin, Sales, §§ 1125, 1186; 1 Benjamin, Sales, § 351; 1 Jones, Liens, §§ 806, 821; *Parks v. Hall*, 2 Pick. 206; *Arnold v. Delano*, 4 Cush. 33, 50 Am. Dec. 754; *Haskins v. Warren*, 115 Mass. 514; *Freeman v. Nichols*, 116 Mass. 309; *Goodwin v. Boston & L. R. Co.* 111 Mass. 487; *Gregory v. Morris*, 96 U. S. 619, 623, 24 L. ed. 740, 741.

The plaintiff having the same lien as the seller of personal property, would not have lost it until the property was delivered to the owner.

Steinman v. Wilkins, 7 Watts & S. 466, 42 Am. Dec. 256.

The plaintiff should not be prejudiced because of his futile effort to attach the property held by his lien.

1 Jones, Liens, § 1013; *Lord v. Jones*, 24 Me. 439, 41 Am. Dec. 391; *Bansimer v. Fell*, 39 W. Va. 454.

Messrs. Flick, Westenhaver, & Baker, for appellees:

The term "livery-stable keeper" is a term of definite meaning and in general use; and means a place where horses are groomed, fed, and hired, and vehicles are let.

13 Am. & Eng. Enc. Law, p. 935; *Anderson*, Law Dict. 44; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663, and note.

Such persons have no lien on the property placed with them; because it is essential to the existence of such a lien that the person claiming it shall remain in the exclusive and continuous possession of it. If the owner gets the property into his own hands without fraud, or the lienor voluntarily parts with the property, the lien is at an end, and will not revive on a return of the goods.

Grinnell v. Cook, 3 Hill, 485, 38 Am. Dec. 663; *Bevan v. Waters*, 3 Car. & P. 520; *Jones v. Thurloc*, 8 Mod. 172; *Jones v. Pearle*, 1 Strange, 556; *Sweet v. Pym*, 1 East, 4.

Whenever the relation between the persons is such that the owner has the right at all times to take the property into possession, and exercises the right, the lien does not arise, or, if so, it is severed each and every time the owner uses it.

1 Jones, Liens, §§ 20-23.

Only the common-law lien of inn-keepers is conferred by the statute, that is a lien which can only be created and kept alive by an exclusive possession of the lienor.

1 Jones, Liens, §§ 647-682.

Special privileges such as this statute creates, like the liens of mechanics, are not extended by implication.

McGugin v. Ohio River R. Co. 33 W. Va. 68.

Plaintiff has merged or waived his lien:

First, by reducing to judgment and suing out an attachment for all of his bill, which had accrued prior to our execution lien, he merged all his antecedent rights, growing out of the same cause of action.

2 Black, Judgm. § 674; 15 Am. & Eng. Enc. Law, 1st ed. p. 336; *Fresman*, Judgm. 3d ed. § 216; *Drake*, Attachm. 6th ed. p. 224, a.

Second, in seeking a lien by attachment, he made his election of remedies, and waived his right to a retaining lien.

Central R. Co. v. New Jersey West Line R. Co. 32 N. J. Eq. 67, and note; 6 Am. & Eng. Enc. Law, pp. 247, 250; 2 Black, Judgm. §§ 678, 632.

Third, his action in seeking to subject this property by attachment, is inconsistent with the present theory of his rights, and, having adopted one claim of right, he cannot, when it proves unsuccessful, fall back on an inconsistent one.

2 Black, Judgm. 632; 1 Jones, Liens, §§ 1014, 1019, 1118; *Hanna v. Phelps*, 7 Ind. 21, 63 Am. Dec. 410, note, p. 414.

Parting with possession destroys liens.

Poling v. Flanagan, 41 W. Va. 191; *Bullitt v. Winston*, 1 Munf. 269; *Dorrier v. Masters*, 83 Va. 459; *Herman*, Executions, p. 244, § 172; *Very v. Watkins*, 23 How. 473, 16 L. ed. 522; 7 Am. & Eng. Enc. Law, p. 450.

A lien of this sort is defined to be "a right in one man to detain that which is in his possession, belonging to another, till certain demands of him, the person in possession, are satisfied."

13 Am. & Eng. Enc. Law, p. 574; 1 Jones, Liens, § 3; *McFarland v. Wheeler*, 26 Wend. 472.

As the lien is simply a right to hold or detain property till a demand is satisfied, it 41 L. R. A.

follows that in order to create or continue the lien, possession is essential.

1 Jones, Liens, §§ 20, 21; *Bigelow v. Heaton*, 4 Denio, 496; *Sweet v. Pym*, 1 East, 4; *Kruger v. Wilcox*, 1 Amb. 252; *Wheeler v. McFarland*, 26 Wend. 472; *Grinnell v. Cook*, 3 Hill, 485, 38 Am. Dec. 663, and note.

Whenever, therefore, the person claiming the lien delivers possession of the property, and such delivery is without fraud, he loses his lien.

11 Am. & Eng. Enc. Law, p. 47; *Perkins v. Boardman*, 14 Gray, 481; 13 Am. & Eng. Enc. Law, p. 585; 1 Jones, Liens, § 308; *Wingard v. Banning*, 39 Cal. 516; *Jacobs v. Latour*, 5 Bing. 130, 2 Moore & P. 201; *Re Coumbe*, 24 Grant, Ch. (U. C.) 519.

Brannon, P., delivered the opinion of the court:

Lambert kept a horse and buggy for Brown, claiming a lien for the keeping, refusing to let Brown take them without payment. Brown agreed that they should stand good for their keeping. Brown became insolvent, and assigned for the benefit of creditors, but did not include this property in his assignment. Lambert sued for keeping the property, levied an attachment on it, the officer leaving it in his possession. The attachment was quashed, but personal judgment was rendered for the debt. Afterwards, Nicklas Bros. & Co. levied an execution against Brown on the property, and Lambert procured an injunction against selling, and the court held that Lambert had no lien, dissolved the injunction, and gave the execution preference over Lambert's lien, and Lambert appealed.

Lambert claims a lien for keeping a horse and buggy at his stable belonging to Brown, under § 15, chap. 100, Code, that "persons keeping live stock for hire shall have the same rights and remedies for the recovery of their charges therefor as inn-keepers have." It is questioned by counsel whether Lambert ever had any lien. Counsel say that agisters and liverymen have no lien at common law, as is true. 13 Am. & Eng. Enc. Law, 1st ed. p. 943. They say that an inn-keeper has a lien on the goods of his guest, as he has sole and exclusive possession, not concurrently with the owner; but that one who merely feeds and takes care of a horse has not sole possession, but one concurrent with the possession of the owner; that only exclusive possession gives a lien. Now, I see little difference as to possession. The transient guest sometimes takes his horse and uses him during his stay at the inn, as does one who merely keeps his horse at the stable. It is the keeping the guest and the keeping the horse that gives rise to the lien, not alone possession, that being only the means of enforcing pay. It is very plain to me that the statute intended to remedy the defect of the common law, and give anyone keeping live stock for compensation a lien for such compensation,—a lien like that of the inn-keeper. Of course, it does not mean one who keeps stock to be hired, as there the compensation goes to the other party for use of the stock; but it means to

give a lien to anyone who, for hire or compensation, keeps stock. Lambert clearly had a lien.

But it is said Lambert waived or forfeited his lien by bringing action for the same demand before a justice, and levying an attachment upon the property. First, it is argued that judgment in this action merged and destroyed the lien. Judgment does merge the cause of action, so that it cannot be sued on again; but I understand that in law the debt is one thing and its lien on given property another thing, and that judgment does not destroy the lien. The creditor may enforce both, and his election of one does not exclude the other as a remedy. "Though the debt is merged in the judgment, its nature is not destroyed or affected; and, if the debt was one for which a lien was given at common law or by statute, the lien continues after judgment." 1 Jones, Liens, § 1032a.

But it is claimed with more confidence by counsel for appellees that the lien given by this statute is like that given an inn-keeper by common law, and that, as loss of possession destroys the inn-keeper's lien, so the levy of the attachment took away from Lambert the possession, and gave the officer possession, and thus lost Lambert's lien. There is quoted to us the passage from Jones on Liens, § 1014, saying: "An attachment of goods by one who claims a lien upon them to secure the same debt for which the lien is claimed, is a waiver of the lien. The attachment is in effect an assertion that the property attached belongs to the defendant. Having made the attachment, he is estopped from afterwards asserting the contrary." Also Herman's Law of Executions, § 172, saying: "Taking property in execution at the suit of a party having a lien thereon destroys the lien by changing the possession from the bailee to the officer, even though the property is left with the party. The possession must of necessity vest in the officer in order to enable him to sell the property." And citations from 13 Am. & Eng. Enc. Law, p. 586, and Jones, Liens, § 328, to the effect that a carrier's lien is lost by his attaching property. As to the clause from Jones, that "the attachment is in effect an assertion that the property attached belongs to the defendant," I will say that there is no force in it, because by claiming a lien the plaintiff asserts that it belongs to the defendant as much as by attaching it. He asserts the same thing by both lien and attachment, and no estoppel can, therefore, be based upon any contradiction between the two. Very little authority is cited for the above-cited doctrine; the same is cited for all the propositions above given. Regarding it unreasonable, I have sought to trace its origin and find it in an English decision in 1828 (*Jacobs v. Lattour*, 5 Bing. 130), holding that where one entitled to a lien as stable keeper and trainer sued, and sold and bought the horses under execution, he could claim, in trover against him by an assignee in bankruptcy, only under the execution, not under his lien, his lien being waived by the execution. *Legg v. Willard*, 17 Pick. 140, 28 Am. Dec. 44 L. R. A.

282, seems to hold that when one has a lien, and attaches for the same debt, his lien is gone; but it is a mere assertion, and no discussion of any authority. *Wingard v. Banning*, 39 Cal. 543, is cited for the proposition; but there the affidavit declared the creditor had no lien, which was an express renunciation of it. It seems only three out of five judges concurred in the opinion. In *Arendale v. Morgan*, 5 Sneed, 703, the question is considered, and the court refused to follow that doctrine, and held that where one has property in pledge for debt, and parts with possession with intent to abandon the lien, as if he agrees that it be attached at the suit of a third person, it is gone; but not so where he attaches for his own debt. This is the true position.

To sustain this loss of lien we must place it on one or the other of two ideas,—intentional waiver, or from loss of possession. As to the first, authority is abundant to show that one will not be held to waive a lien unless the intent be express or very plain and clear. The presumption is always against it. Merely taking a new security does not. *Bansimer v. Fell*, 39 W. Va. 448; *Hopkins v. Detweiler*, 25 W. Va. 734, 748; *Hess v. Dille*, 23 W. Va. 97. So with the innkeeper's lien; 11 Am. & Eng. Enc. Law, p. 49.

And as to loss of lien by loss of possession: An innkeeper having a lien has no right to sell the property without a judicial proceeding. If he does, he is liable to an action of trover for its unlawful conversion, besides losing his lien. His only remedy is to hold it till payment. Unreasonable this is; but, where no statute can be found providing for a sale, it is so, by much authority. 11 Am. & Eng. Enc. Law, 1st ed. 46; Jones, Liens, § 523. In fact, on the mere strength of lien, he can sue neither at law nor in equity, if there is no statute to allow it. It is different from a pledge or pawn. 13 Enc. Pl. & Pr. p. 127; 1 Jones, Liens, §§ 1033, 1038. The horse is in the innkeeper's stable eating its head off, and he has no remedy. Suppose, however, by reason of nonresidence or other cause, the innkeeper can sue out an attachment, why shall he not do so? He is not thus waiving, but enforcing, his lien. Why it should be said that, when the officer levies on the property to enforce this lien, the innkeeper loses his lien because he gives up possession, I cannot see. The officer is his agent for this purpose. To say so is technical in the highest degree, and defeats justice. The innkeeper is not surrendering possession to the owner, nor to an officer acting in furtherance of his demand. He could bring a suit, as shown above, without forfeiting his lien; and by resorting to an attachment he simply availed himself of a fact giving him right to attachment to enforce a debt for which there was a lien, using a cumulative remedy. Houck on Mechanics' Lien Law, § 6, says: "If possession is relinquished after the lien attached, the lien is gone; for, by parting with possession, the creditor shows that he trusts to the personal credit of the debtor," and cites numerous authorities. This is so where he lets the own-

er or an officer under process for debts of others have possession. Then you can fairly say that he looks to the debtor only; and that, as Houck says, is the reason why surrender of possession destroys the lien. But how can we say that Lambert intended to look to the personal credit of Brown by an act which told the very reverse, and told that he looked to the property for pay, not to Brown? Furthermore, Brown expressly pledged the horse to Lambert for his keep. Lambert could sell it as a pawn. This he could do by agent, and the agent's possession would be his. Is the officer anything but his agent? He is responsible for the officer's trespass, because he acts for him. Judge Story condemns this doctrine as not well established, and says the Massachusetts ruling was local to it. Story, Bailm. § 366. In *Townsend v. Newell*, 14 Pick. 332, one had goods, with right to lien, and an attachment was levied in favor of a creditor, and he refused to give them up, but kept possession, and gave a receipt to the officer for them. Later he levied an attachment for his own lien debt, still retaining possession, but receipting to the officer for the goods. It was held that the lien was not lost. There, as in this case, the officer let the lien owner keep the goods in his custody. In that case, it is

true, he expressly claimed his lien; but who imagines that Lambert intended to give up his lien? His attachment itself speaks the negative. In that case, after levy, it was as much the officer's possession as in this, and the court did not give it the force of forfeiture of lien, but said, as the party did not intend to surrender it, it still held good. There is no evidence that Lambert intended to give up his lien, and if it stands on intention, and not on loss of possession, he who asserts such intention must make it clear. In *Whitaker v. Sumner*, 20 Pick. 399, where one having a pledge allowed a levy for a debt once owned by him and debts of strangers, he was held to have lost the lien; but Chief Justice Shaw was careful to say, "We would not be understood hereby to hold that an attachment under all circumstances, though made by the party holding the pledge, or by his consent, would be a waiver of his lien." I have not said anything about jurisdiction in equity, as the question was not raised or discussed.

Decree reversed, and the case is remanded, with direction to the circuit court to enter a decree allowing Lambert's debt as a lien to be paid out of the proceeds of the property, in preference to the execution of Nicklas Bros. & Co.

WISCONSIN SUPREME COURT.

City of MARSHFIELD, *Respt.*,
v.

WISCONSIN TELEPHONE COMPANY,
Appt.

(.....Wis.....)

1. An injunction is properly granted in a suit by a city against an unauthorized obstruction of a street by telephone poles.
2. Placing telephone poles in a city street without any permit or direction from the city authorities, and without even giving the board of public works, to which the city charter gave authority in the matter, any time to act on an application for a permit, is not justified by the fact that there were no ordinances of the common council or regulations of the board of public works in relation to pole setting.

(April 4, 1899.)

A PPEAL by defendant from an order of the Circuit Court for Wood County refusing to dissolve a temporary injunction which had been granted to restrain defendant from setting poles in a street in the plaintiff city without its consent. *Affirmed*.

Statement by **Bardeen, J.**:

The defendant, the Wisconsin Telephone Company, is a corporation organized under the laws of this state, and is authorized by its charter to build telephone lines and to conduct a telephone business in this state. It maintains seventy-five different telephone exchanges in the cities and towns of Wisconsin, with wires, strung on poles, connecting said exchanges with each other and with exchanges in other states. It has constructed a line from the city of Stevens Point, westerly, to the city of Chippewa Falls, passing just outside the northerly limits of the city

NOTE.—*Injunctions by municipalities against nuisances by railroads and electrical companies.*

I. Railroads.

II. Telegraph and telephone poles.

The question of municipal control over railroads and other electrical companies as nuisances upon streets is treated in *note to Cape May v. Cape May*, D. B. & S. P. R. Co. (N. J. L.) 39 L. R. A. 609.

Upon the question of equity jurisdiction over nuisances in general at the instance of municipalities, see *note to* — L. R. A. —.

The general question of municipal control by injunction over nuisances upon highways and streets will be found in *note to Drew v. Geneva*, 42 L. R. A. 814.

44 L. R. A.

I. Railroads.

In *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620, 628. It is said the state has a like control over highways, streets, and public grounds as is exercised by the Crown in England, and may have like remedies against persons unlawfully obstructing the same. A portion of the political power of the state is committed to municipalities. The general assembly of this state has vested in cities, villages, and towns the right to control the use of highways, streets, and public grounds within their respective limits, and they are invested with the authority of the Crown and of the state, in this respect, to file bills to prevent and remove obstructions from the streets, highways, and public grounds

See also 47 L. R. A. 104.

of Marshfield, which was completed in the spring of 1898. It was desirous of establishing a public station in said city, and proposed to construct a line of poles along Central avenue to some convenient point where the station was to be located. Central avenue is the main business street of the city, and has been paved along the business portion thereof, and upon it the greater portion of the travel and business of the city is done. It has been the policy of the city to keep that portion of this street between D and Sixth streets clear of all obstructions, and for more than five years it has uniformly denied to all persons the privilege of placing telephone, telegraph, electric light, or other poles in or along the same. In February, 1898, the city granted to R. L. Kraus and K. W. Doege an exclusive permit for fifteen years to erect and maintain a system of wires and poles upon the streets of said city, for the purpose of establishing a tele-

phone exchange therein, upon certain conditions, specified in the ordinance, and under the direction of the board of public works. On October 14, 1898, the defendant with a force of men commenced the erection of a run of poles from the intersection of its main line with Central avenue southerly along said avenue, towards the central and main portion of the city, and placed and set a number of poles therein, without permission of any of the city authorities. The latter objected to this procedure, and under their direction the poles so set were chopped down and removed. Thereupon the city commenced this action to restrain defendants from placing any poles on Central avenue, or in any of the streets of the city, except under the direction and with the consent of the board of public works; claiming that the digging up of the soil and pavement, and the placing of poles in said street, would be a permanent injury and obstruc-

tion under their control. To the same effect, see *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540.

So, in a case wherein the municipal authorities sought to restrain a railroad as a nuisance upon the streets, it was said that the public right over streets is subject to the legislative control over them, and, as to the public, the legislature can authorize the abandonment of a street *in toto*, or turn it in part over to a private enterprise, so it may legalize the operation of a steam railroad transversely or longitudinally over or along a highway, but the legislative authority must appear either in express terms, or must flow as a necessary implication from powers expressly granted. *Burlington v. Pennsylvania R. Co.* 56 N. J. Eq. 259.

It may be asserted, as a general rule, that a railroad company, built by authority of law, is not a nuisance, and therefore, if such a company is acting within its authority, and what it threatens to do is authorized by law, there is no equity to interfere, and its actions can work no legal injury to the public, or to private individuals, and although inconvenience or loss may be suffered it is *damnum absque injuria*. It is essential to a nuisance, either public or private, that it be a thing done or suffered contrary to law. *Faust v. Passenger R. Co.* 3 Phila. 164. In such cases, therefore, neither a private person, nor, it would seem, a municipal corporation, can enjoin the same as a nuisance.

And an injunction at the instance of a municipality to prevent an alleged irreparable injury, such as a public nuisance, is properly refused, when neither the petition nor the evidence sets forth facts sufficient to enable the court to determine the necessity for such injunction. *Burris v. Columbus*, 105 Ga. 42.

A railroad company duly authorized by an act of the general assembly to construct and operate a side track of its railroad in a given street of the city, the fee of which is in the state, will not be enjoined at the instance of the public authorities from so doing, merely upon the theory that the laying and operating of such track will be a nuisance which will subject the property to irreparable injury, where such injunction is merely sought to prevent consequential damages to property located upon such street. *Ibid.*

So, in *Atty. Gen. v. Pope*, N. B. Eq. Cas. 272, the construction of a railroad in accordance with a statute authorizing its construction was held not enjoinable, on the ground that a nul-

lance was thereby caused because of the interference with the public highway where such interference was temporary and not of a serious nature, and the statute authorizing the construction of the road contemplated that portions of the highway should be taken for the purpose of constructing the road.

Where power is vested in a railroad or other corporation to erect bridges and other works necessary for the completion of its road, such power must be exercised discreetly, and with a due regard to the privileges of others, and if an injurious and wanton exercise of it be shown to the court, it will interfere and regulate it upon proper principles, but to warrant such interference the exercise of power must be shown to be not only injurious, but wilfully and wantonly so, a mere mistake in judgment not being sufficient, as such is remedial at law. *Atty. Gen., Pettee, v. Stevens*, 1 N. J. Eq. 369, 384, 22 Am. Dec. 526. In this case relief was sought by citizens at the instance of the attorney general.

And where land is donated or dedicated to the public for certain specific and defined purposes, and such purposes are unmistakable, as soon as the lot is recorded, the statute, vesting the same in the municipal authorities in trust to and for the uses and purposes expressed or intended, declares the trust that the property shall be held for such use and no other, and the city accepting the trust has power to apply in equity to restrain the use of such property, for the street railways or other purposes contrary to the trust. *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540, 544.

In this case it is said that a court of equity has the right to enforce the execution of a plainly declared trust, either upon the application of the owners of lots abutting on a public square, or upon the application of the city, the trustee, and the legislature cannot pervert the trust, and give the land to a private corporation such as a railroad company.

In the above case, an act of the legislature gave the corporation authority to construct and operate a railroad "in, over, across, and along any and all the avenues, streets, public grounds, squares, and alleys within the present and future corporate limits of the town." The company claimed the right to construct the track across a public square, operate its road there, and thus frustrate the original purposes for which the grant was dedicated, and destroy its future benefit and enjoyment as a public park. The court perpetually enjoined the company

tion thereto. A temporary injunction was obtained and served. Thereupon defendants obtained an order to show cause why the injunctive order should not be vacated. On the hearing the defendants submitted a modified motion, to the effect that, if the court should be of opinion that the defendants should be restrained from constructing their line upon Central avenue, then that the order be so modified as to permit the line to be constructed upon some other streets in said city. Both motions were denied, and the original order was allowed to stand. This appeal is to review the order denying the motion to dissolve the injunction.

Messrs. Miller, Noyes, Miller, & Wahl, for appellant:

The streets in the city of Marshfield belong to the public, not to the city of Marshfield.

from all attempts to lay down the track of its road through or across the enclosed public square, and held that the attempted use of the square by the defendant, for the track of its road, was a manifest perversion of the trust created and declared, and would operate injuriously to the public and the abutting lotowners, and would mar the beauty of the road, and destroy it as a place of public recreation, which acts could not be justified.

Where, by a city charter, the complainants are given the control and supervision of the streets within the city limits, charged with the duty of keeping and maintaining them in a condition constantly fit for use, free and convenient for the public, a neglect of which duty is a crime for which they may be indicted and punished, the city has a right to file a bill for an injunction restraining the obstruction and destruction of the street by a street railway company in a manner rendering it extremely dangerous for a prudent man to use it. *Newark v. Delaware*, L. & W. R. Co. 42 N. J. Eq. 196.

And, inasmuch as a town is responsible for the construction and amendment of highways, and town ways, and for damages to travelers for losses occasioned by obstructions and defects, it has the right to invoke the equity power vested in the court in cases of nuisances, to determine whether such a use of ways as claimed is, or is not, a justifiable act, under the provisions granted to a railroad company by its charter. *Easton & A. R. Co. v. Greenwich Twp.* 25 N. J. Eq. 565, 567, Affirming 24 N. J. Eq. 217; *Springfield v. Connecticut River R. Co.* 4 Cush. 63, 68.

So, when the power and authority to control and supervise its streets is conferred on a municipal corporation, it may, in its corporate name, institute appropriate judicial proceedings to prevent or remove such obstructions, and therefore, where it is not plainly shown that such power is not conferred by the act of incorporation of a city, the court will not say that it has not the right to institute and maintain, in its corporate name, a suit in equity to restrain a railroad company, in its use of the streets of the city, beyond the power conferred upon it by its franchise. *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88, 92.

In *Grey v. New York & P. Traction Co.* (N. J. Eq.) 40 Atl. 21, 22, the defendant contended that the remedy by indictment would afford adequate relief, and that therefore the court should not interfere, even so far as to prevent the permanent completion and the continued

2 Dill. Mun. Corp. §§ 656, 675; *Paine Lumber Co. v. Oshkosh*, 89 Wis. 460.

The city of Marshfield has no proprietary interest in Central avenue or any other street.

Milwaukee v. Milwaukee & B. R. Co. 7 Wis. 85; *Sheboygan v. Sheboygan & F. du L. R. Co.* 21 Wis. 668; *Janesville v. Carpenter*, 77 Wis. 297, 8 L. R. A. 508; *Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 480; *Neshkoro v. Nest*, 85 Wis. 128.

Legislative authority given to a city "to lease, purchase, and hold" real property, and to sell and convey the same, does not authorize the purchase of a street.

Trester v. Sheboygan, 87 Wis. 500; *State, Domestic Teleg. & Teleph. Co., v. Newark*, 49 N. J. L. 344; *Booth, Street Railway Law*, p. 19, note.

Power to regulate and control streets does

operation of the road, but the court held that in such a case the power of the court of equity might be justly called into requisition, upon the ground that a preliminary injunction was necessary for the full protection of the statutory rights of municipalities, the case resting upon the same basis as the right of a court of equity to interfere by preliminary injunction, where a public company, under cover of statutory authority, attempted to appropriate the lands of another without complying with the legal conditions precedent, either constitutional or statutory, and upon the further ground that, as the statutory right was clear, it would imperil the public control of highways, and deprive municipalities of the powers and advantages intended to be given their statutes. If, on the mere claim of right to occupy the streets without consent, the court should decline to interfere pending the final determination upon the claim.

Although a railroad company may be authorized to locate and construct its road at the termini mentioned in its charter, by such route as it may deem expedient, it will nevertheless be confined to a reasonable exercise of its charter powers, so as to avoid unnecessary or unreasonable injury to the other public highways, and for any plain abuse of its powers in this regard it may be restrained by injunction. *Stroudsburg v. Wilkes-Barre & E. R. Co.* 2 Pa. Dist. R. 507; *Philadelphia, G. & N. R. Co.* 2 Walker, 291, Cited in 2 Pa. Dist. R. 507. In these cases the injunction was sought at the instance of the municipal authorities.

Where the petition for an injunction was presented in the name of the state, at the instance or relation of citizens and trustees of the township, the court stated that the obligation imposed upon the railroad company to place the highway in such condition as not to impair its former usefulness to the public is a condition inseparable to the right or franchise granted to the company to cross the highway with its railroad, or to divert it from its location for the accommodation of the railroad, and while the company continues in the exercise of its franchise the state has a right to compel it to perform the condition upon which the franchise was granted, and this may be done by petition in chancery prosecuted by the attorney general in the name of the state. *State, Little, v. Dayton & S. E. R. Co.* 36 Ohio St. 434.

In granting an injunction to restrain the defendant company from making an illegal use of, and creating a public nuisance by constructing,

not authorize the common council to grant telephone or other franchises.

Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; 2 Dill. Mun. Corp. 4th ed. ¶¶ 715-717, and cases there cited.

The city of Marshfield, under its charter, had not only no authority to grant any telephone franchise, but particularly not an exclusive franchise to Kraus & Doege.

Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co. 24 Fed. Rep. 306; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 653, 29 L. ed. 518; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 534; *State v. Milwaukee Gaslight Co.* 29 Wis. 454, 9 Am. Rep. 598.

By the general statutes of the state, authority is given to all telephone companies to place poles along the streets and highways of the state.

Wis. Rev. Stat. § 1778.

a proposed double track upon certain streets of the city, the court stated that the right of the city to interfere in such cases ought to be considered as at rest, even though there was no complaint of injury to the immediate property of the corporation, the wrong being done to the citizens of the municipality and of the commonwealth generally. *Philadelphia v. Thirteenth & F. Streets Pass. R. Co.* 8 Phila. 648.

Where one has a license to interfere with the highway, as where a railroad company has authority to lay its track along, under, or over a highway, the terms of the license, so far as it directs the manner of such interference, must be complied with, and an interference in any other mode is a public nuisance, over which equity has jurisdiction in a suit by a city. *Moundsville v. Ohio River R. Co.* 37 W. Va. 92, 100, 20 L. R. A. 161, 169.

So, a license from a city council to a railroad company to build its road across, along, or upon a public street, gives it no power to destroy the street, and the company is bound to restore the street to its former state, or to such state as not unnecessarily to impair its usefulness to the public, and also to build proper crossings over the railroad and keep them in good repair, and if it fails to do so, the company may be compelled to do it by mandamus, and, as the company is guilty of maintaining a nuisance, equity may entertain a bill by a city to abate such nuisance, and may compel the company to perform its duty. *Moundsville v. Ohio River R. Co.* 37 W. Va. 92, 100, 20 L. R. A. 161.

And, though a railroad company may be authorized to cross a street on the same level as the street, and to raise or lower the highway for that purpose, nevertheless if they so execute it as they may deem to be their duty, but so as to create a public nuisance, a court of equity may interfere by way of injunction at the instance of a town council, and, if they proceed to do so, may restrain them thereby. *Johnston v. Providence & S. R. Co.* 10 R. I. 365.

In all suits by a municipality to restrain a nuisance by a railroad company in the use of the streets, where there is a grant of authority the grant is construed most liberally in favor of the public, and most rigidly against the company. *Moundsville v. Ohio River R. Co.* 37 W. Va. 92, 100, 20 L. R. A. 161.

It is contumacious and wrongful conduct for the officers of a railroad corporation to occupy a public highway with its track, practically destroying the street for purposes of public travel, and then defy or disregard all law and all au-

The authority granted by this statute is not conditioned upon the procurement of any consent or subordinate franchise from local authorities.

Young v. Yarmouth, 9 Gray, 388; *Roberts v. Wisconsin Teleph. Co.* 77 Wis. 589.

This statute applies to telephone companies.

Wisconsin Teleph. Co. v. Oshkosh, 62 Wis. 32; *Roberts v. Wisconsin Teleph. Co.* 77 Wis. 589; *State, Wisconsin Teleph. Co., v. Janesville Street R. Co.* 87 Wis. 78, 22 L. R. A. 759.

Section 1778, authorizing the construction of telephone lines upon the streets of a city, does not deprive the city of its police control.

State, Wisconsin Teleph. Co., v. Janesville Street R. Co. 87 Wis. 79, 22 L. R. A. 759; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 40.

Section 7 of chapter 11 of the Marshfield city charter does not change the general rule

thority invoked to compel them to repair the wrong which they have done to the public, and the courts would be impotent indeed if they could not correct such flagrant invasion of public right. *Oshkosh v. Milwaukee & L. W. R. Co.* 74 Wis. 534.

Where it is shown that the work of a railroad company, in erecting its road beyond the banks of a river, would obstruct navigation in a manner beyond what is reasonably necessary for the purpose of carrying out the provisions of its enabling act, equity will restrain its work as a public nuisance. *Newark Pl. Road & Ferry Co. v. Elmer, Van Wagenen, 9 N. J. Eq.* 754, 758. In this case the attorney general brought suit at the instance of others, but whether on behalf of private parties or of the town or city authorities, does not clearly appear.

And, if the extension of a street railroad company, which it is sought to enjoin as a public nuisance and an obstruction to the street, is found to be a public nuisance, the remedy by way of injunction is complete, although no damage be shown. *People v. Third Ave. R. Co.* 45 Barb. 63, 68, 80 How. Pr. 121. In this case the injunction was sought by the people, but whether at the instance of the inhabitants or municipal authorities, does not appear.

The wrongful placing of abutments in the line of a highway by a railroad company cannot become a right, or be legalized by length of time, the same being a wrong, and a nuisance which no length of time will legalize, and the obstruction and nuisance thus created is restrainable by the municipality. *Riakely v. Delaware & H. Canal Co.* 2 Lack. L. News, 59.

So, a railroad placed longitudinally in a street without statutory authority expressly given or arising from necessary implication is a nuisance, restrainable in equity by municipal authorities. *Burlington v. Pennsylvania R. Co.* 56 N. J. Eq. 259.

And the invasion of a highway without authority is a public nuisance, and the track itself in such a case is an obstruction and a nuisance, and the bad street it leaves, and the bad crossing, is a nuisance, abatable by suit in equity at the instance of the city authorities. *Moundsville v. Ohio River R. Co.* 37 W. Va. 92, 100, 20 L. R. A. 161.

Again, an unauthorized occupation of a street by railroad tracks is a nuisance *per se*, and its use, as well as the removal of the tracks, may be controlled by injunction at the suit of any member of the public. *Musser v. Fairmount & A. Street R. Co.* 5 Clark (Pa.) 466. In this

that telephone companies can construct their lines along streets without first obtaining permission from the local authorities.

Mr. B. R. Goggins, with Mr. P. A. Williams, for respondent:

While the streets in the city of Marshfield belong to the public, the city of Marshfield has nevertheless control of its streets, and in this respect represents the public in relation thereto.

Waukesha Hygeia Mineral Spring Co. v. Waukesha, 83 Wis. 475; *Jamestown v. Chicago, B. & N. R. Co.* 60 Wis. 648; 2 Dill. Mun. Corp. 4th ed. § 659, p. 783; *Madison v. Mayers*, 97 Wis. 399, 40 L. R. A. 536; *Eau Claire v. Matzke*, 86 Wis. 291; *Neshkoro v. Nest*, 85 Wis. 126.

The erection of a run of poles along a public street not only results in the temporary digging up and disturbance of its soil and pavement, but also results in its permanent obstruction, and is a nuisance *per se*.

case the defendant's charter provided for the consent of the city council before laying the tracks. The consent was obtained, but was subsequently withdrawn, and again conditionally renewed, but the renewal was held invalid as the council had exhausted its powers of election, and the injunction was therefore granted.

And the construction of a railway along the public streets of a city, if unauthorized by law, is a nuisance restrainable by injunction. *Faust v. City Pass. R. Co.* 3 Phila. 164. In this case, however, the injunction was granted at the instance of certain property owners.

So, although an unauthorized railroad track across a street in a city at grade is not irreparable injury, yet the court will restrain trains on such tracks on the application of the city authorities, until a trial at law, as it is for the time being an exclusive damage not ascertainable in money, and is thus in a sense irreparable. *Cincinnati N. R. Co. v. Cincinnati*, 8 Ohio L. J. 334, 1 Bates' Digest, 1243.

In *Atty. Gen. v. Lombard & S. Streets Pass. R. Co.* 10 Phila. 352, the court restrained the unauthorized occupation of a street by the railroad company as a nuisance *per se*, and held that in such a case equity had a right to grant relief without a trial at law, and would also relieve where the case merely showed a temporary use of the street for such purposes without a right. In this case, however, the suit was brought at the instance of the attorney general, and was on behalf of the commonwealth.

So, in *Grey v. New York & P. Traction Co.* (N. J. Eq.) 40 Atl. 21, the court restrained the defendant company at the instance of the municipal authorities, until final hearing, from constructing and operating its railroad upon a certain highway without having complied with the requirements of the statute making it compulsory for such company to obtain the consent of the governing body of the township, before proceeding to construct its railroad. The court, however, intimated that if the consent of the township committee was obtained before final hearing an application might be made by the defendant company to dissolve the injunction.

A railroad placed longitudinally in a street is regarded as practically an exclusive appropriation of that part of the street which it occupies to a use inconsistent with the legitimate use of the street by the public, and its presence in the street is as repugnant to the rights of the public as would be the presence of a church or a market house, or any other structure devoted to private objects. *Burlington v. Pennsylvania* 44 L. R. A.

2 Dill. Mun. Corp. 4th ed. § 698; *Elliott, Roads & Streets*, p. 478, and cases cited; *Keasbey, Electric Wires*, p. 45.

Public highways belong from side to side and end to end to the public.

State v. Berdett, 73 Ind. 185; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380.

The power to grant franchises to particular persons or corporations is now under general laws vested absolutely, fully, and completely in cities and other municipalities.

Ashland v. Wheeler, 88 Wis. 616.

The statute authorizing the use of highways does not permit the use of streets generally, but simply gives the right of way through the municipality.

State Home Teleph. Co., v. New Brunswick (N. J.) 40 Atl. 628.

It cannot be contended but that the city has the power to contract for those things

R. Co. 56 N. J. Eq. 259. In this case, therefore, the court granted relief in equity at the suit of the city authorities.

And equity will enjoin a plank-road company from rendering the road dangerous and unsafe, at the instance of officers charged with the duty of seeing that it is maintained and kept in good repair, safe for travel. *Detroit & E. Pl. Road Co. v. Macomb Circuit Judge*, 109 Mich. 371.

An injunction was granted at the instance of the corporate authorities, calling upon the railroad company to reduce its bridge across a street so as to conform to the grade thereon, in *Jersey City v. Central R. Co.* 40 N. J. Eq. 417, 422.

So, in *Thompson v. Paterson & H. R. R. Co.* 9 N. J. Eq. 526, an injunction was granted, at the relation of numerous citizens and property owners, restraining the defendants from erecting a permanent railroad bridge on a line of great and increasing travel in an unusual and unnatural position, and in a manner that would not do as little injury to navigation as possible. The injunction, however, only extended to the restraint of the defendant until the question of the proper position of the piers and draws could be determined at law.

In *Moundsville v. Ohio River R. Co.* 37 W. Va. 92, 100, 20 L. R. A. 161, the city sought to compel the street-railroad company to put a street in certain order, according to the terms of a municipal ordinance, and the question was whether such a suit could be maintained in equity, the contention being that it could not, because the damage at law would affect the whole remedy. The court held that such was not the case, as a city had the right to move in the matter, the state statutes and decisions giving it control over streets, and making it liable for defects, and in so doing it represented the public interest, the act of the railroad company in so dealing with the street, and not putting it in repair, constituting a nuisance.

In *Jacksonville v. Jacksonville R. Co.* 67 Ill. 541, 544, in granting an injunction perpetually enjoining the railroad company from laying down its track through or across a public square, the court stated that a court of equity had the right to enforce the execution of the plainly declared trust, either upon the application of the owners of lots abutting upon the square, or upon the application of the city as trustees, as the legislature could not pervert the trust, and give the land to the private corporation, as such an act would be bad faith to

resulting to its special benefit in the administration of its affairs. The Kraus and Doege franchise confers special benefits upon the city.

It is an executed contract on the part of the city, the consideration for which is the benefit which the public will derive from its use and exercise.

Ashland v. Wheeler, 86 Wis. 615; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380.

This is not, however, an exclusive franchise. It is exclusive only for a very limited time.

Des Moines Street R. Co. v. Des Moines Broad Gauge Street R. Co. 73 Iowa, 613.

Telephone companies are authorized by law to enter upon the highways and streets of the state of Wisconsin only upon condition that they obtain from the respective towns, cities, and other municipalities the consent of their governing bodies.

the original proprietors as well as to the public, the square being valuable property intended for the public use, and appurtenant to the estate of the abutting lotowners; and the trustees of the city must be permitted to preserve it for the express and intended purposes of the trust.

Where the remedy sought by the complainant in equity, by way of injunction, was one to judicially determine whether the defendant railroad company had complied with its obligation of duty with respect to the streets of the city, and if it had not performed its duty, then to abate the nuisance by requiring a cessation of the present state and the performance of such duty, it was held a court had jurisdiction to adjudicate on the question whether the company had fulfilled its obligation, and if not to make an order for it to do so, as courts of equity exercise a very salutary jurisdiction in matters of nuisances, to adjudge the question of nuisances, and to abate them, and, though the remedy by way of mandamus would be adequate, yet it was more formal, and not as flexible, as that in equity. *Moundville v. Ohio River R. Co.* 37 W. Va. 92, 106, 20 L. R. A. 161.

And it is no defense to an action for a mandatory injunction to compel a railroad company to restore the highway or street to its former condition of usefulness, to allege that the city should so restore the street, and then by action at law recover the expenses thereof from such company. *Oshkosh v. Milwaukee & L. W. R. Co.* 74 Wis. 584.

In *District Attorney v. Lynn & B. R. Co.* 16 Gray, 242, the selectmen of the town through the district attorney sought to restrain defendant company from laying a track for a horse railroad within the limits of the town. The court upheld the authority of the attorney general, or other law officer empowered to represent that government, to file an information in equity to restrain and prevent a public nuisance, stating that such steps might be taken by him either *ex officio*, or upon the relation of persons who had an interest in the subject-matter of the bill, and whose private rights were to be protected by the decree, which was sought mainly on the ground of public injury, the court seeing no serious objection to such method of reaching and restraining a public nuisance.

In *Windsor v. Delaware & H. Canal Co.* 92 Hun, 127, 133, the defendants had constructed an overhead crossing. It was alleged that such crossing materially and unnecessarily impaired the usefulness of the highway; that no

Eels v. American Teleph. & Teleg. Co. 143 N. Y. 133, 25 L. R. A. 540; *Zehren v. Milwaukee Electric R. & Light Co.* 99 Wis. 83, 41 L. R. A. 575; *Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co.* 95 Wis. 561, 37 L. R. A. 856.

A telegraph or telephone line cannot be constructed on a public highway or street except with the consent of the state.

2 Cook, Stock & Stockholders, No. 730, p. 1594, No. 731, pp. 1595, 1596; *People's Pass. R. Co. v. Memphis City R. Co.* 10 Wall. 38, 19 L. ed. 844; *Cater v. Northwestern Teleph. Exchange Co.* 60 Minn. 530, 28 L. R. A. 310.

The legislature may delegate to municipal or local bodies the right to grant or refuse such authority.

2 Dill. Mun. Corp. 4th ed. § 724; 2 Cook, Stock & Stockholders, No. 913, pp. 1551, 1552; 2 Dill. Mun. Corp. 4th ed. §§ 658, 698, 708, 719; *People, Third Ave. R. Co., v. Newton*, 112 N. Y. 397, 3 L. R. A. 174.

Even where the power of the municipality

necessity existed for a passageway as narrow as that maintained by the defendant corporation: that the requirements and safety of the traveling public demanded an enlargement of such passageway, and also that the defendant did not, in constructing its railroad across such highway, restore the same to its former state or to such a state as not to unnecessarily impair its usefulness. The court held that, under N. Y. Stat. 1890, an action was properly maintained in the name of the town to enjoin the railroad company, and it was not necessary for the highway commissioners in the first instance to declare an encroachment and institute proceedings given by the statute for its removal.

Again, in *Stearns County v. St. Cloud, M. & A. R. Co.* 36 Minn. 425, 426, an injunction was granted at the instance of a board of management to enjoin the railroad company from constructing and maintaining its road without any lawful authority, along and through an established and traveled road in two towns, so as to entirely destroy the road for the purposes for which it was established.

So, without the aid of special statute a municipal corporation can prevent by injunction the erection of a nuisance upon lands dedicated to the use of its inhabitants, and therefore an injunction will be granted at the instance of the municipality to restrain the defendant railroad from laying an additional railroad track in a public street in the city without the permission of the proper authorities. *Cohoes v. Delaware & H. Canal Co.* 134 N. Y. 397, 408. Reversing 54 Hun. 558.

In *Chicago, B. & Q. R. Co. v. Quincy*, 136 Ill. 489, the court, at the instance of the city, enjoined the defendant company from depositing dirt, cinders, and other material upon certain portions of the streets, although the defendant contended that the acts complained of amounted to a mere trespass, and that equity would not assume jurisdiction by injunction to prevent the placing of obstructions in a public street. The court followed its prior decision in *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620, wherein it held that, as the legislature had committed a portion of its sovereignty to municipalities, in respect to streets, highways, and public grounds within their limits, they had the authority of the state in that respect, and might maintain such a bill in equity.

So, in *Northern C. R. Co. v. Baltimore*, 21 Md. 95, 106, an injunction was allowed at the instance of the corporate authorities, restrain-

is, by the legislature, restricted to the designation of the streets and of the manner of placing the poles therein, proper application to the proper authorities is held to be a condition precedent to the right to set up poles.

New York & N. J. Teleph. Co. v. East Orange, 42 N. J. Eq. 490; *State, Broome, v. New York & N. J. Teleph. Co.* 49 N. J. L. 624, 50 N. J. L. 432; *State, Winter, v. New York & N. J. Teleph. Co.* 51 N. J. L. 83; *Suburban Light & Power Co. v. Boston*, 153 Mass. 200, 10 L. R. A. 497; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7.

Bardeen, J., delivered the opinion of the court:

Both parties admit the public character of the streets of a city and the almost omnipotent control of the legislature over their use. The city does not own, and cannot alien, its streets. It cannot rightfully au-

ing the railroad company from constructing, grading, or laying with rails its branch railroad upon, along, or across certain streets in the city, or from altering the grade of the same, or from proceeding with the work of the building without the consent, and under the supervision, of the mayor of the city and city commissioners, as provided by city ordinance, the provisions of the ordinance being well known to the company, the mere fact that the city authorities did not invoke the interposition of the court sooner being no defense.

And in *Detroit & E. Pl. Road Co. v. Macomb* Circuit Judge, 109 Mich. 371, the court refused an application for a writ of mandamus to compel the circuit judge to dissolve an injunction restraining the defendant company from proceeding in the construction of its road in a manner not pointed out by the act granting its franchise, and pointed out that it was competent for the highway commissioners, and for the township, to commence the proceeding, and for the circuit judge to issue the injunction, and also for the circuit judge to modify the injunction if he was satisfied, from the showing made before him, that to do so would be to the advantage of the public, and would not result in the creation of a threatened nuisance dangerous to the traveling public, the right to issue the injunction and to modify it arising from the fact that it was a proper exercise of the power of the court to see that the police regulation given by the Michigan statute over highways was enforced.

In *Burlington v. Pennsylvania R. Co.* 56 N. J. Eq. 259, where a bill was filed by the city authorities to restrain the company from laying an additional track through a street in the city, and also to remove a part of a track already laid in such street, the question was whether the municipal consent was sufficient to legalize the structure. The facts showed that another company laid its route through, and built a single line upon, the street upwards of sixty years previously, and that the city authorities granted to the company the right to construct the railroad authorized by the incorporating act at, upon, through, and along the street from east to west, and that the city had covenanted that it should be lawful for the company to enter upon the street and grade the same, lay rails thereon, and do other acts and things necessary for the proper and effectual completion of the road, and for keeping the same in repair, doing no unnecessary damage or injury either to the street or adjoining property, the 44 L. R. A.

thorize obstructions therein without legislative authority. Its duties and obligations with respect thereto are defined in its charter. The general law grants powers and privileges to persons or corporations like the defendant company, to be exercised by municipal consent or subject to municipal limitations. Section 1778, Rev. Stat. 1898, under the interpretation of this court, authorizes the use of the highways of this state by corporations like the defendant, by their poles and wires, provided they are so set as not to obstruct or incommode the public use thereof. *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32; *Roberts v. Wisconsin Teleph. Co.* 77 Wis. 589. And see *State, Wisconsin Teleph. Co., v. Janesville Street R. Co.* 87 Wis. 72, 22 L. R. A. 759. It is conceded by appellant that this section does not deprive cities of their power of police control over the manner in which such work shall be done, and that they may adopt, by ordi-

road to be constructed as near as possible in the middle of the street, leaving ample and sufficient carriage way along the street on each side of such railroad. The court enjoined the construction of the additional track, and also issued a mandatory injunction for the removal of such parts of it as had been already laid.

Where the corporate authorities alleged that the defendant company tore up the pavement, and laid down and constructed, through the entire length of a certain section of a street and diagonally over the same in a certain direction, a portion of their railroad being a double-track road, occupying a strip of almost 15 feet in width, and with the overhanging of the cars used by them upon the said tracks occupied a strip of 21 feet, and that there was no necessity for the construction of the road in such manner, nor was it reasonably necessary that such double track should be laid so as to infringe upon a certain street upon an acute angle, the court held that such averment showed a substantial equity as the company had no right to occupy any portion of the streets of the city for the purposes of their road, except to such extent as was reasonably necessary, and that such facts exhibited a prima facie case for the action of a court of equity. *Newark & N. Y. R. Co. v. Newark*, 23 N. J. Eq. 515, 522.

So, in *Philadelphia v. Lombard & S. Streets Pass. R. Co.* 3 Grant, Cas. 403, an injunction was granted restraining the defendant company from removing a cobble pavement in the street for the purpose of building their own roads thereon, contrary to the provisions contained in their charter, to the effect that the company shall be subject to all the ordinances of the city council, an ordinance of the city prohibiting them from so doing without consent of the common council.

And, where a railroad company, licensed by the city authorities to construct its road upon the streets of the city within a given time, failed to construct the same within such time, and the city authorities thereupon revoked the license, and sought to enjoin the company from so constructing its road, it was held that the proceedings were rightly brought in equity at the instance of the city authorities to restrain the construction of such road. *Plymouth Twp. v. Chestnut Hill & N. R. Co.* 168 Pa. 181. The bona fides of the company in so continuing to construct its road, and the hardship of the revocation of the consent, were declared to be no reason for the court's declining to grant the injunction.

nance, all reasonable regulations for the location and use of telephone poles and wires in the streets. Section 4, subc. 4, chap. 160, Laws 1891 (plaintiff's charter), provides that "the common council shall have authority by ordinances, resolutions, by-laws, or regulations: . . . (26) To lay out, make, open, and keep in repair, alter or discontinue, any highways, streets, lanes, or alleys, and to keep them free from encumbrances and to protect them from injury. (27) To establish and alter the grades of streets, and to regulate the manner of using the streets in said city, and to protect the same from injury by vehicles used thereon." Construing similar provisions in the charter of the city of Janesville, this court, in 87 Wis. 72, 22 L. R. A. 759, before cited, said: "There can be no question, at this late day but that our municipal corporations may make all reasonable regulations for the location and use of electric wires in the street,

and require all reasonable safeguards for the same. The question is virtually so settled in this state by our own decisions." The authorities and decisions there cited seem fully to warrant that conclusion. That, in the exercise of this power, the city authorities may go so far as to prohibit the encumbering by telephone poles of certain of its streets, in the exercise of a reasonable discretion, is equally clear. Such right necessarily follows from the grant of the power to regulate. It is also implied from the fact that the dominant purpose of a street is for public passage, and any appropriation of it by a legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. *Hudson River Teleph. Co. v. Waterliet Turnp. & R. Co.* 135 N. Y. 393, 17 L. R. A. 674; *Utica v. Utica Teleph. Co.* 24 App. Div. 361. Or, to state the rule in another way: "All legislative grants to

In *Stroudsburg v. Wilkes-Barre & E. R. Co.* 2 Pa. Dist. R. 507, the railroad company had located its road, and was about to build its track on the part of a certain highway in the borough, occupying the road for a distance longitudinally and obliquely. The evidence showed that the proposed location of the railroad company on the carriage road would occupy the whole width thereof, so as to render travel upon the same with wagons and other vehicles impossible, unless the track of the railroad was used for such passage, and there was no necessity for the company to occupy the said street, and that if there was the nature of the territory was such that another road could have been easily located on as favorable ground as the existing road. The court continued the injunction until such time as the company made proper provisions for the convenience of the public, as the company had no right to occupy the street to the exclusion of the public, or in such a manner that the safety of travelers should be endangered by requiring them to seek passage on or along the railroad track longitudinally.

Where a railroad company had commenced the destruction of the road or public highway two years prior to the commencement of the action, and had been required by the town authorities to restore the same to its former state of usefulness, and had neglected to do so, it was held that ample time had been given them to perform such duty, and the court therefore granted the mandatory injunction to compel the performance of such duty. *Jamestown v. Chicago, B. & N. R. Co.* 69 Wis. 648, 651.

So, in *Jamestown v. Chicago, B. & N. R. Co.* 69 Wis. 648, 651, the court allowed the injunction, as the statute gave the railroad authorities power to construct such road, and imposed the express condition that it should restore the road to its former state of usefulness. The court stated that the town had redress for the destruction of such road, and might maintain an action to compel the railroad company to restore it to its former usefulness, where it had impaired it by building such track, the town having suffered special injury by the destruction of the highway.

The court distinguishing this case from the prior cases of *Milwaukee v. Milwaukee & B. R. Co.* 7 Wis. 85, and *Sheboygan v. Sheboygan & F. du L. R. Co.* 21 Wis. 668, *infra*, upon the ground that in the first of those cases the city, by virtue of its interest or property in the streets, attempted to enjoin a railroad company from

building its road in the street, and it was held that the city had no property or interest in the street which would authorize it to maintain the suit; but the question in the case then before the court was not considered or even alluded to in that case, and therefore not decided, while in the *Sheboygan* case it was not clear whether the acts complained of were authorized by the charter or not, and, as the right to the injunction depended upon the disputed question, it was held that no injunction should issue until the acts of the company were shown to be illegal by an action at law, the court in the latter case intimating that, as the state statutes imposed upon towns the obligation of keeping in repair all public highways and bridges within their respective limits, the town had an interest of a certain kind in preventing acts destructive of public highways within its limits, not common to the people at large, and impliedly stated that the town had a right in such a case to invoke the equity powers of the court by injunction.

And the doctrine established in *Jamestown v. Chicago, B. & N. R. Co.* 69 Wis. 648, was upheld in the later case of *Oshkosh v. Milwaukee & L. W. R. Co.* 74 Wis. 534, wherein the court stated that a mandatory injunction would seem to be the only adequate remedy to redress the wrong to the public rights, in a case showing that the street in question had been materially impaired, injured, and obstructed by raising an embankment thereon, above the grade of the street, so as to make it impracticable to drive over the track in certain places, or even to turn with an ordinary team or vehicle, thereby destroying the use of the street.

Where a deed, entered into between the city and the railroad company, formed the contract governing the manner in which the railroad company must grade and use the portions of certain streets mentioned therein, and its terms were plain and unambiguous, and conferred upon the company a right to grade, improve, and use a certain specified portion of the street in such a manner as might suit the convenience of the company, and the company had also the right to construct thereon such tracks, slide-tracks, switches, and frogs as it might desire, and to use the same in the transaction of its business as the convenience of the company might require, and the only restrictions and limitations imposed were that the railroad company had no right to erect in parts of the street in question any building or buildings, nor to appropriate the streets to any private use ex-

private corporations to occupy streets with electrical appliances are made impliedly, if not expressly, subject to the police powers of the municipality, both to dictate and to change the location of such plant." *Monongahela City v. Monongahela Electric Light Co.* 4 Am. Electrical Cas. 53, 12 Pa. Co. Ct. 529.

But, it is said, the city of Marshfield has never passed any ordinance or by-law regulating the placing of poles in its streets, and it is argued that, as defendants were not violating any regulation in that respect, this action cannot be maintained. Section 7, chap. 11, of the charter provides: "No building shall be moved through the streets or obstructions be placed therein without a written permit therefor granted by the board of public works. Said board shall have the power to determine the time and manner of using the streets for laying or changing water pipes, or placing and maintaining electric lights, telegraph and telephone poles: Pro-

cept to the uses therein mentioned, and the streets were to be so graded by the company, and the tracks so laid, that carriages and other vehicles might conveniently cross the same, the court held that, if the company in occupying the streets undertook to disregard such duties, it might be enjoined in that regard, but not otherwise, and that the company was at liberty to grade and improve the parts of streets as it might desire, but that the improvement must be so made that wagons and vehicles of all kinds might cross over the same conveniently, the occupation of the streets by the company under the powers conferred, of necessity, to some extent, obstructing the free use of the streets so that the public would not have that free use thereof which would have otherwise existed. The court therefore reversed the decree of the court below, and dismissed the case, with directions to enter a decree enjoining the railroad company from grading the parts of the street in such a manner as would prevent wagons, etc., of all kinds conveniently passing over the said parts of the street to the water's edge, and refused to extend the injunction to an obstruction of the streets amounting to a prevention of the free uses by the public, the right to occupy and use the streets in that case not depending on the general power conferred upon cities and towns to control and regulate the streets and the use thereof. *Chicago, B. & Q. R. Co. v. Quincy*, 136 Ill. 489.

In *Stockton v. Atlantic Highlands R. B. & L. B. Electric R. Co.* 53 N. J. Eq. 418, 424, the court applied the principles discussed by the court in *Franklin Twp. v. Nutley Water Co.* 53 N. J. Eq. 601, in granting a preliminary injunction restraining the water company from laying its pipes in the streets of the township without the consent of the township authorities, which was by a statute made a condition precedent to such work. The case then before the court was that of a street railroad laying its tracks operated by electricity supplied by overhead wires in the streets of the township, but the action was brought by the attorney general on behalf of certain property owners whose consent had not been obtained as provided by the statute. The court stated that the rights of such parties were equal to those of the township authorities.

The principles laid down in the above-mentioned case of *Franklin Twp. v. Nutley Water Co.* 53 N. J. Eq. 601, are as follows: "For the full protection of the statutory rights of the municipalities, a preliminary injunction is nec-

essary, however, that the decision of said board in this regard may be appealed to the common council." This provision gives to the board of public works ample power to exercise control over the streets of the city, subject to appeal to the council. Whether it gives them the power to totally prohibit the encumbering of the streets of the city by telephone poles is not necessary to decide. The city makes no such claim, but it does insist that its streets shall not be so encumbered except under the direction of the proper officers. The record shows that the defendant Gallagher, representing the company, went to Mr. Hoffman, the chairman of the board of public works, about 11 o'clock A. M. of October 14, and said he was ready with a crew of men, and wished the consent of the board to set a line of poles along Central avenue, from its main line to the business part of the city. He was informed that the chairman had no power to give such consent, that some of the members were out of

essary, and in this respect the case rests upon the same basis as the right of the court of equity to interfere by preliminary injunction where a public company, under cover of statutory authority, attempts to appropriate the lands of another without complying with the legal conditions precedent, either constitutional or statutory. . . . Where the statutory right is clear, . . . it would imperil the public control of highways, and deprive municipalities of the powers and advantages intended to be given by statutes, if, on the mere claim of right to occupy the streets without consent, this court should decline to interfere pending the final determination upon the claim."

In *Fenelon Falls v. Victoria R. Co.* 29 Grant, Ch. (U. C.) 4, it was held that a municipality might file a bill to compel a railroad company to put streets and highways, not properly traversed by such road, in good repair, and that the corporate powers will not be restricted to proceeding by way of indictment or information.

So, in *Atty. Gen., Nepean Twp. v. Bytown & N. R. Co.* 2 Grant, Ch. (U. C.) 626, it was held that a municipality had the right of prohibiting the proceeding with any road within the limits of the jurisdiction, the making or improving of which by a road company formed under the statute 12 Vict. chap. 84, was commenced, before any opposition was made thereto, without the permission of such municipality; and that notice of such opposition, if duly given before the work was commenced according to the 2d section of that statute, had the effect of an interim injunction to restrain the commencement of the road; but if such notice was not given in time for that purpose, the power of prohibition conferred upon a municipal council was not forfeited.

And where plaintiffs, a municipal corporation, sought to restrain defendants, a railroad company, from trespassing by running their track along one of the streets of the municipality without consent, in contravention of the railway act (C. S. C. chap. 66, § 12, subsec. 1), it was held that by virtue of the municipal act there was such power of management, control, etc. bestowed upon municipalities, and such a responsibility cast upon them, as to justify them in intervening on behalf of the inhabitants for the preservation of their rights, and to restrain bodies like the defendants from transgressing the statutory regulations imposed upon them, although the court stated that but for the language in the early chancery de-

the city, but that a meeting of the board would be called not later than the evening of that day to act upon such request. Gallagher replied that he was ready with his men to set the poles, and would not wait for such meeting; that his instructions were to set the poles immediately, and he would do so, independent of the board or the other city authorities, which he forthwith proceeded to do until forced to stop. It is such conduct as this that creates and fosters feelings of prejudice against corporations. It was in utter disregard of the city's rights. The city had theretofore granted a franchise for a local exchange. Under it the local company had a right to use certain of the streets for its poles, under the direction of the board. It cuts no figure in this case that the franchise was exclusive for a limited time. If it was wrong, it did not justify the defendant in committing another wrong. The fact that the common council had adopted no ordinances, or the board of public works had passed no regulations, in relation

to pole setting, affords the defendant no justification for its procedure. While it is true the city might have enacted ordinances on the general subject of the encumbering of the streets yet from the very nature of the situation it was impossible to anticipate the needs or desires of a company coming in as the defendant did. Before the board could act intelligently, it was necessary for them to know something about the desires and intentions of parties desiring to use the streets. When the situation had sufficiently developed that the board could act understandingly, it became its duty to act, and to act reasonably. It was likewise incumbent upon the defendant to make its purposes and wishes known to the board, and to give them a reasonable time to take action. The defendant had no right to enter upon the streets of the city, even though no prohibitory ordinances had been passed, and occupy them as it pleased, and set up poles that were obstructions, at will. Its right to go upon the streets with its structures was lim-

cluded it would have preferred to hold that the proper frame of suit in that case was by way of information in the name of the attorney general with the corporations as relators; the court adopting the language used by the vice chancellor in *Guelph v. Canada Co.*, 4 Grant, Ch. (U. C.) 632, wherein he said: "I think that the suit is not improperly constituted." *Fenelon Falls v. Victoria R. Co.*, 29 Grant, Ch. (U. C.) 4.

In *Devonport v. Plymouth D. & Dist. Tramways Co.*, 52 L. T. N. S. 161, 49 J. P. 405, the defendant company was authorized by act of Parliament to make tramways in the public streets of certain boroughs. The act provided that the defendant should not, without consent of the corporations of such boroughs, use for public traffic any of the tramways mentioned in the act until the whole system was completed, and if either corporation should at any time complain to the board of trade that the company were not carrying out such permission, the board might direct an inquiry in the manner prescribed by the act, and the company must abide by every order made consequent on such inquiry by the board. The company had opened and worked a tramway in a borough without the requisite consent, and the corporation of an adjoining borough moved for an interim injunction to restrain the company from working the section opened until the whole system in both boroughs was complete. The court held that the injunction could be granted as there was nothing in the section of the private act to take the case out of the jurisdiction of the court, under the judicature acts of 1873, to grant an injunction, and that the plaintiffs were entitled to complain of the breach of the conditions imposed by the private act without showing that they had thereby sustained any actual damage.

In some cases, however, equity has refused relief at the instance of municipalities. Thus in *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602, 609, 610, an incorporated company was invested by act of a general assembly with power to lay a railroad track through certain streets in the city. The court held that the state had the right of eminent domain over the streets and squares of the city, dedicated to the use of the inhabitants by the act of general assembly of 1760, and might lay additional servitude thereon by granting the defendants the right to run the railway through them, without the consent of the city authorities; and further, that the mayor and aldermen of the city had no such

power in the streets and squares, under the act or any act amending it, as entitled them to a pecuniary compensation for the additional servitude so placed upon the streets, nor had they a right to an injunction restraining the construction of the railway for the benefit of the residents along such streets and squares, and that if any of the residents were damaged by the construction of such a road they would be heard upon a proper case. The injunction was therefore refused.

So, in *Chicago, R. I. & P. R. Co. v. Joliet*, 70 Ill. 25, the court refused relief by way of injunction, restraining the railroad company from using the tracks, in a public square, in the city, for purposes of its road, in violation of a city ordinance declaring the same to be a nuisance, as the city cannot by a mere declaration make such structure a nuisance, especially when the city authorities only have power by ordinances to regulate the use of the public streets and squares by a company having authority from the legislature to lay its road upon a public street.

And in *Waterloo v. Waterloo Street R. Co.*, 71 Iowa, 193, the city was refused an injunction to restrain the defendant from laying down a street-railway track in one of the streets of the city. An ordinance of the city had granted the defendant the exclusive privilege of constructing, in the streets and alleys of the city, necessary tracks of a railway. Subsequently the city council passed an ordinance repealing the former grant, but granting the same privilege as to streets then occupied by the defendant. The petition sought to restrain the defendant in constructing its track in a certain street without authority or right, and it was contended that the defendant was using, in the construction of such track, a rail different from that ordinarily used in street railroads, but the ordinance did not provide as to the kind of rail to be used or the gauge of the road. The court refused relief upon the ground that the plaintiffs had full power to regulate the construction of such roads without proceeding in equity, and such powers were not affected by the city's contract with the defendant company.

Again, where a corporation owned the fee on both sides of the street, and laid railroad tracks thereon, and the supervisors of the highway, at the instance of the attorney general, sought to restrain the same as an obstruction to public travel and a nuisance, the relief was refused

ited by the charter provisions mentioned, and, until it had complied with their requirements, it was without legal justification. Here was a city of 5,000 people, with water-works, electric lights, a local exchange, and paved streets. Considerations of local pride seemed to demand that their main business street, in the business center, should be kept clear of obstructions or encumbrances. The board had an undoubted right, in the exercise of a reasonable discretion, to prohibit the encumbering of Central avenue with wires and poles. The discretion of that body could be controlled by the council on appeal. It was not within the power of the council to determine the time when or the manner in which defendant might set up its line, except in the exercise of its appellate jurisdiction over the board. We do not say that the city has the right to entirely exclude the defendant from entering the city, because, under the facts, that question is not before us. We do hold, however, that before the

defendant can occupy any of the streets, application should be made to the board of public works, and a reasonable time given for that body to act. Its action is subject to review by the council, on appeal, if not satisfactory. In the exercise of its powers, the council may consider that the rights of the defendant under the general law are in subordination to the police powers vested in the city authorities, and may adopt all reasonable regulations necessary to prevent its streets from being obstructed or encumbered. If it acts contrary to law, no doubt an ample remedy exists.

Defendant's so-called "modified motion" must also fail. The court will not assume to control the action of the board of public works. When a proper and timely application has been made to the board, they may be compelled to act. Until then the court has no right to interfere.

The order of the Circuit Court is affirmed.

upon the ground that it was not of such a nature as to require the extraordinary process of injunction, as the same were placed thereon by the town authorities. *Atty. Gen. v. Bay State Brick Co.* 115 Mass. 431.

Where it was not alleged that the defendant intended or threatened to construct its railroad in, upon, or across any common highway or street in the town without permission of the selectmen thereof, as required under the state statute by which the defendant was incorporated, but the proceedings showed that it proposed only to construct its track over and upon a certain turnpike, constructed and maintained by a corporation duly authorized for that purpose, and charged by law with the care, safety, and suitable repairs thereof; and it also appeared that the defendant was acting in the construction of its track with the sanction and consent of the turnpike corporation, according to a contract entered into with the corporation, pursuant to a power expressly given to them by the act of incorporation, to the exercise of which power the consent or sanction of the selectmen of the town was not required,—the court refused the injunction as there was no ground for the position that the defendant's acts were unauthorized or illegal, neither was there evidence to prove that the construction of the proposed railroad over the turnpike would create any serious or continued hindrance or obstruction to public travel, the evidence not being sufficient to overcome the presumption that the company would perform its legal duty in the construction of the road, or to lead to the inference that a nuisance or public wrong would be committed in the exercise of its rights and privileges. *District Attorney v. Lynn & B. R. Co.* 16 Gray, 242. In this case, however, the refusal was without prejudice.

The ground upon which the injunction was refused in the case of *Atty. Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 136, would seem to be that the nuisance complained of already existed, and the act which occasioned it had been done, the court considering the application too late and unavailing even if granted.

So, where the obstruction of a street by a railroad company, by reason of abutments, was not such as seriously to impede public travel, and it was shown that the travel over the highway in question was merely nominal, the roadway consisting of a single wagon track, the highway on either side of which was overgrown by underbrush and weeds, so that for all practi-

cal purposes a sufficient space between the abutments was ample for the public accommodation, it was held that the remedy by indictment was sufficient to abate the nuisance and to restore to the public the use of the highway. The court therefore refused the injunction, at the instance of the township, restraining the railroad company from so obstructing the road. *Raritan Twp. v. Port Reading R. Co.* 49 N. J. Eq. 11, 16, 17.

Again, such relief was refused in *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530, 536, 539, where the object of the bill was to enjoin the laying of a second track of a railroad through a certain street in the village, and the intervention of the attorney general on behalf of property owners was sought to be justified upon the ground that the street was a public highway, and that the proposed construction of an additional track by the defendants through the streets longitudinally would be such an interference with public rights as to be a public nuisance, the complainant and the relators presenting their right to relief in two aspects: the first was based upon the public rights, and the other upon the private rights. It did not appear that the street was ever laid out as a public road, but it was claimed to be such by virtue of a dedication alleged to be made by a survey and map, followed up by sales and conveyances of lots designated on the map. The court stated that the remedy by indictment was so efficacious, that courts of equity entertain jurisdiction over public nuisances with great reluctance, whether their intervention was invoked at the instance of the attorney general or of a private individual who suffered some injury therefrom distinct from that of the public, and that whether the question was viewed in the aspect of a proceeding by the attorney general to protect the rights of the public, or of a suit by the complainant and the individual relators to protect their private rights, yet the most cogent reasons existed for courts of equity abstaining from drawing the controversy within its jurisdiction, until the rights of the parties were settled in a court of law; and therefore, there being ample remedy for the invasion of any public right by indictment, and it not being shown that there was any pressing necessity to relieve the public travel from an immediate and serious inconvenience, the retention of the injunction at the instance of the attorney general was held to be inconsistent with the principles upon

which courts of equity employ process of injunction as a purely preventive remedy.

The New Jersey statute of 1896 (Pamph. Laws 1896, p. 228), provides that "any city of this state, except cities of the first class, be and they are hereby authorized and empowered to enter into contracts with any of the railroad companies whose roads now enter or lie within their cities respectively, or whose routes have been located therein, granting the said railroad companies or any of them the right to lay their road and construct their tracks in, through, along, and upon any of the roads or streets of said cities upon such terms. . . . And any such contracts heretofore or hereafter made by said cities or any of them with any railroad company or companies as aforesaid are hereby fully authorized, ratified, and confirmed; provided, that thereafter no road shall be laid, or track constructed, in, through, or upon any of said roads or streets, other than such as have been authorized by any such contract heretofore made, until said railroad company shall have acquired the rights of the abutting owners on said road or street, either by agreement, purchase, or condemnation proceedings."

Under the above statute it was held, in *Burlington v. Pennsylvania R. Co.* 56 N. J. Eq. 259, that although such an act regulated the internal affairs of cities, and conferred power upon cities to grant licenses to railroad companies to use the streets, which were a matter of strictly municipal concern, yet it was unconstitutional, as being special, inasmuch as the legislature cannot confine the affairs of its enactment to the condition of affairs existing at the date of the act, if similar conditions were likely to arise thereafter. In this case the city authorities sought to restrain the defendants' acts in constructing the railroad upon the public streets so as to obstruct the same and create a nuisance.

In *North Manheim Twp.'s Appeal*, 22 W. N. C. 149, the bill seeking to restrain the railroad company from operating its road in a manner contrary to the provisions of the statutes, and so as to cause an obstruction in the street and a nuisance, was dismissed, upon the defendant fencing in its line of road within a reasonable time, and paying the costs of the proceedings.

So, where the question was a close one, whether the defendant had the right to salt its tracks for the purpose of melting accumulations of snow that had gathered thereon, when not done wantonly, even at the expense of the convenience of the general traveling public, although the right might not be expressly conferred by its charter, and the evidence showed that at certain times salting the tracks became necessary to the full enjoyment of the franchise and such implied power conferred by the charter, the court refused to interfere by way of preliminary injunction in equity, to restrain the defendant from so using its tracks until the question had been determined in a court of law, as the plaintiff had not established his claim that the salting of the tracks by the defendant worked a detriment to the traveling public, or, in other words, that it created a public nuisance by trial at law, the court not taking upon itself the decision of that question. *Easton v. Passenger R. Co.* 2 Pa. Co. Ct. 639.

In the above case, it was, however, held that a bill for an injunction to restrain a company from salting its tracks was well brought in the name of the borough, without intervention of the attorney general, the use of the salt at a time when the tracks of the company were covered with snow, for the purpose of removing it, rendering the streets through which the railroad

passed, burdensome, dangerous, and injurious to the traveling public.

In *Johnston v. Providence & S. R. Co.* 10 R. I. 365, 367, the bill for an injunction against a railroad company stated that such company, incorporated under act of general assembly for the purposes of constructing a railroad, had under its charter located its road in the city through a village which was partly in the plaintiff town, and so located it as to intersect and cross a street and public highway in such village and town at even grade with the street, which highway the town was by law bound to repair; and that such corporation was proceeding to build and construct such railroad to cross the said highway at such grade, and that the highway between the proposed crossing was in a compact part of the village, and was the principal street for public travel to and from a certain city, and there was no other highway by which such travel could be accommodated; that the travel there was very large with loaded teams, carriages, and foot passengers, all which travel would be much incommoded, and the safety endangered, by the crossings of such railroad at the grade as then located. The court refused the injunction, as the defendant company, having brought the highway to the same grade as their road, and crossing at the same level, had not committed a nuisance to the highway, neither was there under the authority existing for the use of the streets any evidence of a nuisance, the charter merely requiring them, whenever their road crossed a highway, to so construct their road as not to impede or obstruct the safe and convenient use of the highway, the only ground upon which such an action could be sustained being the violation of the duty imposed upon such company.

So, in *Milwaukee v. Milwaukee & B. R. Co.* 7 Wis. 85, the bill sought to perpetually enjoin and restrain the company from laying and constructing its track along certain streets and across a public square in the city. It was held that, inasmuch as the city in its corporate capacity had not such an interest or property in the streets and public squares across and along which the railroad company was building its road, as to authorize it to maintain such action, the relief must be refused, although it was alleged that the fee in the streets and public squares was vested in the city by dedication from the owners of the land, the court stating that it could not see how it was possible for the city to become the owner of the fee by dedication: although land might be dedicated to public uses, and the public might, by the dedication, acquire a right to the use, yet the fee of the land could not be vested in anyone by that act.

Again, in *Sheboygan v. Sheboygan & F. du L. R. Co.* 21 Wis. 608, it was sought to enjoin the railroad company and its employees from placing or erecting piles, posts, timbers, or other obstructions at the railroad bridge constructed where the track crossed the river in the town; and further, to have the piles and obstructions removed from the river upon the ground that they greatly hindered the natural flow of the water through and under the span of the bridge, and, in cases of high water, caused the waters to dam up and flow back, thereby overflowing and greatly injuring and destroying the public highway near the river, and also injuring and destroying bridges, thereby impeding the public travel. The court said it was very questionable whether, upon principle or authority, the town would be entitled to a perpetual injunction to restrain the commission of acts which constitute a public nuisance, unless it showed that it sustained some special injury from those acts

not common to the public in general or to a large class of the community, for, when the act complained of was injurious to the whole state, and not specially to the rights of an individual, the general remedy was by prosecution or action on behalf of the state.

In the above case the court stated that the prior case of *Milwaukee v. Milwaukee & B. R. Co.* 7 Wis. 85, had a strong bearing on the question of the right of the town to have an injunction to restrain the commission of such acts; and further, that, even assuming that the town had suffered special injury in consequence of the overflow of the public highway, and bridges, not common to the whole community, no injunction should be granted until it had been established, by an action at law, that the acts of the company were not authorized by its charter.

In *Fredericksburgh Twp. v. Grand Trunk R. Co.* 6 Grant, Ch. (U. C.) 655, the bill alleged the defendants had carried its railway across several public highways and diverted them from their proper course, and that though the operation of the railroad was completed they had not replaced the highways, but had obstructed and continued to obstruct the same so as to render them impassable, and that the defendants had been requested to remove such obstructions but had refused. The court held that, as the evidence was conflicting as to the injury done to the highways and the manner in which the railway was constructed, the parties must be left to their legal remedy. The injunction was therefore refused.

II. Telegraph and telephone poles, etc.

Where the poles, erected by a telegraph company, are such as are necessary either in size or height, and the right to erect and maintain them is given by the legislature, so far as they are within that authority they cannot be alleged to be a nuisance or an unlawful obstruction on the street, and to that extent the right to maintain them is legalized; but wherever such right is exceeded either by reason of the size or height of such poles the act is unauthorized, and violates the implied restraint created by the statute, and is the legal subject for an action of redress. *People v. Metropolitan Teleph. & Teleg. Co.* 31 Hun, 596. In this case the public sought to restrain the erection of the poles in the city streets, and the court upheld the right of the public to enjoin the nuisance and obstruction.

Yet, in order to secure the interposition of a court of equity to restrain the completion of a telephone line in the public streets, and to remove the incomplete line as a nuisance, and to restore the street to its original condition, there must be some gravity to the complaint presented as the subject-matter of the action, for equity will only intervene to prevent irreparable injury, or to avoid multiplicity of suits. *People v. Metropolitan Teleph. & Teleg. Co.* 31 Hun, 596, 604.

So, there should be a finding in some form showing which of the poles and to what extent they exceeded the necessary bounds prescribed by statute; and if there is no evidence by which the defendant can be denied the right to erect and maintain them, no authority can be given to a court to direct them to be taken down and removed. *People v. Metropolitan Teleph. & Teleg. Co.* 31 Hun, 596.

In *Summit Twp. v. New York & N. J. Teleph. Co.* (N. J. Ch.) 41 Atl. 146, it was sought to enjoin a telephone company, which had obtained

the consent of landowners to erect its poles, from carrying its wires thereon across a street of an incorporated town at an elevation which it was not shown would interfere with public travel, upon the ground that the consent of the township committee had not been obtained as required by the local ordinance, but the court refused the relief sought.

So, in *Brigantine v. Holland Trust Co.* No. 2 (N. J. Ch.) 37 Atl. 438, an injunction was refused at the instance of a municipal corporation which based its rights solely upon its general supervision and control of the streets to restrain the stringing of wires over the street at a height of 20 feet, where peculiar circumstances did not render such wires a serious impediment to travel.

If, however, the evidence sustains an allegation that the telegraph poles have been improperly erected in the street, and incommode and interfere with its use as a public highway, a right of action for damages, as well as for the abatement and removal of the poles, is made out and established, for the reason that a purpose or unauthorized appropriation of a portion of the street will in that case be made, and for its correction and removal an action to restrain the same will afford a proper remedy, and the case will be one wherein relief may be sought in equity. *People v. Metropolitan Teleph. & Teleg. Co.* 31 Hun, 596, 604.

The terms of a state statute, which enact that "the use of the public streets in any of the incorporated towns (by any corporation organized under this act) shall be subject to such regulations and restrictions as may be imposed by the corporate authorities," comprehend any use that may be made of them by a telegraph company, and therefore include overhead wires over the road, the public easement not being limited to the use of the soil of the highway, but extending upward indefinitely, for the same reason that a barrier, stretched above a highway, or a bough of a tree overhanging it, may constitute a nuisance. *American U. Teleg. Co. v. Harrison*, 81 N. J. Eq. 627, 630, wherein the town sought relief against the nuisance.

Under the above clause it was held that the town authorities might adopt regulations fixing the elevation at which telegraph wires should cross the street, and might also prescribe such other precautions as might be reasonable and necessary for the safety of travel, but where such regulations had not been adopted, and the town authorities had never entered into the consideration of the question whether it was expedient or not to exercise such power, and there was no reason to believe that the wires as then overhanging the street did in the slightest degree impede or interfere with the full and free use of the same, the company erecting their poles on private property and hanging their wires at an elevation of 25 feet above the roadway, did nothing but what they had a legal right to do. Therefore, the court restrained the corporate authorities from cutting the wires or otherwise unlawfully interfering with them as a public nuisance. *American U. Teleg. Co. v. Harrison*, 81 N. J. Eq. 627, 630.

Where the telephone poles complained of had been erected some three years, and the damages found to have been sustained by reason of their exceeding the necessary size prescribed by law were merely nominal, and no serious injury had arisen, it was held that the court would not be at liberty to restrain the maintenance of the poles, even if they were all intended to be in-

cluded in the verdict of the jury, for the reason that the damages resulting from the injury were so trifling in their amount as to deprive the action of every serious attribute which could be made the subject of equitable complaint, equity not interfering to remedy a mere technical or theoretical injury to land. *People v. Metropolitan Teleph. & Teleg. Co.* 31 Hun, 596, 604.

Where the telephone poles in question had been erected by the defendants as a telegraph company under authority of chap. 265, N. Y. Laws 1848, as amended by chap. 471, Laws 1853, and the company was incorporated under the first-named statute, and had authority to erect the poles for the support of its wires and fixtures, and the transaction of its business was restricted to the erection of such as were necessary for that purpose, in a manner that would not incommode the public use of the street, the court stated that if the right had been exceeded, and the public incommoded thereby, then, so far as that excess was extended, an unlawful appropriation of the street had been made by it which would constitute a purpresture calling for the interference of a court of equity for its correction. *People v. Metropolitan Teleph. & Teleg. Co.* 31 Hun, 596.

Notwithstanding the telegraph act of 1869, § 3, a telephone company registered under the English company's act of 1862, and not incorporated under any special act, does not fall within the phrase "the company" as used in the English telegraph act of 1863, and it is not forbidden by § 12 of such last-mentioned act to erect its wires across a street unless the consent of the body having control of the street is obtained, and therefore the court will not grant an injunction, at the instance of a board of works, or vestry, restraining the placing of a wire at a great height, and causing no appreciable danger to the public, or to the traffic in the street. *Wandsworth Dist. Bd. of Works v. United Teleph. Co.* L. R. 13 Q. B. Div. 904. Following *Coverdale v. Charlton*, L. R. 4 Q. B. Div. 104, 48 L. J. Q. B. N. S. 128, 40 L. T. N. S. 88, 27 Week. Rep. 257.

In *Utica v. Utica Teleph. Co.* 24 App. Div. 361, action was brought by the city to restrain the defendant company from erecting and maintaining its poles and wires in the streets of the city without the consent of the public authorities and in violation of a city ordinance. The defendant claimed the right to construct and operate the telephone lines without the consent of the city, under § 102 of the transportation corporation law, chap. 566, N. Y. Laws 1890, which provides that such corporations may erect, construct, and maintain the necessary fixtures for its lines upon, over, or under any of the public roads, streets, and highways, and through or across or under any of the public waters within the limits of the state, and upon, through, or over any other land, subject to the right of the owner thereof to full compensation for the same, and upon the ground that in so doing it acted pursuant to an acquired right to act under the franchise of another company. The right of the latter company, however, was limited to stretching wires across the streets, and along the housetops where the owners consented, and averred no authority to put structures on the street, or to do any of the acts complained of by the city in that action. The court therefore held that it was no protection to the defendant in doing

any act beyond the limited permission given to the late company by the city council.

The main question in the above case, however, was whether, under the statute, the legislature intended to permit any such corporation, organized under the transportation corporation act, to occupy the streets of the city, and to leave the city powerless to prevent it. The court pointed out that the question, which was a new one, must be decided, not only upon the consideration of the statute in question, but upon the powers and duties of the municipal corporation with reference to the streets of the city as created by the charter and ordinances thereof, and also the principles governing the rights of the public in streets and highways, as well as corporations exercising special privileges in the streets. *Utica v. Utica Teleph. Co.* 24 App. Div. 361.

In that case the charter of the city gave the common council power to perform the duties of, and be subject to the liabilities of, commissioners of highways in towns, and also empowered them to lay out, open, discontinue, etc., highways, and also to require the removal of buildings, fences, or other obstructions upon the line of the street, and § 35 of such charter gave it power, *inter alia*, to make, alter, and modify and repeal ordinances, not repugnant to the Constitution and laws of the state, as it deemed expedient for the good government of the city, preservation of peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants, and such ordinances, rules, and regulations as might be necessary to carry such power into effect, particular power being given to it to determine what are nuisances, and prevent, abate, and remove the same, and to ascertain the settled boundaries of the city, and all streets, alleys, and highways therein, and to remove and prevent all encroachments thereon. Pursuant to such 35th section of the charter, the city adopted ordinances abating the placing in any street of any obstruction thereof without a permission of the mayor, etc., and forbidding the placing in the street of any wood, lumber, or material or property of value, and also forbid any person to take up any pavement in any street or side or cross walk, or dig any hole or ditch in the street without such permission, and also provided that the sidewalks, etc., should be kept and reserved free from all obstructions, and also that all telegraph and telephone wires should be placed beneath the fire-alarm telegraph of the city. The court granted the injunction upon the ground that the common council were acting in a quasi judicial, or discretionary, character, with which the courts could not ordinarily interfere, and that the transportation act gave the defendants no interest in the streets of the city, as it was only intended to protect such companies from indictment for maintaining public nuisances in putting their poles in the street; and further, as the city charter was a local law, it could not be presumed that the legislature intended by the general telephone act to repeal or nullify the provisions of the charter governing the admission of such lines into the city, especially in the absence of legislative declarations to that effect, the provisions of the telephone act not being so inconsistent with the city charter as to create a repeal by implication. *Utica v. Utica Teleph. Co.* 24 App. Div. 361.

From the above opinion, however, there were

dissenting opinions by Hardin, P. J., and Adams, J., to the effect that the injunction, in so far as it enjoined and restrained the defendant "from erecting any poles or stringing any wires," was too broad, and in that respect should be modified, and allowed to remain so as to restrain the placing of obstructions or digging any holes in, upon, or over the streets or sidewalks of the city which might "intermode the public use of the streets," the injunction as granted being an arbitrary and improper attempt to interfere with the rights which the defendant acquired under the act, and one which ought not to be sanctioned.

So, the city authorities have power to restrain by way of injunction the replacing of telegraph wires in the public streets, where the time limited by the city ordinance for the use of the streets in that manner has expired, they having power to regulate and control the manner in which the telegraph lines shall enter or pass through the city. *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309.

In *Wandsworth Dist. Bd. of Works v. United Teleph. Co. L. R. 13 Q. B. Div. 904*, an action for an injunction to restrain the defendants from retaining or building any poles or wires for the purpose of telegraphic and telephone communications or otherwise, over, along, or across any street vested in, or under the control of, the plaintiffs except in cases where the defendants had received, or might receive, the plaintiffs' consent to retain or place the same, it was held that the metropolis management act of 1855 did not, by § 96, confer upon a vestry, or a board of works constituted under that statute, such a property in the streets situated in their district as entitled them to maintain such action against the erection of a telephone wire across a street, erected at a great height and causing no appreciable danger to the public or to the traffic in the street, the court following the prior decision in *Coverdale v. Charlton*, L. R. 4 Q. B. Div. 104, 48 L. J. Q. B. N. S. 128, 40 L. T. N. S. 88, 27 Week. Rep. 257, *et supra*.

As to municipal control over telegraph and telephone poles, etc., as nuisances, see note to *Cape May v. Cape May*, D. B. & S. P. R. Co. (N. J. L.) 39 L. R. A. 609, 619.

E. W.

Charles N. BROWN, Admr., etc., of August ZILMER, Deceased, Appt.,
v.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Resp't.

(.....Wis.....)

1. Wrongful death under such circumstances that had death not ensued decedent could have proceeded against the wrongdoer for damages is not sufficient of itself to uphold an action in favor of his survivors under a statute providing such action and naming the beneficiaries; but the existence of beneficiaries within the provisions of the statute must be shown.
2. Causes of action for personal injuries which survive the death of the persons injured under Rev. Stat. § 4253, are not limited to cases where death does not ensue from the injury although other sections

of the statute provide a right of action for relatives injured by wrongful death.

3. A cause of action for personal injuries which survives by force of Rev. Stat. § 4253, is separate and distinct from the cause of action in favor of surviving relatives under § 4255.

On rehearing.

4. Propositions assumed by the court to be within the case, and questions presented, considered, and deliberately decided by the court, leading up to the final conclusion reached, are not *obiter dicta*, but, if *dicta* at all, are judicial *dicta*, and are as effectually passed upon as the ultimate questions solved.
5. The maxim *Noscitur a sociis* has no application to a statute which is too plain to admit of construction.

(December 16, 1898.)

APPEAL by plaintiff from an order of the Circuit Court for Dane County sustaining a demurrer to the complaint in an action brought to recover damages for alleged wrongful killing of plaintiff's intestate. *Reversed*.

Statement by Marshall, J.:

Action to recover damages for a personal injury to August Zilmer, deceased, and also damages for his death. The complaint states all formal matters, and, in substance, that on the 29th day of August, 1895, at the incorporated village of Deerfield in this state, at a crossing of defendant's railroad with a public street in such village, August Zilmer was traveling on the street with due care, riding in a wagon drawn by a horse, and while so circumstanced defendant's servants caused one of its locomotives to approach and go onto and over the crossing at an unlawful rate of speed, to wit, 40 miles an hour, without in any manner signaling such approach, whereby, without contributory fault of Zilmer, the locomotive struck his horse and wagon, and threw him with great force and violence on the ground, bruising and wounding him upon his head, body and limbs, thereby causing him to suffer great mental and physical pain, from the effects of which he on the same day died, to the plaintiff's damages in the sum of \$5,000. The complaint further stated that the deceased left no wife, or father or mother or children, but left some brothers and sisters, and stated facts showing that a pecuniary loss was sustained by them by reason of his wrongful death, to the extent of \$5,000. The defendant demurred generally to the complaint, which demurrer was sustained, and from the order accordingly entered this appeal was taken.

Messrs. Bushnell, Rogers, & Hall, for appellant:

The intention of Rev. Stat. § 4253, is to

NOTE.—As to the right to more than one action for injuries resulting in death, see note to *Louisville & N. R. Co. v. McElwain* 44 L. R. A.

(Ky.) 84 L. R. A. 788; also *Hill v. Pennsylvania R. Co. (Pa.)* 85 L. R. A. 196; *Sweetland v. Chicago & G. T. R. Co. (Mich.)* 43 L. R. A. 568.

work the survival of such causes of action as this.

Scott v. Shepherd, 2 W. Bl. 892, 3 Wils. 403; 2 Am. & Eng. Enc. Law, 2d ed. p. 953.

If there could be any doubt about the meaning of Rev. Stat. § 4253, as to the survival of this right of action, that doubt is set at rest by Rev. Stat. § 3252, which provides that "for wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrongdoer, an action may be brought by the executors or administrators of the person injured after his death against such wrongdoer, and, after his death, against his executors or administrators.

Revised Statutes, § 4255, gives a right of action for damages against the wrongful slayer without any reference to relatives or next of kin left surviving.

These statutes are remedial ones, and "should be construed, not strictly, but so as to advance the remedy, and suppress the supposed wrong and injustice existing under the former condition of the law."

Rudiger v. Chicago, St. P. M. & O. R. Co. 94 Wis. 191.

Section 4253 provides for the survival of a "cause of action," as well as for the survival of an "action" already begun.

Plumer v. McDonald Lumber Co. 74 Wis. 137; *Lehmann v. Farwell*, 95 Wis. 185, 37 L. R. A. 333; *Webber v. Quaw*, 46 Wis. 118; *Rudiger v. Chicago, St. P. M. & O. R. Co.* 94 Wis. 191; *Hollenbeck v. Berkshire R. Co.* 9 Cush. 480.

On rehearing.

The sole purpose and intent of Lord Campbell's act was to give further rights of action in cases of wrongful death, and not to take away any part of the rights of action theretofore existing in such cases.

8 Am. & Eng. Enc. Law, 2d ed. p. 857; *Bradshaw v. Lancashire & Y. R. Co.* L. R. 10 C. P. 189.

Messrs. Fish, Cary, Upham, & Black, for respondent:

Section 4253, Rev. Stat., relates only to actions, and makes no reference to cause of action.

The distinction between an action and a cause of action or right of action is obvious, and is clearly recognized in various sections of our statutes.

Section 3252 relates solely to rights and interests in property.

Both sections 4253 and 3252, if their language is open to construction at all, must be construed strictly against effecting the survival of any cause of action which did not survive at the common law, because to that extent they would be in derogation of the common law.

Farrall v. Shea, 66 Wis. 561; *Eilers v. Wood*, 64 Wis. 422; *Ean v. Chicago, M. & St. P. R. Co.* 95 Wis. 69.

By the common law no recovery of damages was permitted for the death of a human being caused by negligence. By sections 44 L. R. A.

4255 and 4256, Wis. Rev. Stat., this defect was remedied, and in all such cases a recovery was authorized. Even then there existed this defect in the law; if a person suffered injuries from the negligence of another and died from some other cause and not by reason of such injuries, his cause of action, or his action if he had commenced it, died with him. The purpose of § 4253, Wis. Rev. Stat., as amended by chapter 280, Laws 1887, clearly and reasonably is to remedy this last defect, at least in so far as to prevent the abatement of an action already commenced.

In all cases where a person suffers injuries through the negligence of another person, and such injuries do not result in his death, § 4253 permits an action to be maintained therefor, which shall survive his death from other causes.

Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586.

In all cases where a person suffers injuries through the negligence of another person, which result in his death, an action therefor may be maintained under §§ 4255 and 4256, Wis. Stat. 1898, and no action therefor can be maintained except as provided by those sections.

Holton v. Daly, 106 Ill. 131; *Rudiger v. Chicago, St. P. M. & O. R. Co.* 94 Wis. 191; *Ean v. Chicago, M. & St. P. R. Co.* 95 Wis. 69; *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L. R. A. 797.

The complaint must allege, and upon the trial the proof must show, that some beneficiary within the classes enumerated by § 4256, Wis. Rev. Stat. is in existence.

Woodward v. Chicago & N. W. R. Co. 23 Wis. 400; *Regan v. Chicago & N. W. R. Co.* 51 Wis. 599; *Schmidt v. Menasha Wooden Ware Co.* 99 Wis. 300.

On rehearing.

General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.

Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257.

In *Lehmann v. Farwell*, 95 Wis. 185, 37 L. R. A. 333, the learned judge who wrote the opinion in considering the question whether the verdict was assignable, discussed collaterally the question whether an action for damage to the person survived under § 4253, and correctly concluded that it did. The opinion is as general as the language of the statute. There was no attempt to construe the statute with reference to the question here presented.

In *Hulbert v. Topeka*, 34 Fed. Rep. 510, the precise question here presented was raised. Justice Brewer, then circuit judge, delivered the opinion of the court, and held that the right of action in favor of the personal representative was exclusive and such representative had no right of action for injuries to the person where the injuries were such as to cause death.

McCarthy v. Chicago, R. I. & P. R. Co. 18

Kan. 46, 26 Am. Rep. 742; *Legg v. Britton*, 64 Vt. 652; *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357; *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555; *Sweetland v. Chicago & G. T. R. Co.* (Mich.) 43 L. R. A. 568.

"Assault and battery or false imprisonment" do not imply a killing, and "other damage to the person" simply means, like damage—"or other" means further, by negligence or wilful, wrongful act, producing a like injury.

Hiner v. Fond du Lac, 71 Wis. 82.

Our position is sustained by *Ean v. Chicago, M. & St. P. R. Co.* 95 Wis. 69; *Randall v. Northwestern Teleg. Co.* 54 Wis. 140, 41 Am. Rep. 17; *Messe v. Fond du Lac*, 48 Wis. 323; *Gibbs v. Larrabee*, 23 Wis. 495; *Rudiger v. Chicago, St. P. M. & O. R. Co.* 94 Wis. 191; *Holton v. Daly*, 106 Ill. 131; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742; *Eureka v. Merrifield*, 53 Kan. 794; *Martin v. Missouri P. R. Co.* 58 Kan. 475; *Bigelow v. Anderson*, 34 U. S. App. 261; *Bigelow v. Nickerson*, 70 Fed. Rep. 113, 17 C. C. A. 1, 30 L. R. A. 336.

Marshall, J., delivered the opinion of the court:

Two questions are presented on this appeal: (1) Can brothers and sisters of one wrongfully killed recover damages from the wrongdoer to compensate them for the pecuniary loss thereby sustained? (2) Does a cause of action for damages to a person, because of an injury from the effects of which death ensues, survive to his administrator for the benefit of his estate? The decision of either of these questions in favor of the appellant must result in a reversal of the order appealed from.

Actions for death losses sustained by surviving relatives are wholly statutory, and therefore, unless clearly thus given, do not exist at all. The subject in this state is covered by §§ 4255, 4256, Rev. Stat. 1898, which provide that if the death of a person be caused by the wrongful act of another under such circumstances that if death had not ensued such person could have recovered of such other damages for his injury, such other shall be liable to an action for damages notwithstanding the death, such action to be brought and prosecuted in the name of the personal representative of the deceased person for the benefit of the husband or widow of such person if there be such surviving, otherwise for the benefit of such person's lineal descendants, or, in default of such descendants, such person's lineal ancestors. We are asked to hold that by such statutes the right of action for the wrongful death of a person is conditional only upon the circumstances being such that if death had not ensued the decedent could have proceeded against the wrongdoer for damages. If the statute were susceptible of that construction, in any reasonable view of the language used, and we think it is not, the contrary view has been too long established as its true meaning 44 L. R. A.

to leave the matter open to question at this time. In *Woodward v. Chicago & N. W. R. Co.* 23 Wis. 400, decided thirty years ago, it was held that unless a person named in the statute as entitled to the benefit of a recovery when obtained, be shown to be in being by the allegations of the complaint, the calls of the statute are not satisfied and the action for damages for the death cannot be sustained. That is in line with the numerous decisions in this country and England where similar statutes exist, as abundantly appears in the opinion of the learned chief justice in the case cited, and the numerous authorities cited there by counsel. It has never been since questioned successfully in this court, but on the contrary has been repeatedly affirmed. *Topping v. St. Lawrence*, 86 Wis. 526; *Regan v. Chicago, M. & St. P. R. Co.* 51 Wis. 599; *Gores v. Graff*, 77 Wis. 174; *Schmidt v. Menasha Wooden-Ware Co.* 99 Wis. 300. The reasonableness of that construction is fully realized when one considers, as the fact is, that the action for a death loss to a surviving relative is not a right by survivorship to the claim which existed in favor of the injured person in his lifetime. If that right of action exist at all, it is for the benefit of the estate under the statute, to be hereafter considered under the second point made by appellant. The death loss act of the English statute (9 & 10 Vict. 93), commonly called "Lord Campbell's Act," and the various laws of a similar kind that have been modeled after it, gave a new cause of action unknown to the common law, for the benefit of certain designated classes of surviving relatives. Such relatives do not take the cause of action for damages to the deceased by transfer to them by operation of law, or otherwise, but are enabled by statute to recover the pecuniary loss to themselves caused by the wrongful taking off of the decedent, the continuation of whose life would have been beneficial to them. As was said by Mr. Justice Orton, in *Topping v. St. Lawrence*, 86 Wis. 526, the action accrues to the surviving beneficiary mentioned in the statute by reason of the death of the injured person caused by the wrongful act of another. It is strictly not proper to say that it is a cause of action which survives; it is rather a new action by §§ 4255 and 4256, which can be brought, not for the benefit of the estate, but solely for the benefit of the beneficiaries named in the statute. Counsel's contention is that the liability is made absolute by § 4255, and therefore is not limited by the following section which designates who shall be the beneficiaries. As before indicated, that question has long been foreclosed in this court, contrary to counsel's contention; nevertheless, if the question were now presented for the first time, in view of the fact that the section giving the right is coupled with the section for its enforcement, it would appear to be a very plain proposition that such remedy is exclusive, and necessarily limits the right to those for whose benefit it may be enforced, i. e., to the

particular beneficiaries named and in their order, that is, husband or widow, if there be such, otherwise lineal descendants, and, in default of such, lineal ancestors.

On the question of whether a cause of action for injury to the person survive to his personal representative in case death ensue therefrom, this court held in the affirmative in *Lehmann v. Farwell*, 95 Wis. 185, 37 L. R. A. 333, construing what is now § 4253, Rev. Stat. 1898, which provides generally that actions for the recovery of damages to the person shall survive. The subject there received most careful consideration, and no reason is perceived now for changing the ruling there made.

The learned counsel for respondent contend, with much learning, that the section last referred to, and §§ 4255 and 4256 of the statutes giving a right of action to relatives in certain circumstances specified, should be construed together, so as to limit actions that survive under § 4253 to cases where death does not ensue from the injury. That claim has the merit of being supported by decisions elsewhere under similar laws, but looking only to the language of the statutes, no good reason is perceived for resorting to construction at all to determine their meaning. The language seems too plain to allow that. We have not even good reason for saying, as some courts have, that the statutes were enacted at the same time, or went into effect at the same time, and it is therefore unreasonable to hold that the legislature intended to give two rights of action at the same time for one injury. The law of this state conferring upon surviving relatives the right to recover their pecuniary loss caused by the wrongful taking off by death of a husband, wife, child, father, or mother, has existed for over forty years, while the law reviving the right, in favor of the personal representatives of a deceased person, to his claims for damages to his person, was not enacted till 1887. But independent of that circumstance, as before observed, the language of the two provisions is plain. They refer to entirely distinct losses recoverable in different rights: The one in the right of the deceased for the loss occasioned to him; the other in the right of the surviving relatives for the loss to them. Both are dependent on the injury but only one dependent on the death with surviving relatives to take under the statute. The language of one provision is that "actions for personal injuries shall survive," and of the other, "in case of the death of a person by the wrongful act of another," under certain circumstances named, the wrongdoer "shall be liable to an action for damages notwithstanding the death of the person injured, if the death be caused in this state." The only condition of the right of action in the former case is the existence of the actionable claim for damages at the time of the death of the injured party. The statute creates no new liability, but prevents the lapsing by death of an old

one. The only condition of liability under the other provision is the existence of an actionable claim in the right of the injured party at the time of his death and the existence of the beneficiaries mentioned in the statute. The liability of the wrongdoer, while dependent on the condition named, is not on the actionable claim called for to satisfy such condition, but on a new right created by the statute,—the right of the surviving relatives to compensation for the loss which falls upon them. The language of the statutes, when viewed in the light of the evident legislative purpose, is too plain to justify courts in interpolating into them language not there by necessary implication from the context, in order to make them accord with the ideas of judges as to the best legislative policy. The judicial function, we need not say here, does not extend so far. It calls for a firm adherence to the law as written, if valid, without regard to individual opinions as to its being good or bad. In this we do not intend to suggest, that the law in question, as construed here, is a bad law. On the contrary there appears to be much wisdom in providing that a person who wrongfully causes a personal injury to another shall not profit by that other's death, so far as actual damages go, either to the deceased person or to the wife, husband, or lineal descendants or ancestors of such person.

True, as claimed by the learned counsel for respondent, and before indicated, several courts, for whose judgment we entertain high regard, in construing similar statutes have decided that the right of action to surviving relatives is exclusive, and that the personal injury action that survives under § 4253, does not include those where death ensues from the injury. A good example, among others cited in counsel's brief, is *Holton v. Daly*, 106 Ill. 131. That learned court reasons that there is but one ground of liability: the wrongful act; and as all claims for damages grow out of the one wrong it is unreasonable to say the legislature intended there shall be two causes of action based upon it; that the more reasonable view is that the act making causes of action for personal injuries survive should be considered as referring to a special class of actions, not included in those named in the general provision giving a right of action to surviving relatives; that without that construction there would be a repugnance between the two provisions. The fallacy of that reasoning is easily apparent. True, in the circumstances named, there is but one wrongful act, but that is not the sole ground of action in the right of the deceased or the survivor. It takes the wrongful act and the loss to make the complete cause of action, and as the loss to the person upon whom the injury is inflicted must be recovered by or in his right, and the loss to the surviving relatives by or in their right, the causes of action are clearly distinct. It does not require, apparently, much clearness of

mental perception to discover that if several persons are made to suffer pecuniary loss by one wrongful act, each may very properly have his independent cause of action and remedy for the loss resulting to him, and that, generally, in order to do complete justice, in the absence of some provision for a recovery for the benefit of all and a distribution of the proceeds, separate causes of action must necessarily exist.

The views of the Illinois court accord with the judgment of the supreme court of Kansas. *McCarthy v. Chicago, R. I. & P. R. Co.* 18 Kan. 46, 26 Am. Rep. 742; *Eureka v. Merrifield*, 53 Kan. 794; *Martin v. Missouri P. R. Co.* 58 Kan. 475. It is significant that the former treats the act for the survivorship of the right to recover damages to the deceased for the benefit of his estate, as a special provision, and that for the benefit of surviving relatives as a general act, and that, giving them a literal interpretation, they are repugnant to each other in part; while the latter reverses the situation, treating the act of the claim for damages to the deceased as general, and that for the benefit of surviving relatives as special, the latter being intended to take away the right of survivorship for the benefit of the estate, which would otherwise be given by a literal reading of the former provision. The fallacy of both processes of reasoning grows out of a failure to observe the distinction between the wrong and the resulting loss; that though there be but one wrongful act and one physical injury, there may be several persons that suffer distinct losses, some of which are actionable at common law and some actionable dependent on the statute. Justice Brewer, who was a member of the Kansas court at the time the first decision there was rendered, and concurred in it, referred to the subject when he was later called upon to consider the matter as a member of the Federal bench, in the case of *Hulbert v. Topeka*, reported in 34 Fed. Rep. 510, and said, substantially, that he doubted the correctness of his former opinion, and followed it only in deference to the settled judicial policy of Kansas, the cause being one that arose there; that the basis of recovery under the two provisions of law under consideration, the one for the benefit of the estate of the decedent and the other for the benefit of his surviving relatives, are entirely distinct, the former being based on survivorship of the claim of the deceased, taking no note of the pecuniary loss to relatives, and the other on survivorship of relatives mentioned in the statute, taking no note of damages to the decedent; that the latter proceed regardless of whether the death was instantaneous or followed after months of pain and suffering, being damages to relatives by death to be measured by their pecuniary loss caused thereby; while the former is for loss that would otherwise be a permanent injury to the estate itself. For further illustrations of the distinction, the following in Mr. Justice Wilson's opinion in *Needham v. Grand Trunk R. Co.* 38 Vt. 294, 44 L. R. A.

is quoted by Justice Brewer: "The principles on which the intestate's cause of action rested at common law are the same, irrespective of the cause of his death." It "died with his person but is revived by the statute in favor of his administrator." It includes "nothing more than his intestate's cause of action. That section simply revives but does not enlarge the common-law right of the intestate." The provision for surviving relatives "introduced principles wholly unknown to the common law, . . . namely, that the value of a man's life to his wife and next of kin constitutes a part of his estate." "Such damages to the widow and next of kin begin where the damages of the intestate ended, viz., with his death."

The weakness of the theory that the action for injuries to the person, which survive, includes only those not covered by the statute for the benefit of surviving relatives, is further illustrated by the fact that courts adhering to that view uniformly refer to *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555. The decision there is only to the effect that if an injured person have satisfaction of his claim before death, the subsequent death from the injuries does not confer a right of action upon surviving relatives; that such right exists only where there is an injury to a person and there is an existing claim for damages therefor at the time of his death. Justice Blackburn, who delivered the opinion, said, in substance, that the proper construction of the statute is that it gives a right of action to certain surviving relatives of a person when death was caused by the wrongful act of another, where he had not received satisfaction in his lifetime, and that to go further would be straining the language of the law. That seems plain. The language of our statute is that liability of the wrongdoer exists where the deceased could have recovered if death had not ensued. That clearly excludes the idea that where the decedent receives satisfaction for his injuries, the conditions requisite to the right of surviving relatives may exist notwithstanding. There is nothing in *Read v. Great Eastern R. Co.* in conflict with *Blake v. Midland R. Co.* 10 Eng. L. & Eq. 443, where in a very instructive opinion by Coleridge, J., it is said that Lord Campbell's act does not transfer to the surviving relatives mentioned the claim for damages previously possessed by the deceased, but gives to them an independent cause of action for damages peculiarly incident to their relation to the deceased. The two cases are often cited to opposite views, but are in fact, when correctly understood, in perfect harmony. The one holds that the right of the relatives named in the statutes is separate and distinct from that possessed by the deceased; the other, that the right of the relatives is contingent on the death of the injured person without having satisfied his claim for damages.

With proper regard for the argument of the learned counsel for respondent, we cannot well close this discussion without some re-

view of the decision of the supreme court of Rhode Island in *Lubrano v. Atlantic Mills*, reported in 19 R. I. 129, 34 L. R. A. 797, which is cited to our attention with great confidence. The case expressly holds with the Illinois court and the Kansas court, that the statute giving the right of action to personal representatives of a person wrongfully killed, for the benefit of certain relatives named, is exclusive. The case does not throw any new light on the subject under consideration, except as to the inherent weakness of the reasoning indulged in to support the theory which the distinguished court adopts. *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555, is cited without perceiving, apparently, that, as before indicated, it only holds that where the claim of the deceased person is extinguished, one of the conditions requisite to the cause of action for damages under Lord Campbell's act is impossible, therefore statutes on that subject have no office to perform; that it has no bearing on the question of whether, in the absence of such extinguishment, there are two rights or causes of action for distinct and separate losses. Again, the learned court falls into an error heretofore mentioned, in referring to the two statutes as one being general and the other special, and that the two in part refer to the same subject, viewing the liability of the wrongdoer as entire merely because based on a single wrong. As we have seen, each treats of a distinct species of loss, and for that is general. There is no question of repugnancy or implied repeal of one provision by another on the same subject, or the substitution of one right for another, to be considered, if we give effect to the plain reading of the law and not attempt to vary it because of consequences which to some minds may appear to throw unreasonable burdens upon the wrongdoer. It must be presumed that the legislature had all these matters in mind, and from its judgment there is no appeal.

The Rhode Island court, further discussing the subject, speaks of the right of survivorship as a mere remedy given as a substitute for that which existed in the right of the decedent. Here again, there is a confusion between rights and remedies. To say that § 4255 of our statutes gives a remedy for the one that at common law lapsed with the death of the decedent, is to say that it gives a new remedy for a pre-existing right. But there was no such pre-existing right of the surviving relatives to recover their loss caused by the wrongful death. The right or cause of action itself is new, and the remedy to enforce it as well, as observed, in effect, in *Topping v. St. Lawrence*, 86 Wis. 526. The court further, in support of its decision, refers to *Needham v. Grand Trunk R. Co.* 38 Vt. 300, stating that the Vermont court later, in *Legg v. Britton*, 64 Vt. 652, overruled its former judgment on the subject of whether there were two causes of action in the circumstances under discussion. A careful reading of the opinion in the later Vermont case discloses the fact that it is there held, 44 L. R. A.

in perfect harmony with the early case, that two causes of action exist: one in the right of the estate; and the other in the right of the surviving relatives where the cause of action of the deceased is not extinguished before his death. The court said that the extinguishment of the cause of action in the right of the deceased was a bar to that in favor of the surviving relatives. There, the action for damages to the injured person was brought in his lifetime and prosecuted to judgment and satisfaction after his death, and the court said that under such circumstances the right of the deceased was extinguished with the same effect as if satisfaction had occurred before death, therefore that the circumstances requisite to the application of the statute, giving the right of action to the widow and next of kin, did not exist. Using substantially the language of the court there was left no proper office for the act for the benefit of the widow and next of kin to perform.

There are many other cases bearing on the subject before us, but they do not add anything to what has been said, or call for further discussion, so we shall not further extend this opinion by referring to them. We are well satisfied that § 4253 preserves for the benefit of the estate of a deceased person the cause of action possessed by him in his lifetime for an injury resulting in his death, and that it is not affected in any way by the other right or cause of action given by §§ 4255 and 4256 to his surviving relatives to recover for the loss sustained by them; that such is the plain meaning of the statutes, and that if the language used were open to construction at all, the view we have adopted is supported by far the better reasoning and the greater weight of authority. The supreme court of Michigan, in *Hurst v. Detroit City R. Co.* 84 Mich. 539, quite recently had the same subject under consideration, with the same result at which we have arrived. That court said, in effect, that a pecuniary loss sustained by a surviving relative resulting from a wrongful death, recoverable under the statute, is one thing; and that damages for the injury to the deceased, is another; and that a recovery for the former is no bar to an action for the latter.

Of course, there is no question as to whether a recovery on one claim will bar an action for the other; therefore, what is said should not be taken as deciding that question. We have referred to cases holding that a satisfaction of a claim in the right of the estate leaves the statute giving the other right of action no office to perform, merely in support of the position that the two statutes deal with separate and distinct rights.

The complaint demurred to, by sufficient allegations, shows that plaintiff's intestate was injured by actionable negligence of the defendant, and that he lived thereafter some period of time. The length of time he survived the injury is not stated and is not material except as to the damages recoverable and that does not go to the cause

of action. *Bancroft v. Boston & W. R. Corp.* 11 Allen. 34; *Hollenbeck v. Berkshire R. Co.* 9 Cush. 118; *Tully v. Fitchburg R. Co.* 134 Mass. 499; *Chandler v. New York, N. H. & H. R. Co.* 159 Mass. 589; *Corcoran v. Boston & A. R. Co.* 133 Mass. 507; *Kellow v. Central Iowa R. Co.* 68 Iowa, 470, 56 Am. Rep. 858.

Within the principles stated the complaint states one cause of action, and that for the recovery of damages which the deceased sustained and which he might have recovered for had he lived. Therefore the decision of the trial court sustaining the demurrer to the complaint must be reversed.

The order appealed from is reversed, and the cause remanded for further proceedings according to law.

A petition for rehearing having been filed, *Marshall, J.*, on February 21, 1899, handed down the following response:

The motion for a rehearing, made on behalf of the respondent, has received careful, tireless, and patient consideration as did the case when originally considered, notwithstanding some suggestion to the contrary made in the second argument of the distinguished counsel who made such motion. It is not considered that there was any warrant for such suggestions. They had no proper place in counsel's argument. The importance of the case furnished a sufficient excuse for the motion, and counsel's resources for legitimate argument are too well known to warrant the belief that there was any necessity of resorting to other means of enforcing their logic, even by way of emphasis. Calm, fair consideration of legal questions, while not as necessary to the proper performance of the duties of counsel as those of the court, is quite as helpful in the one case as in the other. It would be well to bear that in mind, especially in presenting motions for reargument. The situation of counsel at such a time, especially where great interests are involved, and the decision disappoints hopes and convictions born of much careful study of a subject, is well suited to test to the utmost their power of calm consideration and courteous review of reasons and authorities judicially declared to lead to and require the decision objected to. But whether counsel stand successfully such test or not, the duty of the court to carefully and dispassionately consider, and judicially determine, the questions presented, uninfluenced by any other consideration than to discover and pronounce the law correctly, remains the same.

The suggestion of the learned counsel as to the importance of this case, and the far-reaching character of the decision rendered, is fully appreciated, and was from the start. It is also fully appreciated that the result of the decision will probably be additional labor for the court, but it is not perceived why that can by any possibility change the law. Legislative enactments are to be rigidly enforced within constitutional limitations, according to the legislative will. If courts

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were permitted to read them so as to minimize to any degree judicial labor or to adapt them to individual notions of judges as to the best governmental policy, it would be very easy to nullify or change the written law so as to defeat the people's will and destroy the very foundation of a government by the people. So, the menace of an increase of judicial labor, and the difficulties of administering the law as we have declared it to be, does not appear at all weighty in favor of changing the decision heretofore rendered.

We should say in passing that the suggested difficulties in administering the law, and danger of injustice to defendants, are largely imaginary, and will gradually disappear as we adapt ourselves to the new conditions which the revived statute creates. The trial judge can easily, by proper instructions, limit the recovery in a revived action to the loss actually caused to the deceased prior to his death; and in the action under § 4255, Rev. Stat., to the pecuniary loss sustained by the surviving relatives entitled to the benefits of that provision. If the two causes of action are joined, the court can readily require the jury to make separate findings as to damages. As the elements entering into each are entirely distinct, it will readily be seen that there is no more danger of a double recovery under such circumstances than in any one of the numerous cases that might be suggested where two causes of action result from a single wrong. The injustice of two recoveries for distinct grievances, suggested by the learned counsel, and by some courts that have taken the view pressed upon us, is not perceived. A little dispassionate reflection on the subject, it would seem, would prevent unqualified condemnation of the legislative wisdom, that says, if a person be wrongfully injured, the pain and suffering and expenses to him in consequence thereof shall not be lost to his estate by the circumstance of his death from the injury before receiving satisfaction for his damages, even though the damages to his surviving relatives, to satisfy their own grievance, may be recovered.

What has been said sufficiently meets the preliminary observations and reasons given in the argument for the rehearing. We will now endeavor to take up in their order the objections to the decision, relied upon.

It will not be necessary to go over, to any great length, the subjects discussed in the former opinion. As before indicated, they have all been once considered with all the deliberation and care that should characterize the work of a tribunal of last resort, whose judgments must stand as the infallible truth, there being no power under our system by which such judgments can be changed after the brief time for review allowed by the Code shall have expired.

Our attention is called to the rule stated in the opinion of Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257, to the effect that, though general expressions in an opinion which go beyond the case may

be respected, they ought not to control the judgment in a subsequent suit. That proposition is familiar, and is not liable to be forgotten by judges who have been called upon to apply it in their daily work for a series of years. The trouble with the learned counsel's argument is that he applies the rule, as it seems, to everything in a legal opinion not a part of the final conclusion reached,—to what is judicial *dictum* and even to the reasons upon which the decision is based and are essentially a part of it, when that seems necessary to dispose of authorities that are clearly opposed to their contention; and again, treat mere observation by a judge in writing an opinion by way of illustration or argument, referring to collateral topics for that purpose, as a part of the deliberate judgment of the court, when, if so considered, they support counsel's contention. There are few decisions of any court but that might be successfully attacked if such a method were permissible. What is here said will be borne out, in our judgment, by what follows.

It is conceded by the learned counsel that if we were right as to what was decided in *Lehmann v. Farwell*, 95 Wis. 185, 37 L. R. A. 333, the decision heretofore reached in this case rests on authority. The question there was, whether a claim for a personal injury, based on actionable negligence, is assignable. The court decided that the question turned on whether a cause of action to enforce such a claim survives the death of the original owner; that by the common law the answer must be in the negative, but under § 4253, as it now stands, making all causes of action for false imprisonment, assault and battery, or other damages to the person, survivable, all bodily injuries resulting from actionable negligence are included, and therefore the question must be answered in the affirmative. Said Mr. Justice Winslow, the statute "includes every action the substantial cause of which is bodily injury," and the language in that regard is too plain to leave any room for rules of construction to operate. To support that, the decisions of the Massachusetts court, made under a similar statute adopted in 1842, the first act of its kind in this country, and from which our own was doubtless taken, holding the same, were cited. It needs no discussion to show that the familiar rule stated by Chief Justice Marshall, with which the learned counsel prefaced his review of *Lehmann v. Farwell*, has no application to it whatever. The expression, that the survival statute includes every actionable personal injury, and is too plain to that effect to require construction, was not *obiter*,—it was not even judicial *dictum*. It was the very groundwork of the opinion itself and governs this case beyond reasonable controversy, unless we are to overrule it.

It is a mistaken opinion that nothing is decided in a case except the result arrived at. All the propositions assumed by the court to be within the case, and all the ques-

tions presented and considered, and deliberately decided by the court, leading up to the final conclusion reached, are as effectually passed upon as the ultimate questions solved. *School Dist. No. 28 v. Stoker*, 42 N. J. L. 115. The judgment is authority upon all points assumed to be within the issues which the record shows the court deliberately considered and decided in reaching it. *Quackenbush v. Wisconsin & M. R. Co.* 71 Wis. 472; *Pray v. Hegeman*, 98 N. Y. 351. Nothing is *obiter*, strictly so called, except matters not within the questions presented,—mere statements or observations by the judge who is writing the opinion, the result of turning aside for the time to some collateral matter by way of illustration. *Buchner v. Chicago, M. & N. W. R. Co.* 60 Wis. 264; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451; *Michael v. Morey*, 26 Md. 239, 90 Am. Dec. 106; *Clark v. Thomas*, 4 Heisk. 419; *State, Nourse, v. Clarke*, 3 Nev. 566; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60. The test of what is *obiter* by means of which counsel confidently brush aside the decisions of this court on the very point at issue, and the deliberate decisions of many other courts on the same point, or on questions essentially involved, was pressed upon our attention in *Buchner v. Chicago, M. & N. W. R. Co.* 60 Wis. 264, was there fully considered, and was rejected. A study of the opinion in that case, written by the present chief justice, is commended as the most effectual remedy for the mistaken notion, not only that a decision is not authority except upon the very point necessary to it, but that *obiter* is to be rejected, always, as entirely without authority. The opinion quotes the rigorous rule by which counsel test authorities fatal to their contention: then the observation of an eminent text writer, whose writings stand as authority in every country where the common law to any extent prevails, that "it is . . . difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point," and adds: "Such *dictum*, if *dictum* it is, should . . . be regarded as 'judicial *dictum*,' in contradistinction to mere *obiter dictum*,—that is, an expression originating from the judge alone, while passing, by the way, in writing his opinion, as an argument or illustration drawn from some collateral question." And further adds that even such expressions are by no means to be rejected as not entitled to be regarded at all; that while they are not binding, they are not without authority; neither is their use reprehensible, as evidenced by the fact that "some of the most sacred canons of the common law have their origin in the mere *dicta* of judges."

At this point a suggestion should be noticed, that in considering § 4253 we over-

looked the familiar rule of *Noscitur a sociis*. *Hiner v. Fond du Lac*, 71 Wis. 82, where there is an intimation that such maxim may play an important part in determining the meaning of the statute under consideration, is referred to. Why the discovery of such a serious omission in this case, and not in *Lehmann v. Farwell*, 95 Wis. 185, 37 L. R. A. 333, where the statute was first considered and its meaning judicially determined, or in the multitude of cases in other courts where similar statutes were construed, in none of which was it supposed that the rule was applicable! That is not easily comprehended. The maxim *Noscitur a sociis* is not a rule of interpretation by which the meaning of one word or designation, or that of several such, used in close connection, governs in determining the meaning of other words or designations used in the same connection. You may know a person by the company he keeps. You may know the meaning of a term by its associates,—what precedes and what follows it. When? Not in every case; but when not apparent from the language itself. It is a rule of construction to be resorted to where there is use for construction, not otherwise. The court said in *Lehmann v. Farwell*, that the statute is too plain to admit of construction, hence no rule to that end has any application. The latter familiar rule was evidently not in mind when it occurred that, through forgetfulness in writing the former opinion, the maxim *Noscitur a sociis* was overlooked. To seek to apply it in determining the meaning of the statute under consideration, in view of the fact that similar statutes have existed in other states for nearly half a century, and been universally supposed to cover injuries from actionable negligence, and thereby reach a different conclusion, would be what might be called judicial recklessness.

The idea that our statute (§ 4255, Rev. Stat.) does not grant a new right of action, but continues an old one, with different beneficiaries and different rules for assessing damages, is urged, as correct, with such confidence that we are called upon to go over the subject anew. No attempt will be made to harmonize all the conflicting observations found in decisions elsewhere regarding the nature of Lord Campbell's act. That cannot be done, and it is not necessary, for most of the conflicts will disappear as one applies judicial observations to the particular facts in regard to which they were made. We said in the former opinion that the view that the statute for the benefit of surviving relatives confers a new right of action for a grievance separate and distinct from that of the injured person, is supported by the better reasoning and the greater weight of authority. That is adhered to, and it is considered that what follows leaves little or no room for reasonable controversy as to its soundness, if reliance can be placed upon the evident purpose of the statute of authorities elsewhere. It is suggested that the conclusion was reached by illogical reasoning based upon

obiter observations in judicial decisions. We will consider that.

We said that the cause of action of the injured party, which survives, is separate and distinct from the cause of action in favor of surviving relatives under § 4255; that a cause of action unsatisfied at the death of the injured party, for compensation for his injuries, is a condition of the operation of such section so as to give a right of action to the survivors therein named; that the extinguishment of the primary cause of action leaves the statute with no office to perform; that in the absence of such extinguishment, there are two rights or causes of action for distinct and separate losses. That was supposed to be supported by numerous authorities cited in the opinion, and it does not seem to have occurred to the courts where such decisions were rendered that the reasoning was illogical or the conclusion arrived at a *non sequitur*. That characterization was made of the reasoning and conclusion referred to. How one can draw from such reasoning and conclusion the idea that the premises reasoned from contemplated the existence of two causes of action before the death of the injured party, and that the idea expressed was that the satisfaction of one of such existing causes of action satisfied the other, as counsel seems to have assumed in designating the conclusion reached as a *non sequitur*, is not perceived. It seems perfectly clear that the idea expressed was, that before the death of the injured party there is but one cause of action; that if that be not extinguished before such death, by the operation of § 4255 there may be another cause of action; that while before the death there can be but one such cause, if that survive there may be two. The learned counsel evidently forgot for the moment that the reasoning, though clothed in the language of the writer of the opinion, was based on the same premises, and proceeded by the same mental process, with language definite and clear, to the same conclusion as that in the opinion of Justice Coleridge in *Blake v. Midland R. Co.* 10 Eng. L. & Eq. 443, Justice Brewer in *Hulbert v. Topeka*, 34 Fed. Rep. 510, Justice Wilson in *Needham v. Grand Trunk R. Co.* 38 Vt. 294, and many others in numerous opinions in cases cited, and still others that will be cited in this opinion, which on account of counsel's labor, must be assumed not to have escaped their notice.

Our attention is again called to *Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555, decided in 1868, and *Griffiths v. Dudley*, L. R. 9 Q. B. Div. 357, in support of the continuation of the old cause of action theory. The question in both cases was, Does the satisfaction of the claim of the injured party in his lifetime leave Lord Campbell's act still applicable to the situation created by the death of such party? The nature of the statute otherwise, particularly its proper construction in connection with a statute preserving for the benefit of the estate, the common-law right of action for damages to

the injured person, was not thought of. What is said as to the statutory right not being new, but a right conferred in place of an old right, is much nearer pure *obiter* than what is called such in the argument on the motion for rehearing in reviewing decisions cited by this court as authority. In neither of the cases is *Blake v. Midland R. Co.* 10 Eng. L. & Eq. 443, decided in 1852, referred to, where the exact nature of the statutory action was considered, and, in the learned opinion given by Justice Coleridge, said to be a new right and not a right by transfer or continuation of the claim of the deceased, which opinion has been referred to as an authority in many courts and by many text writers since that time. "The statute does not," said Justice Coleridge, "transfer the right of action [of the deceased] to his representative, but gives to his representative a totally new right of action on different principles." The three cases are, really, in perfect harmony when rightly understood. On the one hand it is said Lord Campbell's act is in the nature of a survival statute and does not confer a new right. That is true in the sense the English court doubtless understood its own language; that is, that the compensation to surviving relatives was conferred in place of that of the injured person, which, by the common law, was extinguished by death. On the other hand, it is said Lord Campbell's act confers an entirely new right, which, too, is obviously true in the sense that it is a right of recovery by different persons, for different losses, on different principles than were known to the common law. That there is any such material variance between the two ideas as courts in some jurisdictions have discovered and assigned as a justification for holding that plain language in the legislative act, making survivable all claims based on actionable negligence, does not mean that but something else, is not perceived. Lush, J., said (*Read v. Great Eastern R. Co.* L. R. 3 Q. B. 555), that it was not the intention of the English statutes to make the wrongdoer pay twice for the same injury, so the right was there spoken of as not new and independent, but a right in substitution for the lapsed right. That does not conflict with the other ideas that none of the elements of damage, of the right which lapsed by common-law rules, are transferred by this statute to the beneficiaries therein named, and in that sense that the right conferred by statute is new. Therefore, the purpose of Lord Campbell's act was not to make the wrongdoer pay damages twice for the same wrong; it was to give to the surviving relatives a right on condition. That condition, in case of survival of the right of action, which falls by the common law, exists nevertheless; and if the original inducement for granting of the new right be removed by preserving the old right under another statute, that does not by any means affect the situation, for the sufficient inducement is yet left to uphold the statutory right.

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That we have expressed correctly the views of the English courts is abundantly borne out by numerous cases, some decided before and some after *Griffiths v. Dudley*, not before cited, including a very recent case passing directly on the question, which was not before us when the previous opinion was prepared and which has evidently not received the attention of respondent's counsel. *Leggott v. Great Northern R. Co.* (1876) L. R. 1 Q. B. Div. 599; *Bradshaw v. Lancashire & Y. R. Co.* (1875) L. R. 10 C. P. 189; *Barnett v. Lucas* (1872) Ir. Rep. 6 C. L. 247; *Robinson v. Canadian P. R. Co.* (1892) A. C. 481; *Robinson v. London & S. W. R. Co.* 19 C. B. N. S. 51; *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59; *Pym v. Great Northern R. Co.* 4 Best & S. 396.

In *Leggott v. Great Northern R. Co.* the question was, Does a recovery under Lord Campbell's act preclude a recovery for the benefit of the estate, of damages to the injured person?—the precise question in this case. The affirmative, unless barred by a recovery under Lord Campbell's act, was conceded for the purposes of the case, though the rule generally as to that was otherwise. The direct question left was the one indicated, namely, Does a recovery after death in one right bar a recovery in the other? And on that the court decided in the negative. Quain, J., in deciding the case said, the two actions are entirely different things, one for the loss the estate has suffered and the other under Lord Campbell's act, which "enables an action to be brought in a case where it could not have been brought before that act, namely, when the man has suffered a personal injury and dies in consequence. After his death, before Lord Campbell's act, no such action could have been maintained, because the death destroyed it. It fell with the life of the individual injured. Now Lord Campbell's act gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased. . . . I therefore feel clear upon the point that these actions are not brought in the same right, and that, therefore, the finding in the one does not constitute an estoppel in the other."

If the foregoing leaves doubt in the minds of the most skeptical, as to the position of the English courts, it will be removed by *Robinson v. Canadian P. R. Co.* decided by the house of lords in 1892. That is probably the most recent expression of such courts on the subject. The case arose in Canada. The statute is similar to our § 4255, except it requires, as a condition of its operation, death of the injured person without having satisfied his claim. The word "satisfied" does not occur in our statute, but words equivalent so far as relates to the extinguishment of the claim. The Canadian act further provides that the beneficiary may bring the action direct. There is a limitation of the right of the injured person to commence an action to enforce his claim for

damages, to one year after the happening of his injury. In the given case the period was allowed to lapse and death then occurred. Action was then commenced to enforce the statutory liability to surviving relatives. The loss by prescription of the primary claim was urged in bar of the statutory right. The Canadian supreme court sustained that, and by special leave the cause was carried to the house of lords where, all the members of the privy council who heard it concurring, Lords Watson, Macnaghten, Morris, Hannen, Shand and Sir Richard Couch, the judgment of the lower court was reversed upon the ground that the right of action of surviving relatives, contingent on the death of the injured person without having satisfied his claim, is a new and independent right which vests on the happening of the contingency mentioned in the statute; and that such contingency is death from the negligent injury without the injured party having satisfied his claim; that an extinguishment of such claim by prescription is not the satisfaction thereof contemplated by the act, which requires the active participation of the injured party, and is not satisfaction by mere operation of law. There was no difference of opinion between the last decision and the one reversed, except as to the scope of the word "satisfied" used in the Canadian act. Both courts held that the statutory action was to enforce a new right. Justice Strong [19 Can. S. C. 303], in delivering the opinion of the lower court, said: "It has been determined in England that the action under Lord Campbell's act is not the same action as that which the deceased person would have himself had at common law, if he had survived, but a new action given by the statute." Again he said: "As I have before said, I am of opinion that the action, being of the same nature, and indeed the same action in all respects, as that conferred by Lord Campbell's act, it must, as an action on that statute is considered in England, be deemed to be a new action, but still a new action dependent on the condition that the action of the deceased had not at the time of his death been barred or extinguished." With this we rest the subject under discussion as to the holdings of the English courts.

In support of what was formerly said, that the great weight of authority in this country is in favor of the doctrine that there may be two independent causes of action for distinct losses for a single injury, in the circumstances presented by this case, the following additional authorities are referred to: *Safford v. Drew*, 3 Duer, 627; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, 7 L. R. A. 283; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Hedrick v. Iowaco R. & Nav. Co.* 4 Wash. 400; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693; *Connors v. Burlington, O. R. & N. R. Co.* 71 Iowa, 490, 60 Am. Rep. 314; *Putman v. Southern P. Co.* 21 Or. 230; *Mulchahey v. Washburn Car Wheel Co.* 145 Mass. 281; *Belding v. Black Hills & Ft. P. R.* 44 L. R. A.

Co. 3 S. D. 369; Hamilton v. Morgan's L. & T. R. & S. S. Co. 42 La. Ann. 824. They are all to the effect that the right under statutes similar to our § 4255 is new and independent, subject only to the conditions therein named, and that if the primary cause of action survive, both may be enforced, and at the same time. Said Devio, J., in *Whitford v. Panama R. Co.* 23 N. Y. 465, speaking of a situation where there was no survival statute: "At . . . common law . . . the right of action for damages on account of his bodily injuries which belonged to the deceased while he lived, was extinguished by his death. The statute does not profess to revive his cause of action in favor of the executor or administrator. The compensation for the bodily injuries remains extinct, but a new grievance of a distinct nature, namely, the deprivation suffered by the wife and children or other relatives of their natural support and protection, arises upon his death and is made by the statute the subject of a new cause of action—in favor of these surviving relatives, but to be prosecuted in point of form by the executor or administrator."

In *Davis v. St. Louis, I. M. & S. R. Co.* 53 Ark. 117, the court by Cockrill, Ch. J., speaking of statutes similar to our §§ 4255 and 4253, said: "The English rule, which is commonly followed by the courts of the states whose statutes embody the provisions of Lord Campbell's act, is that the right of action, given by the latter statute to the personal representative of one whose death has been caused by the default of another, is created by the statute, and is not a continuation of the right of action which the deceased had in his lifetime, although the new right . . . arises only by preserving the cause of action which was in the deceased. If the deceased never had a cause of action, none accrues to his representative or next of kin. The right which accrued to the deceased revives to his administrator by virtue of the former statute (Mansf. Dig. § 5223) [our § 4253] the newly-created right [our § 4255] results from, and accrues on, the death of the injured party. Both actions are prosecuted in the name of the personal representative, where there is one, and may proceed *pari passu*, without a recovery in the one having the effect of barring a recovery in the other, because the suits are prosecuted in different rights and the damages are given upon different principles to compensate different injuries. One is for the loss sustained by the estate and for the suffering from the personal injury in the lifetime of the decedent, the recovery in which goes to the benefit of the decedent's creditors, if there are any; the other takes no account of the wrong done to the decedent, but is for the pecuniary loss to the next of kin occasioned by the death alone. The death is the end of the period of recovery in one case and the beginning in the other. In one case the administrator sues as legal representative of the state for what belonged to the deceased, in the other

he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them."

Further quotation from opinions would only unnecessarily prolong this opinion. Those given are in line with the other decisions cited. It is quite likely that the lapsing of the cause of action in favor of an injured party by his death, according to the rule of the common law, was the inducement for the passage of Lord Campbell's act,—the very bottom of it, as said in *Hecht v. Ohio & M. R. Co.* 132 Ind. 507, and from that we find some judges regarding the new cause of action as a continuation of the old, and others holding that the cause of action under the statute is an entirely different cause of action for the benefit of different persons, recoverable in a different right, and including entirely different elements of damage. That the actual loss sustained by the surviving relatives was ample inducement for the passage of the act for their benefit, and that in providing for the survival of the cause of action of the injured party for the benefit of the estate, it was so deemed, is too clear from the unmistakable language used to admit of a contrary view. We leave this branch of the subject, suggesting, in closing, that our statutes are substantially the same as those of Massachusetts, so long back as 1842, the survival statute there having been adopted at that date as before indicated. The decisions which subsequently followed, construing such statutes, are all in accordance with the conclusion we have reached.

We proceed now to show that what the learned counsel was pleased to call loose talk and *obiter*, in opinions of other courts cited in our former opinion, was the deliberate judicial determination of such courts, or such judicial *dicta* as should be regarded as authority on the subjects treated.

We referred to the language of Justice Brewer in pronouncing judgment in the United States circuit court for the district of Kansas, in *Hulbert v. Topeka*, 34 Fed. Rep. 510. Counsel call that *obiter*, and suggest that the justice's idea was based on *obiter* observations of other courts. *Needham v. Grand Trunk R. Co.* 38 Vt. 294, and *Blake v. Midland R. Co.* 10 Eng. L. & Eq. 443, were cited by Justice Brewer. As to the English decision sufficient has already been said. Reference is had to that at this point. Justice Brewer was called upon to judicially consider what the situation was under the Kansas statutes, which are similar to ours, in circumstances similar to those we have in this case. As a member of the supreme court of Kansas he had participated in a decision to the effect that if death ensue from an injury, no cause of action for the benefit of the estate survives; that the right of action to the surviving relatives is exclusive. As an original proposition the learned judge clearly indicated that he deemed such decision wrong, but that it was binding on the Federal court in a case arising in Kansas. His expressions of opinion were properly made 44 L. R. A.

in the case and undoubtedly such as he felt bound to make, in order that the court might not be embarrassed by the decision rendered, in the event of a case being thereafter presented where the court would be free to decide according to its judgment of the law, unbridled by the decision of some other court. What was said should be treated with more deference than loose talk. So far as other courts are concerned, it is entitled to consideration quite equal with the Kansas decision to which it refers.

Now a few words in regard to the Vermont case, *Needham v. Grand Trunk R. Co.* 38 Vt. 294, which will be considered in the light of *Legg v. Britton*, 64 Vt. 652. What is said in the former on the subject before us, in the argument for the rehearing here is called *obiter* and said to have been disapproved as such in the latter case. True, the question of whether the right of action to surviving relatives is a new and independent right, and whether the right of the deceased may survive and under any circumstances the two rights be enforced independent of each other, was not necessarily decided in the *Needham Case*; yet the subject was considered, was unquestionably presented by counsel on both sides, was supposed at the time to be a question proper for determination, and was deliberately determined. As we have before shown, what was said in making that determination is not *obiter*. It is at least judicial *dictum*. The case has been regarded as authority by courts and text writers generally. With but few exceptions it has been given all the force of an adjudication by the court on the very point referred to. Of course it was not controlling on the Vermont court, neither would it be here, even if the case had depended on the question. It was not discredited, but rather was affirmed, in the subsequent decision in *Legg v. Britton*. All there said is that the language of the former decision, on the subject here discussed, was not controlling, because the question was not necessarily decided in reaching the final conclusion on the point at issue in the case. There is no intimation that the point was not deliberately passed upon, or but that what was said in regard to it was entitled to respect. The idea expressed was that the court was free to consider the subject in the subsequent case as an original question, not disregarding, however, as without authority, the early case. After reaching that conclusion the question was considered anew, and a result reached, as said in our former opinion, substantially the same as before. Chief Justice Ross, who delivered the opinion, met the contention respondent supports here, by saying, in substance, that the statutes conferred separate and distinct rights, one by survival, and the other a new right dependent on conditions mentioned in the statute. "In conferring this new right of recovery," said the chief justice, "for the same wrongful act, the legislature could place such limitations upon it as it judged expedient. . . . The same

wrongful act frequently furnishes two independent rights of recovery, as in the case of an injury to the wife, or an injury to a servant. . . . Hence whether the damages recovered, if two actions are given, may, to some trifling extent be double, or whether the same injury sometimes gives two independent legal rights of recovery, throws very little light upon the intention of the legislature in passing the act of 1849 [the survival statute]. A wrongful injury resulting in the death of the person injured . . . may work serious loss and damage to him while living, and to his estate, and, at the same time, deprive his widow and next of kin of what he would have earned and saved, but for the injury." There is nothing new in the decision. It is in perfect harmony with *Needham v. Grand Trunk R. Co.* which, instead of being considered overruled, should be considered as affirmed; and so it is considered by other courts that have reviewed the subject. The case is referred to by Rapallo, J., in *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271, as being the necessary result of a situation where there is a statute reviving the cause of action of the injured person in favor of his estate, and a statute conferring a cause of action upon his surviving relatives.

A word is required in regard to *Hurst v. Detroit City R. Co.* 84 Mich. 539, wherein it is said that the cause of action which survives is a separate thing from the new cause of action given to surviving relatives under the statute. Counsel quotes the language of Justice Long in that case, and follows with the observation that it needs no argument to show that it is pure *obiter*. The miscalled *obiter* states one of the principal reasons given by the court for the conclusion finally reached, and is by no means *obiter* within the proper significance of the term, as we have before remarked. Instead of the later case of *Sweetland v. Chicago & G. T. R. Co.* (Mich.) 43 L.R.A. 568, to which our attention was earnestly invited, changing the rule of the *Hurst Case*, it stands as a clear affirmation of it. The two cases, together, are very much in the situation of the two Vermont cases. If the first, by itself, is not to be regarded as a clear adjudication upon the points under discussion, it should be so regarded in connection with the affirmation of the principle in the latter case. True, Justice Long, Justice Grant concurring, said that the language of his former opinion was *obiter*, but it was not such within the rule stated in this opinion, and was not so considered by the majority of the Michigan court. The opinion of the court, given by Mr. Justice Grant, is to the effect that no cause of action accrued to the injured person in the absence of conscious existence after the injury; that there was no evidence warranting a finding that there was such conscious existence; hence the recovery of damages to the deceased was reversed. Justice Montgomery dissented, because, in his judgment, the question of conscious exist-

ence was for the jury on the evidence. Justice Hooker dissented, because, in his judgment, life after the injury was all that was necessary to a survival of the cause of action. On the whole, how anything can be seen in the case to weaken what was said in the *Hurst Case* is not understood. True, the court was divided on the question, but the majority of the justices held to the doctrine that the cause of action of the injured person is not lost by his death. That seems plain beyond reasonable controversy.

We now come to a suggestion that this court has expressly decided that in case of death from actionable negligence, no cause of action survives. At this point the significance of the term *obiter dictum* suddenly changes, as it seems. Formerly everything was included not necessary to the conclusion reached, but when *Ean v. Chicago, M. & St. P. R. Co.* 95 Wis. 69, is reached, an observation regarding the subject beyond the case, —something far less entitled to the weight than those mere general expressions based on correct premises but beyond the case, covered by the maxim to which Chief Justice Marshall alluded in *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257, to which counsel referred in the opinion, as the test to be applied to the authorities cited by this court, a statement made in passing regarding an outside and not even collateral topic, the purest kind of *obiter* and worse, because the premises upon which it was based omitted the change in the statute regarding revival of actions, which varied the whole situation, and had not theretofore been passed upon by this court as affecting negligent injuries,—is cited to us as the deliberate judgment of the court on the very point covered by the observation. The question was, if death happened to an employee from the negligence of a co-employee under such circumstances that, had death not ensued, he would have had, by statute, a cause of action against the common employer to recover damages for his injury, may surviving relatives recover their loss under § 4255? That was the sole question considered and decided. Section 4253, as it now exists, was not thought of, nor was it in any way involved, even collaterally. In making the observation, decisions were in mind made before the change in the statute in regard to the survival of causes of action for injury to the person. All this is so obvious, even by a casual reading of the case, that it is not seen why it was cited to our attention as authority, especially in view of *Lehmann v. Farwell*, subsequently decided, where the survival statute was fully considered and it was said that it covered every cause of action for a bodily injury based on actionable negligence, and in view of the further fact that we have heretofore said in this case that the court decided that way in the *Lehmann Case*, and that it rules here. There are many cases where a contention regarding what has been decided is justifiable, but when once made and considered, and the court deliberately passes judgment as to

what it before decided, that at least should set the matter at rest.

There are some references, made in the argument for a rehearing, to statutes of other states and decisions under them. That field was covered in the former opinion. It was recognized that those decisions, and some others, are in conflict with our conclusion. No reason is perceived why that can have any greater weight now than before, or why we should again consider them.

We have now referred point by point to every suggestion found in the argument in support of the motion for a rehearing, and have treated anew those considered of importance, with as much care as if the subjects were before us for the first time. Notwithstanding the result reached is the same as before, the motion and this opinion upon it will add strength and stability to the judicial declaration of the law originally made. The labor of counsel for respondent has not been without good results. It has placed before us all suggestions, liable to occur to members of the profession, why a different result should have been reached. The court has been enabled thereby to consider such suggestions and pass upon them as a part of this case instead of their being left for consideration in future cases. That adds to the authority of a decision, and may rightly be considered fortunate.

To recapitulate why the motion for a rehearing should be denied, notwithstanding the reasons urged to the contrary:

(1) The statute (Rev. Stat. § 4253) we were called upon to construe, is too plain to admit of any other consideration than that which the ordinary meaning of the words suggests.

(2) The statute is not open to construe-
44 L. R. A.

tion in this case, because the subject was fully covered in *Lehmann v. Farwell*.

(3) The suggestion that the maxim *Non oītur a sociis* should be applied to the statute cannot be adopted, because a rule for construction is not applicable where there is no use for construction.

(4) The contention that the illustration used in the former opinion, to make apparent the false theory drawn by some courts from the English decisions, is illogical and involved a *non sequitur*, is based on a misconception of the premises on which the conclusion was based.

(5) The contention that language in judicial opinions cited in support of the decision, are *obiter* expressions is based on a misconception of the cases where such opinions were given, and what is properly considered *obiter* in a judicial decision.

(6) The assumed conflict in English decisions as to the character of the lord chancellor's act is not there when they are viewed from the situations of judges who delivered the opinions.

(7) If the conflict mentioned does exist, that does not change the situation where the legislative purpose is plain to preserve the cause of action of the injured person without prejudice to the cause of action to surviving relatives.

(8) The imagined menace of a double recovery in the situation as we find it does not exist in fact, as the damages in one right are limited to the loss which accrues to the injured person before death, and the damages in the other to the pecuniary loss of surviving relatives, as before the survival statute. The two rights in no way overlap each other.

Motion for rehearing is denied.

NEBRASKA SUPREME COURT.

John L. LUNNEY, *Plff. in Err.*,
v.
Leslie J. HEALEY.

(..... Neb.....)

- *1. This court will not reverse the judgment in a case tried to the court without a jury, merely because of the admission of improper evidence.
2. Where a real-estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one financially able, with whom the owner actually makes an enforceable contract of sale. The failure to carry out that contract, even if the default be that of the purchaser, does not deprive the broker of his right to commissions.
3. Evidence in such a case examined, and held to sustain a finding for the broker.

(October 5, 1898.)

*Headnotes by IRVINE, C.

NOTE.—Performance by a real-estate broker of his contract to find a purchaser or effect an exchange of his principal's property.

- I. General rule.
- II. Custom as affecting performance.
- III. The necessity of a written contract.
- IV. Necessity of consummated sale.
- V. Time of performance.
- VI. In case of a special contract.
- VII. In case of an exchange.
- VIII. Negotiations by principal.
- IX. Acceptance of purchaser by principal.
- X. Broker's presence at sale by principal.
- XI. Ratification of broker's acts.
- XII. Position of purchaser found.
- XIII. Effect of purchaser's default.
- XIV. Failure of broker to report purchaser.
- XV. Acts held sufficient performance.
- XVI. Acts held not to constitute performance.

The subject of a real-estate broker as the procuring cause of the sale, and his right when the principal makes the sale, is treated of in a note to *Hoadley v. Savings Bank of Danbury* (Conn.) *ante*, 821.

The subject of real-estate broker's commissions as affected by the negligence, fraud, or default of the principal and a defective title will be found discussed in the note to *Brackenridge v. Claridge* (Tex.) 43 L. R. A. 593.

The question of real-estate broker's commissions as affected by his negligence, or fraud, or other acts or agreements on his part respecting the sale or exchange of real estate will be found discussed in note to *Leathers v. Canfield*, and *Friar v. Smith* (Mich.) —L. R. A.—.

I. General rule.

Generally it may be stated that a broker's commissions are the compensation for the services of the broker, and when the service stipulated for has been rendered he will be entitled to his commissions. *Glider v. Davis*, 137 N. Y. 504, 20 L. R. A. 398.

The question what constitutes a sale which amounts to performance of a contract to effect a sale or procure a purchaser has arisen in some cases.

The case of *Watson v. Brooks*, 8 Sawy. 316, 318, held that a sale of real property was an

ERROR to the District Court for Seward County to review a judgment in favor of plaintiff in an action brought to recover commissions alleged to have been earned as a real-estate broker. *Affirmed*.

The facts are stated in the opinion.

Messrs. Biggs & Thomas, for plaintiff in error:

In an action to recover commissions for the sale of land, alleged to have fallen through on account of the principal's failure to procure a patent to the land within the time agreed on, the intended purchaser being unable to complete the purchase when the patent was secured, the agent cannot recover unless he affirmatively proves that the purchaser had during the time the actual cash to make the payment, it not being sufficient to show that he had the property out of which the price could have been made by suit.

Dent v. Powell, 93 Iowa, 711; *Mattingly v. Pennie*, 105 Cal. 514.

agreement by the vendor to convey the title thereto, or an estate therein, to the vendee for a certain valuable consideration then or thereafter to be paid, and was complete without the conveyance, although the legal title remained in the vendor.

The business of a real-estate broker or agent, generally, is only to find a purchaser, and the settled rule as stated by the courts is that, in the absence of an express contract between the broker and his principal, the implication generally is that the broker becomes entitled to the usual commissions whenever he brings to his principal a party who is able and willing to take the property and enter into a valid contract upon the terms then named by the principal, although the particulars may be arranged and the matter negotiated and completed between the principal and the purchaser directly. *Hill v. Jebb*, 55 Ark. 574, 576; *Zelmer v. Antisell*, 75 Cal. 509; *Phelan v. Gardner*, 43 Cal. 311; *Armstrong v. Lowe*, 76 Cal. 616; *Smith v. Schiele*, 93 Cal. 144, 149; *Duffy v. Hobson*, 40 Cal. 244, 6 Am. Rep. 617; *Rutenberg v. Main*, 47 Cal. 219; *Dolan v. Scanlan*, 57 Cal. 266; *Phelps v. Prusch*, 83 Cal. 628; *Babcock v. Merritt*, 1 Colo. App. 84, 87; *Howe v. Werner*, 7 Colo. App. 530, 532; *Collins v. McClurg*, 1 Colo. App. 348; *Hungerford v. Hlecks*, 39 Conn. 259; *Davis v. Morgan*, 96 Ga. 518, 520; *Rees v. Spruance*, 45 Ill. 308, 310; *Wilson v. Mason*, 158 Ill. 304; *Fischer v. Bell*, 91 Ind. 243, 244; *Hopwood v. Corbin*, 63 Iowa, 218; *Cassady v. Seeley*, 69 Iowa, 509; *Iselin v. Griffith*, 62 Iowa, 668, 670; *Blodgett v. Sioux City & St. P. R. Co.* 63 Iowa, 606, 609; *Van Gorder v. Sherman*, 81 Iowa, 403; *Gillett v. Corum*, 7 Kan. 159; *Coleman v. Meade*, 13 Bush, 358, 360; *Garcelon v. Tibbetts*, 84 Me. 148; *Kimberly v. Henderson*, 29 Md. 512; *Jones v. Adler*, 34 Md. 440; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 343; *Burke v. Cogswell*, 39 Minn. 344; *Hamlin v. Schultz*, 31 Minn. 486, 34 Minn. 534; *Armstrong v. Wann*, 29 Minn. 126; *Francis v. Baker*, 45 Minn. 83; *Barringer v. Stoltz*, 39 Minn. 63; *Plister v. Gove*, 48 Mo. App. 455; *Chiple v. Leathe*, 60 Mo. App. 15, 20; *Wright v. Brown*, 68 Mo. App. 577; *Nesbitt v. Helser*, 49 Mo. 383, 385; *Woods v. Stephens*, 46 Mo. 556, 557; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Hayden v. Grilo*, 26 Mo. App. 293; *Millan v. Porter*, 31 Mo. App. 563, 576; *Tyler*

There is a wide difference between the case at bar and the case where the seller puts the contract in motion by accepting a payment or making a contract with the buyer for payment. In that class of cases the agent is entitled to his commission, but, where the buyer is to make a payment as earnest money and he does not do so and wholly fails to do the primary thing which he is to do by his contract, then there is not, in fact, a contract, and it would be a fraud upon the seller, if, as in the case at bar, the seller would be compelled to go into court to compel the buyer to do the first thing which he agreed to do.

Pearson v. Mason, 120 Mass. 53; *Rice v. Mayo*, 107 Mass. 550; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Keys v. Johnson*, 68 Pa. 43.

The purchaser must do the thing which he is to do which will commence the contract.

Neiderlander v. Starr, 50 Kan. 766; *Cremier v. Miller*, 56 Minn. 52; *Tousey v. Etzel*, 9 Utah, 329; *Barber v. Hildebrand*, 42 Neb. 406.

Messrs. D. C. McKillip and Thomas Healey, for defendant in error:

When a real-estate broker is employed to procure a purchaser on terms fixed by the seller, and he produces one ready, able, and willing to buy on the seller's terms, and introduces him to the seller, and the seller then enters into a contract with the proposed buyer himself, without calling on the agent, he cannot escape paying the commission, if the contract so made with the purchaser is so defectively drawn as to be unenforceable.

Crevier v. Stephen, 40 Minn. 288; *Potvin v. Curran*, 13 Neb. 302; *Cassady v. Seelye*, 69 Iowa, 509.

All the agent had to do to earn the stipulated commission was to bring to his employ-

v. Parr, 52 Mo. 249; *Timberman v. Craddock*, 70 Mo. 638; *Bell v. Kaiser*, 50 Mo. 151; *Goffe v. Gibson*, 18 Mo. App. 1; *Gaty v. Sack*, 19 Mo. App. 477; *Love v. Owens*, 31 Mo. App. 501; *Stinde v. Scharff*, 36 Mo. App. 15, 19; *Collins v. Fowler*, 8 Mo. App. 588, Appx.; *Ramsey v. West*, 31 Mo. App. 685; *Christensen v. Wooley*, 41 Mo. App. 53; *Carpenter v. Rynders*, 52 Mo. 278; *Balley v. Chapman*, 41 Mo. 536; *Gaty v. Foster*, 18 Mo. App. 639; *Hayden v. Grillo*, 35 Mo. App. 653; *Yoder v. White*, 75 Mo. App. 155; *Traynor v. Morse* (Neb.) 75 N. W. 1103; *Jones v. Stevens*, 36 Neb. 849; *Potvin v. Curran*, 13 Neb. 302; *Barber v. Hildebrand*, 42 Neb. 400; *Siemssen v. Homan*, 35 Neb. 892; *Stewart v. Smith*, 50 Neb. 631; *Hinds v. Henry*, 36 N. J. L. 328, 332; *McClave v. Palne*, 49 N. Y. 561, 10 Am. Rep. 431, 432; *Glentworth v. Luther*, 21 Barb. 145; *Mullenhoff v. Gensler*, 39 N. Y. S. R. 441; *Condict v. Cowdrey*, 46 N. Y. S. R. 896, 898; *Duclos v. Cunningham*, 102 N. Y. 678; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Ware v. Dos Passos*, 4 App. Div. 32, 35; *Gerdling v. Haskin*, 141 N. Y. 514; *Montgomery v. Knickerbacker*, 27 App. Div. 117; *Powell v. Lamb*, 1 N. Y. Supp. 431, 432; *McComb v. Von Ellert*, 7 Misc. 59, 60; *Moses v. Helmke*, 18 Misc. 357; *Smith v. Nicoll*, 91 Hun, 173, 174; *Curtiss v. Mott*, 90 Hun, 439; *Felner v. Kobre*, 13 Misc. 499, 500; *Gilder v. Davis*, 137 N. Y. 506, 20 L. R. A. 398; *Fraser v. Wyckoff*, 63 N. Y. 445, 448; *Douglass v. Halsted*, 81 Hun, 65, 69; *Landsberger v. Murray*, 6 Misc. 605; *Folsom v. Hesse*, 24 Misc. 713; *Hay v. Platt*, 68 Hun, 488; *Smith v. Seattle, L. S. & E. R. Co.* 72 Hun, 202; *Woolley v. Lowenstein*, 83 Hun, 155; *Condict v. Cowdrey*, 139 N. Y. 273; *Levy v. Ruff*, 4 Misc. 180, Affirming 3 Misc. 147; *Mooney v. Elder*, 56 N. Y. 238; *Bennett v. Egan*, 3 Misc. 421, 422; *Barnard v. Monnot*, 33 How. Pr. 440, 1 Abb. App. Dec. 108, 3 Keyes, 203; *Hamilton v. Gillender*, 26 App. Div. 156; *Coleman v. Garrigues*, 18 Barb. 00, 66; *Goodwin v. Brennecke*, 21 App. Div. 138, 139; *Freedman v. Havemeyer*, 37 App. Div. 518; *Redfield v. Tegg*, 38 N. Y. 212; *Seymour v. St. Luke's Hospital*, 28 App. Div. 119, 122; *Simonson v. Kieselick*, 4 Daly, 143, 145; *Satterthwaite v. Vreeland*, 3 Hun, 152; *Kirwin v. Barney*, 27 Misc. 181; *Baker v. Thomas*, 11 Misc. 112, 113; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Roush v. Loeffler*, 3 Ohio Dec. 628, 629; *Kyle v. Rippey*, 20 Or. 447, 453; *Clendenon v. Pancoast*, 75 Pa. 213; *Keys v. Johnson*, 68 Pa. 43; *Pratt v. Patterson*, 112 Pa. 475; *Middleton v. Thompson*, 163 Pa. 112, 119; *Hartley v. Anderson*, 150 Pa. 391; *Gibson's Estate*, 3 Pa. Dist. R. 147, 44 L. R. A.

148; *Peckham v. Ashhurst*, 18 R. I. 378; *McLaughlin v. Wheeler*, 1 S. D. 497; *Parker v. Walker*, 86 Tenn. 566, 565; *Cheatham v. Yarbrough*, 90 Tenn. 77; *Woodall v. Foster*, 91 Tenn. 195, 197; *Ryan v. Kahler* (Tex. Civ. App.) 46 S. W. 71, 72; *Tousey v. Etzel*, 9 Utah, 329; *Halsey v. Montelro*, 92 Va. 581, 583; *Donohue v. Padden*, 93 Wis. 20, 22; *McArthur v. Slauson*, 53 Wis. 41; *McGavock v. Woodlief*, 20 Illow. 221, 15 L. ed. 884.

The above principle has been held to imply and involve the agreement of the buyer and seller, a meeting of their minds, and the production of the purchaser by the agency of the broker. *Garcelon v. Tibbets*, 84 Me. 148.

So, the above rule holds good in cases in which the broker is merely to find a purchaser, without any authority to execute a contract binding upon his principal. *Hamlin v. Schulte*, 34 Minn. 334, 536.

This last proposition is upheld by the decisions of all the courts of the Union, and may be said to be so far settled as hardly to require the citation of authorities to support it.

It has been held that there is no meritorious distinction between the case of an agent undertaking to sell and one undertaking to find a purchaser, upon the ground that the agent in undertaking to sell must not alone find a purchaser but must place the parties in such a position that the sale may be enforced between them by law, for the reason that the broker in either case is required to do no more than find a purchaser, and cannot do the selling unless specifically authorized to do so by power of attorney, the undertaking to sell in such cases being no more than an engagement to find a purchaser who is ready and willing to buy. *McFarland v. Lillard*, 2 Ind. App. 160. To the same effect. *Treat v. De Ceis*, 41 Cal. 202; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Goss v. Broom*, 31 Minn. 484; *Reynolds v. Tompkins*, 23 W. Va. 229; *Lockwood v. Rose*, 125 Ind. 588.

And it has been held that all that the broker can do is to find a party who will be acceptable to the owner, and enter into a contract of purchase with him, unless the owner makes him more than a mere broker by giving him a power of attorney to convey the property; but in such a case he ceases to be a broker and becomes an attorney. *McConaughy v. Mahannah*, 28 Ill. App. 169, 173; *Glentworth v. Luther*, 21 Barb. 145, 146.

He must, however, find the purchaser. *Markus v. Kenneally*, 19 Misc. 517; *Wylie v. Marine Nat. Bank*, 61 N. Y. 416.

In case the terms of the contract are express

er a responsible purchaser, willing to buy at the price of \$6,400, upon terms satisfactory to his employer.

Gilder v. Davis, 137 N. Y. 504, 20 L. R. A. 398.

If the broker negotiates a contract different from that prescribed by his employer, and the employer subsequently ratifies it, and thus a contract is finally made which is satisfactory to him, then the broker has earned his commission.

Nesbitt v. Helser, 49 Mo. 383; *Coleman v. Meade*, 13 Bush, 358.

The ability of Stutzman to perform the contract is presumed and proof thereof waived by Lunney's acceptance of Stutzman as a purchaser and entering into contract with him, without calling on the aid or assistance of his agent Healey.

Francis v. Baker, 45 Minn. 83; *Rice v. Mayo*, 107 Mass. 550; *Pearson v. Mason*,

to sell at a fixed price the broker must find a purchaser at the price for which he has been authorized to sell, before he can lawfully demand his compensation. *Satterthwaite v. Vreeland*, 3 Hun, 152; *Henderson v. Vincent*, 84 Ala. 99.

And if he is to sell at an amount which shall be "net" to his principal he must show that he has procured such a purchaser before he can recover his commissions. *Antidel v. Canfield* (Mich.), 5 Det. L. N. 777, 77 N. W. 944.

The rule that the right of a real-estate broker, who finds a purchaser able and willing to buy upon the principal's terms, to commissions, is complete, rests upon the general usage of the business, and is liable to be modified or superseded by a special usage in relation to the particular transaction in connection with which the broker was employed, or by a special agreement between the parties. *Hinds v. Henry*, 36 N. J. L. 328, 332.

But where there is no contract the broker's right to compensation depends upon the fact that the property was sold by him, and this is so without reference to custom. *Harrell v. Zimpieman*, 66 Tex. 292, 294.

Something more than a mere offer to purchase must be shown by the broker, as an offer to purchase may be made by one without means, and who is in no condition to comply with the terms of the sale, and against whom a claim for damages resulting from the failure to perform the contract of purchase cannot be enforced, and an offer from such an one ought not to be considered as constituting the performance of the broker's undertaking to negotiate a sale of the land. *Isehn v. Griffith*, 62 Iowa, 668, 670.

The undertaking to procure a purchaser requires of the party no undertaking, not simply to name or introduce a person who may be willing to make any sort of contract in reference to the property, but to produce a party capable, and who ultimately becomes the purchaser. *Kimberly v. Henderson*, 29 Md. 512, 515; *Keener v. Harrod*, 2 Md. 63; *McGavock v. Woodlief*, 20 How. 221, 15 L. ed. 884.

So, where the compensation is to be paid by way of commissions, the whole services or duty must be performed before any right to commissions arises unless the act of the principal has prevented the performance of it; he must complete the thing required of him before he is entitled to charge for it. *Hyams v. Miller*, 71 Ga. 608, 618; *Gottschalk v. Jennings*, 1 La. Ann. 5, 7, 45 Am. Dec. 70.

And the whole question turns upon the inquiry whether the things he has done while his

120 Mass. 53; *Coleman v. Meade*, 13 Bush, 358; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Keys v. Johnson*, 68 Pa. 43.

Where the vendor has made a contract of sale, to a person produced by the broker, the solvency and ability of such purchaser to perform the obligations of his contract will be presumed.

Goss v. Broom, 31 Minn. 484; *Grosse v. Cooley*, 43 Minn. 188; *Hart v. Hoffman*, 44 How. Pr. 168; *Crevier v. Stephen*, 40 Minn. 288; *Cook v. Kroemeke*, 4 Daly, 268; *Nicholas v. Jones*, 23 Neb. 813; *Butler v. Kennard*, 23 Neb. 357; *Potvin v. Curran*, 13 Neb. 302; *Blakeslee v. Ervin*, 40 Neb. 134; *Holden v. Starks*, 159 Mass. 503; *Heaton v. Edwards*, 90 Mich. 500.

Irvine, C., filed the following opinion:

This was an action by Healey against Lunney to recover commissions as a real-estate

agency continues have brought forth a purchaser able, willing, and ready to accept the owner's offer of sale. *McKnight v. Thayer*, 48 N. Y. S. R. 620, 622; *Slater v. Eliot*, 10 N. Y. S. R. 257, 261, 262.

The broker's commissions on a sale of real estate are earned and due when the terms of the contract of sale are specific and unmistakable, and everything is done that can be done by the purchaser to carry out the contract. *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 202.

And in order to fulfil his contract undertaking to make a sale of the property for a certain price within a given time, and upon a representation authorized by the principals to the effect that the title is good, it is necessary for the broker to find someone, not only able and willing to purchase upon the terms proposed and within the time limited, but who will also agree to do so. *Watson v. Brooks*, 8 Sawy. 316, 318.

He must complete the sale; that is to say, he must find a purchaser in a situation ready and willing to complete the purchase according to the terms agreed upon. *Kimberly v. Henderson*, 29 Md. 512, 515; *Hyams v. Miller*, 71 Ga. 608, 618.

In *Pratt v. Patterson*, 7 Phila. 135, it is said that the true meaning of the contract between the principal and the broker is that the former will pay the broker a commission provided he finds a purchaser whom the principal agrees to accept, and to whom an actual sale is made.

The sale must be negotiated and approved before the broker can be said to have fulfilled his contract. *Hall v. Gambrill*, 92 Fed. Rep. 32, 37.

The broker must prove that he effected either a completed sale to the purchaser, or an agreement to purchase susceptible of enforcement against the purchaser. *Hammond v. Crawford*, 35 U. S. App. 1, 66 Fed. Rep. 425, 427, 14 C. C. A. 109; *Hawkins v. Chandler*, 8 Houst. (Del.) 434, 435.

In the absence of fraud on the principal's part he must perform all the conditions of the contract as made with his principal, otherwise he cannot recover. *Warren v. Cram*, 71 Mo. App. 638, 641; *Blackwell v. Adams*, 28 Mo. App. 61; *Reiger v. Bigger*, 29 Mo. App. 421; *Stinde v. Blesch*, 42 Mo. App. 578; *Hackmann v. Gutweller*, 66 Mo. App. 244; *Mullenhoff v. Gensler*, 39 N. Y. S. R. 441; *Burns v. Oilphant*, 78 Iowa, 456, 459; *Zeldler v. Walker*, 41 Mo. App. 118, 121; *Wilson v. Mason*, 57 Ill. App. 325, 330; *Hafner v. Herron*, 165 Ill. 242, *Affirming* 60 Ill. App. 592; *Eldson v. Saxon* (Tex.)

broker. The plaintiff recovered in the district court, and the defendant seeks a reversal of the judgment.

It is suggested that the petition does not state a cause of action, but the supposed defect is not pointed out in the briefs, and we perceive none on examining the petition.

Error is assigned on the admission of certain evidence. The case was tried to the court without a jury, and errors, if any were made, in the admission of evidence, are therefore not a ground of reversal.

The principal controversy concerns the sufficiency of the evidence. The petition alleges a contract between the parties whereby it was agreed that if Healey would find a purchaser for certain land of Lunney's at the price of \$6,400, and on such terms of purchase as should be agreed upon between Lunney and the purchaser, Lunney would pay

Healey \$200. It is then alleged that Healey produced a purchaser willing and able to pay the price fixed, that terms were agreed upon, and a contract executed for the sale of the land. On analysis it will be seen that the petition does not charge the usual broker's contract to produce a purchaser able and willing to purchase on terms previously fixed by the owner. Here the owner had fixed the price alone, and the other terms were to be arranged with the purchaser. The contract would only be performed by the production of a purchaser with whom the owner should actually make a bargain. The evidence on behalf of the plaintiff strongly tended to establish the averments of his petition. It appears that the purchaser by him produced actually executed a contract to purchase the land; but it also appears that the contract was not performed, and it is inferable that

(Civ. App.) 30 S. W. 957; *Kelly v. Stone* (Iowa) 62 N. W. 842; *Fraser v. Wyckoff*, 63 N. Y. 445, 448.

The question of fraud on the principal's part will be found discussed in *note* to *Brackenridge v. Claridge* (Tex.) 43 L. R. A. 593.

So, if the broker, for a stipulated price, undertakes to find a purchaser of the property, he is not entitled to anything unless he finds a purchaser willing to buy the whole property. *Weber v. Clark*, 24 Minn. 354; *Illingsworth v. Slosson*, 19 Ill. App. 612, 614.

Again, he must strictly perform the services required of him, according to the authority conferred upon him. *Wilson v. Sturgis*, 71 Cal. 226, 229; *Buckingham v. Harris*, 10 Colo. 455; *Nelson v. Lee*, 60 Cal. 565, 567; *Armes v. Cameron*, 8 Mackey, 435, 436; *Nesbitt v. Helser*, 49 Mo. 383; *Hoyt v. Shipherd*, 70 Ill. 309, 311; *Moses v. Bierling*, 31 N. Y. 462; *Jacobs v. Shenon*, 2 Idaho, 1002.

He must allege and prove, on the clearest grounds, his compliance with the undertaking. *Hayden v. Grillo*, 26 Mo. App. 289, 293.

If the broker accepts an employment, the import of which makes his title to commissions depend upon his securing a purchaser on terms that are specific, he must perform the undertaking in order to claim his commissions, but the principal must not interfere and prevent such performance. *Brigg v. Rowe*, 1 Abb. App. Dec. 189, 195.

And in such cases no performance on other terms will suffice unless accepted by the principal. *Jacobs v. Shenon*, 2 Idaho, 1002; *Antisdel v. Canfield* (Mich.) 5 Det. L. N. 777, 77 N. W. 944.

The above holdings of the courts are all based upon the principle that the broker's right to commissions depends upon the successful performance of his services, and upon nothing else. *Barnard v. Mennot*, 33 How. Pr. 440, 1 Abb. App. Dec. 108, 3 Keyes, 203.

In *Blanc v. New Orleans Improv. & Bkg. Co.* 2 Rob. (La.) 63, 65, it is said that in the contract of brokerage nothing is paid unless a bargain is effected.

But when the sale is made by the broker his work is done, and he is entitled to his compensation. *Middleton v. Findla*, 25 Cal. 76, 81.

If the broker does not himself effect a sale to the purchaser he must show that he conducted the negotiations of the sale to such a stage as to complete the bargain for the sale, so far as it depended upon his action and efforts to accomplish the sale. *Hawkins v. Chandler*, 8 Houst. (Del.) 434, 435.

He must have discovered the purchaser and

started the negotiations, and there must be a final closing, through his efforts by or on behalf of his principal with the purchaser in compliance with the authority conferred upon him. *Smith v. McGovern*, 65 N. Y. 574, 575; *Hurd v. Nellson*, 100 Iowa, 555, 557; *Smith v. Keeler*, 51 Ill. App. 267, 268; *Carter v. Webster*, 79 Ill. 435, 436.

And the commissions of the broker are earned when his client has expressed satisfaction, and has signed an agreement for the future transfer of the property. *Lightball v. Caffrey* (Quebec Super. Ct.) 6 Legal News, 202.

So, if property is put into the real-estate broker's hands for sale, and he effects an exchange of the same which his principal carries out, he will be entitled to his commissions. *Redfield v. Tegg*, 38 N. Y. 212.

It is not, however, a broker's duty to present a purchaser with a contract ready drawn and executed to tender to his principal, and it is enough that under the terms of his employment with his principal he produces a person able and willing to take the property and pay the price on his principal's terms. *Cook v. Kroe-meke*, 4 Daly, 268, 269.

But if the sale is unauthorized he cannot recover commissions. *Carter v. Webster*, 79 Ill. 435, 436; *Smith v. Keeler*, 51 Ill. App. 267, 268.

So, the mere fact that the broker shows the property to the purchaser, but fails to consummate the sale before the withdrawal of the property from the broker's hands, will not entitle him to commissions. *Stedman v. Richardson*, 100 Ky. 79.

If the broker does not find a purchaser who will give the price fixed no commissions are earned. *Rees v. Spruance*, 45 Ill. 308, 310.

The purchaser found must be a person competent to comply with the terms of the contract, or able to respond in damages. *Hayden v. Grillo*, 26 Mo. App. 289, 293, 42 Mo. App. 1.

So, it is not enough that the broker has devoted his time, labor, or money to the interest of his principal, as unsuccessful efforts, however meritorious, afford no ground of action, and therefore if his acts effect no agreement or contract between his employer and the purchaser the loss must be his own, and he loses his labor and efforts which he staked upon success. His commissions are based upon the contract of sale. *Garcelon v. Flobetts*, 84 Me. 148; *Vlaux v. Old South Soc.* 133 Mass. 110; *Loud v. Hall*, 106 Mass. 404, 407; *Tombs v. Alexander*, 101 Mass. 255, 3 Am. Rep. 349; *Kock v. Emmerling*, 22 How. 69, 16 L. E. 292; *Glentworth v. Luther*, 21 Barb. 147; *Drury v. Newman*, 99 Mass. 256; *Sibbald v. Bethlehem Iron*

the default was that of the purchaser. In spite of some authority to the contrary, we are convinced that, under such a contract as is here pleaded, the broker is entitled to his commission when through his instrumentality a purchaser has been produced, able and willing to buy, and with whom the owner actually makes an enforceable contract of sale, even though that contract fails in performance through the default of the purchaser. In such case the vendor may usually enforce the specific performance of the contract, and he may in any case recover damages for the breach. In either way he gets the advantage of his bargain, and the broker has done all required of him. Such is the generally accepted view. *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Love v. Owens*, 31 Mo. App. 501; *Leete v. Norton*, 43 Conn. 219; *Pear-*

son v. Mason, 120 Mass. 53; *Bach v. Emerish*, 3 Jones & S. 548.

It is, however, insisted, that in this case the contract of sale never became operative, because of the vendee's failure to perform a condition precedent, and the case is said to be similar to *Barber v. Hildebrand*, 42 Neb. 400. There the contract was for an exchange of lands, and the person produced by the broker failed to furnish an abstract showing perfect title in himself to the land which he was to give in exchange. The furnishing of such an abstract was a condition precedent to the exchange. It was as if a purchaser produced had been financially unable to buy, and had been for that reason rejected. Here the contract was that the purchaser should pay "\$6,400 in manner following: \$300 cash in hand paid, the receipt

Co. 53 N. Y. 378, 22 Am. Rep. 441; *Cook v. Welch*, 9 Allen, 350; *Veasie v. Parker*, 72 Me. 443. *Rockwell v. Newton*, 44 Conn. 337.

And a prospective or contemplative agreement is not sufficient. *Montgomery v. Knickerbacker*, 27 App. Div. 117.

So, if by the written agreement the brokers are only entitled to their commissions when they sell or trade the principal's property on the terms therein mentioned to a person ready, able, and willing to purchase upon those terms, their commissions will not be due if they fail to sell on such terms. *Love v. Owens*, 31 Mo. App. 501, 504; *Reiger v. Bigger*, 29 Mo. App. 421; *McArthur v. Slauson*, 53 Wis. 43.

In the absence of a special contract the general rule of law is that there can be no recovery on the part of the broker unless he shows to the satisfaction of the jury that he brought the parties together and was the procuring cause of the sale, as his undertaking is to make efforts to secure a purchaser. *Carroll v. Pettit*, 67 Hun, 418; *Susendorff v. Schmidt*, 55 N. Y. 319, 321.

And where the evidence shows that the broker has performed no services in effecting the sale, an instruction to the jury that if it should so find the broker will not be entitled to recover, is based upon the evidence of the case, and is not inconsistent. *McMurtry v. Madison*, 18 Neb. 291, 298.

It is not sufficient for the broker merely to find a purchaser financially able, and who verbally agrees with him to purchase, makes a deposit, but neither signs a binding agreement to purchase nor is produced as a person ready and willing to enter into such a contract. *Gunn v. Bank of California*, 99 Cal. 349.

The broker must bring the proposed purchaser and the principal together so that they may enter into a valid and binding contract, and the principal must have an opportunity of obtaining the same, or in other words, mutuality must be established between them, and this is the duty assumed by him. *Travis v. Graham*, 23 App. Div. 214; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 382, 22 Am. Rep. 441; *McKnight v. Thayer*, 48 N. Y. S. R. 620, 622; *Forrester v. Price*, 6 Misc. 308; *Follinsbee v. Sawyer*, 8 Misc. 370; *Zelmer v. Antisell*, 75 Ca. 509, 512; *Wyckoff v. Bissell*, 24 App. Div. 66, 67; *Barnard v. Monnot*, 53 How. Pr. 440, 1 Abb. App. Dec. 108, 3 Keyes, 203; *Barer v. Thomas*, 12 Misc. 432, 433, 11 Misc. 112; *Felner v. Kobre*, 13 Misc. 409, 500; *Bab v. Hirschbein*, 33 N. Y. S. R. 423; *Bennett v. Egan*, 3 Misc. 421, 422; *Moses v. Helmke*, 18 Misc. 387; *Vincent v. Woodland Oil Co.* 165 Pa. 402; *Leszynsky v. Meyer* (Cal.) 53 Pac. 703; *Gunn v. Bank of California*, 99 44 L. R. A.

Cal. 349; *Slevers v. Griffin*, 14 Ill. App. 63, 66; *Baars v. Hyland*, 65 Minn. 150; *Duclos v. Cunningham*, 102 N. Y. 378; *Von Hermann v. Wagner*, 51 Hun, 431, 433; *Hamilton v. Gillender*, 26 App. Div. 156; *McGavock v. Woodlief*, 20 How. 221, 15 L. ed. 884; *Gerding v. Haskin*, 141 N. Y. 514.

So, the meeting of the minds of the parties must be on every material particular of the transaction. *Moses v. Helmke*, 18 Misc. 357; *Halprin v. Schachne*, 21 Misc. 519.

And the contract entered into must be one which can be specifically performed. *Norman v. Reuther*, 25 Misc. 161; *Barnard v. Monnot*, 1 Abb. App. Dec. 110, 3 Keyes, 203, 33 How. Pr. 440; *Mooney v. Elder*, 56 N. Y. 238; *Knapp v. Wallace*, 41 N. Y. 477; *Wright v. Brown*, 68 Mo. App. 577; *Christensen v. Wooley*, 41 Mo. App. 53; *Carpenter v. Rynders*, 52 Mo. 278; *Bailey v. Chapman*, 41 Mo. 536; *Love v. Owens*, 31 Mo. App. 501; *Gaty v. Foster*, 18 Mo. App. 639; *Nesbitt v. Helser*, 49 Mo. 383; *Hayden v. Grillo*, 35 Mo. App. 653; *Stinde v. Schraff*, 36 Mo. App. 15, 19; *Collins v. Fowler*, 8 Mo. App. 588; *Clapp v. Hughes*, 1 Phila. 382; *Hartley v. Anderson*, 150 Pa. 391; *Gibson's Estate*, 3 Pa. Dist. R. 147, 148.

And the most conclusive evidence that the broker has brought the minds of the buyer and seller together is the execution and delivery of a deed of the property by the principal to the purchaser. *Travis v. Graham*, 23 App. Div. 214.

When the minds of the parties have met upon the contract and the terms upon which it is made, it matters not what those terms are, or whether carried out or not, or whether the failure to finally consummate it is due to the act of the principal or of the purchaser, as the broker has then fulfilled all that his contract of employment calls for. *Follinsbee v. Sawyer*, 8 Misc. 370; *Gilder v. Davis*, 137 N. Y. 504, 20 L. R. A. 398; *Hodgkins v. Mead*, 130 N. Y. 676; *Martin v. Bliss*, 57 Hun, 199.

And whenever the broker's services have resulted in a complete meeting of the minds of both the parties he is, in the absence of an express stipulation of the contract, entitled to the compensation agreed upon, or to the usual commissions. *Levy v. Kottman*, 11 Misc. 372.

So, when the broker has found a purchaser able and willing to buy, and is the efficient cause of bringing the minds of the parties together, his contract is performed and he has earned his commissions. *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146, 149.

But evidence which merely shows an intention to accept an offer made is not sufficient. *Leszynsky v. Meyer* (Cal.) 53 Pac. 703.

whereof is hereby acknowledged, and the balance as follows," etc. The evidence was that the \$300 was not intended in fact to be paid in cash, but was to be represented in part by the assignment of a land contract at the agreed price of \$125. For the remaining \$175, the purchaser gave, and the vendor received, a note payable in ten days. There is nothing in this that indicates such payment as a condition precedent to the taking effect of the contract. So far as stated, it is quite evident that Lunney might have sued on the note or recovered damages on the contract. But it is said that the contract was not delivered, but left in escrow for delivery only when the other contract should be assigned and the note paid. While, possibly, the evidence might permit the inference that such

was the intention, there is no witness who directly so testifies; and the inference drawn by the trial court that the contract was deemed complete is decidedly the more reasonable. Indeed, the express and implied admissions of Lunney's answer are such that it is doubtful whether his present theory was admissible under the pleadings.

There is a suggestion that the fact that the purchaser failed to assign the contract, and pay his note, shows that he was not financially able to do so. This fact would, at most, be evidence tending to so show, and the purchaser's default was explained in a manner consistent with the theory of his ability to perform. Moreover, all the direct evidence was to that effect.

Affirmed.

In a case in which the broker sought to recover compensation, but in which he failed to show a contract either express or by implication, it was stated that the contract between the broker and the principal was the meeting of the minds of the contracting parties, and that where there was no express contract the parties sought to be charged must have such knowledge, or what is equivalent thereto, before his mind can act on the subject and assent to the terms of the contract. *Atwater v. Lockwood*, 39 Conn. 47, 49.

If the purchaser has agreed to the principal's terms, and the broker has informed the principal thereof, and he has assented and has agreed to meet at the office of counsel to make out the contract, the case establishes sufficient evidence of the meeting of the minds of the seller and purchaser upon the terms of the sale, to entitle the broker to his commissions as upon a performance of his contract, and the principal cannot then insist upon inserting a forfeiture clause in the agreement not previously proposed or even suggested to the purchaser. *Beebe v. Ranger*, 3 Jones & S. 452, 453, 455.

To entitle a broker to his commissions under a contract to effect a sale, it must appear that either the property has been actually sold through the agency of the broker, or of some other, or that from like agency a purchaser has been found ready and willing to take the property upon the terms fixed by the principal. *Mooney v. Elder*, 56 N. Y. 238, 240.

In ordinary cases the broker must prove that the contract was induced by his efforts by competent persons, and that the same was upon terms and conditions carefully expressed, even as to details. *Moskowitz v. Hornberger*, 20 Misc. 559, 560, *Affirming* 19 Misc. 429; *Woolley v. Lowenstein*, 83 Hun, 155; *Emens v. St. John*, 79 Hun, 90.

The agreement as concluded must be that procured by the broker claiming commissions, and it is for him to show that such is the fact. *Baker v. Thomas*, 12 Misc. 432, *Reversing* 11 Misc. 112.

The broker must show performance of the contract on his part, even though his principal refuses to comply with his agreement upon the ground that the name of the purchaser has not been revealed to him, and that he has therefore no means of exercising his judgment as to him. *Hayden v. Grilio*, 26 Mo. App. 289, 293, 42 Mo. App. 1.

He must show negotiations which result in the sale. *Von Hermann v. Wagner*, 81 Hun, 431, 433.

And the legal import of his agreement binds him to name a person who ultimately buys the property. *Keener v. Harrod*, 2 Md. 63, 56 Am. 44 L. R. A.

Rep. 706, 708; *Murray v. Currie*, 7 Car. & P. 584.

It has been held that a broker is entitled to compensation if he substantially effects a sale, by procuring and introducing a purchaser to whom the principal sells the property, even under an oral agreement between the principal and the broker and that a finding by the jury that it is an ordinary case of an employment of a broker to procure a purchaser may be warranted by the evidence. *Desmond v. Stebbins*, 140 Mass. 339.

But as long as the principal insists upon something which he has a right to insist upon as a condition of sale, and to which the purchaser refuses to assent, in consequence of which disagreement the purchaser refuses to enter into an enforceable contract, it cannot be held that the broker has procured a complete meeting of the minds of both vendor and vendee. *Levy v. Kottman*, 11 Misc. 372; *Bennett v. Egan*, 3 Misc. 421.

When a person representing that he is the owner of property, places it in the hands of an agent to be sold, and the agent makes a sale of it in accordance with the instructions of his principal or in pursuance of the terms of the agreement between them, he is entitled to compensation for his labor. *Middleton v. Findla*, 25 Cal. 76, 81.

The question whether the broker is entitled to commissions turns on the inquiry whether the things he has done while his agency continues have brought forth a party able, willing, and ready to accept the owner's offer of sale. *Slater v. Holt*, 10 N. Y. S. B. 257, 261.

Commissions which are to be due when a purchaser shall be found, are due when the purchase is made. *Lawrence v. Atwood*, 1 Ill. App. 217, 223.

And under a contract with a broker to find a purchaser at a given price, if the broker finds a purchaser and reports the same to his principal, and the evidence supports the same, the broker will be entitled to recover regardless of whether or not the principal expresses his satisfaction for what he has done, or whether he keeps the property or sells it. *Orynaki v. Menger*, 15 T. x. Civ. App. 448.

If the property is sold at a given price, with the consent of the owner, the broker effecting such sale will be entitled to his commissions although he may not have been requested to make a sale at that price under an agreement to pay commissions. *Jones v. Adler*, 34 Md. 440, 443.

So, a broker who fully discharges his duty and performs all that he undertakes to do, is entitled to recover for his services without regard to the fact whether such services are beneficial or of value to his employer. *Glenn v.*

Davidson, 37 Md. 365, 367; *Kimberly v. Henderson*, 29 Md. 512; *Schwartz v. Yearly*, 31 Md. 270, 276.

And if it is proved that the purchaser is a man of means and able to pay "ready cash," as called for in the contract when the principal performs a condition precedent required of him by the contract, the broker has fulfilled the contract on his part. *Lemon v. Lloyd*, 46 Mo. App. 452, 456.

The broker may by special agreement with his principal so contract as to make his compensation dependent upon a contingency which his efforts cannot control, even though it relate to the acts of his principal, and a contract of that character is binding, and no action can be maintained until the contingency has arisen. *Hinds v. Henry*, 36 N. J. L. 324, 332.

So, if the contract is subject to a condition, such condition must be fulfilled before the broker can be said to have earned his commissions. *Block v. Ryan*, 4 App. D. C. 283; *Kimberly v. Henderson*, 29 Md. 512.

And whatever the terms and conditions upon which the broker's right to compensation depends, they must be proved as a condition precedent to his right of action for commissions. *Fraser v. Wyckoff*, 63 N. Y. 445, 448.

So, if there is a special contract by which the broker is not to receive any compensation unless the property is sold at a stated price, he is not entitled to recover commissions unless the property is sold at that price, or unless he introduces a purchaser who is willing to buy but is prevented from so doing by the fault of the principal. *Schwartz v. Yearly*, 31 Md. 270.

So, if a broker undertakes to find a purchaser for a given sum this ordinarily means that the amount is to be paid "in cash," or, if so stated by the principal, on terms to be satisfactorily arranged, and if the terms are not definitely prescribed the broker assumes the hazard of being able to find a person whose terms may prove satisfactory to the principal, and with whom a definite arrangement may be made. *Forrester v. Price*, 6 Misc. 308.

Where real estate is placed in a broker's hands for sale at a specified price, which is reduced by a written option for ten days which is afterwards revived and extended in writing for a period of thirty days, the price for which the broker is employed to sell is in the nature of a condition, on which his right to commission is by the terms of his employment rendered dependent, and if he procured a purchaser for either of such sums during the time he is at liberty to accept the one or the other, his commissions are earned, and his right of action created for their recovery, but until he does that, as long as he is not interfered with during the period fixed during which the sale is to be made for the smaller sum no such right accrues to him. *Satterthwaite v. Vreeland*, 3 Hun, 152.

And the mere fact that a principal fixes upon a sum as an equivalent for a performance of the contract of sale will not bind him to accept the contract as a performance by the broker of his contract which was to sell, to which contract the principal had a right to hold him. *Reiger v. Bigger*, 29 Mo. App. 421, 427.

So, the principal may stipulate for payment of commissions only upon a sale being effected through the agency of the broker. *Dolan v. Scanlan*, 57 Cal. 201, 203.

And if the agreement between the broker and his principal is that he shall receive no compensation unless the principal is paid the amount of the purchase price, he will not be entitled to recover commissions without showing 44 L. R. A.

such payment. *Crevler v. Stephen*, 40 Minn. 288.

If the broker's contract calls for an actual sale through his agency, it is not enough for him to show a provisional arrangement which has failed by no fault of the principal. *Levy v. Kottman*, 11 Misc. 372; *Condict v. Cowdrey*, 139 N. Y. 274.

And when a broker, as a part of his employment, attempts to execute for his principal an executory contract of sale or exchange, he does not become entitled to his commissions unless the other contracting party is able to perform the contract on his part. *Kalley v. Baker*, 132 N. Y. 1; *Barnes v. Roberts*, 5 Bosw. 73; *McGavock v. Woodlief*, 20 How. 221, 15 L. ed. 884.

An agreement between a broker and his principal to wait for the commissions upon an exchange of property, until the title deeds pass under which no brokerage is to be paid unless the principal's title proves unmerchantable, which is executed after the brokerage is earned, is without consideration, and cannot be enforced as against the broker. *Moskowitz v. Hornberger*, 20 Misc. 558, Affirming 19 Misc. 429.

And even if the broker has no authority to bind his principal, and is intrusted with no discretion in fixing the terms of the exchange or sale of property, and his only service is to bring the parties together, yet he is bound to perform that service in the interest of the party who employs him before he can recover his commissions. *Walker v. Osgood*, 98 Mass. 348, 98 Am. Dec. 168, 169.

An agreement whereby the person introduced was to be a purchaser has been construed as meaning that the person must at some time, and as a result of the introduction, be ready, willing, and able to buy the property upon the terms acceptable to the owner. *Platt v. Jahr*, 9 Ind. App. 58.

In *Hill v. Jebb*, 55 Ark. 574, 576, it is said that the employment of a broker to sell a tract of land constitutes a special agency, and when the sale is made the only purpose of the agency is accomplished, whether the sale be due to or independent of the acts of the agent.

Yet if the broker fails to perform the contract he cannot obtain remuneration for anything he has done in trying to perform it, especially where it does not appear that he is prevented from accomplishing what he undertook to do by the act of his principal, as the contract must be taken to be entire, and in such a case there can be no apportionment, and no charge for any part of the consideration until that half for which it was agreed to be paid has been performed. *Hillingsworth v. Slosson*, 19 Ill. App. 612, 614; *Rockwell v. Newton*, 44 Conn. 333.

And if the broker has failed in the performance of his contract a jury cannot give a verdict for some compensation to the broker upon the general ground that he ought to have something for what he has done, when a contract is proved between the parties by which they have agreed as to their respective rights and duties, as the parties must be held to their contract, no matter how difficult, harsh, or apparently unjust the operation of the rule may be. *Hillingsworth v. Slosson*, 19 Ill. App. 612, 614; *Bacon v. Cobb*, 45 Ill. 47.

And if he fails to bring about an agreement the fact that a sale is subsequently made to the identical individual whom the broker has introduced is not of significance, except in a case where bad faith on the part of the principal may be shown. *Baker v. Thomas*, 12 Misc. 432, 433, Reversing 11 Misc. 112.

Again, if the evidence shows that the minds of the parties never met, and that there was merely an offer to pay cash which the purchaser did not do, but sought to impose other terms and conditions, there can be no recovery of commission. *Morrill v. Davis*, 27 Neb. 775.

And a substantial variance from the terms of his contract will defeat his right to compensation, though such variance may have been advantageous to his principal. *Gelatt v. Ridge*, 117 Mo. 553; *Nesbitt v. Helser*, 49 Mo. 383.

The principal may, however, accept a conditional or other contract made by his broker as a complete performance by him of his obligation under his contract, where there is a departure from the terms of such contract; but there must be some evidence of such acceptance, and the mere approval of the contract made by the broker where it is substantially different from the contract he was employed to make cannot of itself be held to be an acceptance by the owner as a performance of the broker's obligation. *Reiger v. Bigger*, 20 Mo. App. 421, 427. In this case the court disapproved of and distinguished *Leete v. Norton*, 48 Conn. 219.

And although the written contract made by the broker with the purchaser may not be binding upon the principals for want of authority from them in writing, yet if they verbally authorize the making of the contract, and the purchaser is willing to abide by it, the broker's commissions are earned. *Ward v. Lawrence*, 79 Ill. 295.

Under a contract made with one member of a corporation agreeing to give the broker a certain sum payable within thirty days from the date of the sale provided he sold the property for a given sum, where the broker merely reports the finding of a party ready and willing to purchase, it is essential that before the property can be sold the broker should procure the assent of the company to the sale as well as to the finding of a purchaser, and the mere fact of his finding a purchaser under such contract is not a sufficient performance. *Curtis v. Watson*, 64 Vt. 549. To the same effect, *Kirwin v. Barney*, 27 Misc. 181.

The broker must show that his demand is due at the time of the commencement of the action. *Mooney v. Elder*, 56 N. Y. 238, 240.

And if the services had been rendered as agreed, and the debt has thereby matured, it is the duty of the principal to pay it without a demand, and the doctrine that where a sum is payable on the happening of a certain contingency, and the same has arisen, the debtor must be notified thereof, and the money demanded of him before an action is begun, is not applicable. *Clifford v. Meyer*, 6 Ind. App. 633.

A broker, who seeks to recover a fixed sum on the ground that he is employed to do a particular thing for a stipulated compensation must allege and prove, if his allegations be denied, what it was that he was employed to do, and that he has done it, as the terms of the agreement between him and his employer required. *Barnes v. Roberts*, 5 Bosw. 73.

So, a broker, claiming commissions under an agreement providing that the principal offers to sell at a certain price, and to pay a certain amount for services rendered in selling or placing said property upon terms acceptable to him, must allege in direct and positive terms that he did render services which resulted in the sale thereof, or that he produced a party ready, willing, and able to purchase said property upon the terms named; otherwise it is insufficient. *Jacobs v. Sheron*, 2 Idaho, 1002.

But under a contract empowering him to sell within a given time, and reserving the right to the owner to sell, with a reservation of the 44 L. R. A.

broker's right to the same fees as if he sold himself, where a sale is made by the principal within a certain number of days after the contract is made, it is not necessary that the agent should allege performance of the contract on his part. *Singleton v. O'Brien*, 125 Ind. 151.

If the contract has been fully performed, and nothing remains to be done but making compensation in money, such compensation may be recovered upon the common counts which are founded upon express or implied promises, and the promise depends upon the performance. *Meniffee v. Higgins*, 57 Ill. 50, 52.

When a real-estate broker who undertakes to sell property only succeeds in disposing of a part and leases the remainder upon a reserved ground rent, he is entitled to commissions only on the cash actually received, and not on the value of the whole property unless the owner contracted to pay more either expressly or by implication. *Blake v. Stump*, 73 Md. 160, 10 L. R. A. 103.

In a case in which the broker had been employed by an assignee to sell upon commission, and had performed the services for which he was employed prior to the issuance of an injunction in the case, he was held entitled to be paid for his services. *Gibson v. Gray* (Tex. Civ. App.) 43 S. W. 922, 927.

The broker must also prove that he was the procuring cause of the sale. This question is treated of in a note to *Hoadley v. Savings Bank of Danbury* (Conn.) *ante*, 321.

II. Custom as affecting performance.

If the broker seeks to make his right to commissions depend upon usage or custom he must show that the usage or custom is so notorious as to affect his principal with knowledge of it, and raise the presumption that he dealt with reference to it, or he must show that he had actual knowledge of it. *Blake v. Stump*, 73 Md. 160, 10 L. R. A. 103.

In such a case the general rules of law regarding usages and customs, to the effect that a usage which is to govern a question of right must be so certain, uniform, reasonable, ancient, and notorious, uncontradicted, and distinct as probably to be known to, and understood by, the parties as entering into their contract, and cannot be proved by isolated instances, prevail, and the custom must be clearly proved. *Potts v. Aechternacht*, 93 Pa. 138, 142; *Pratt v. Bank*, 12 Phila. 378.

If, however, the broker's evidence falls to establish the same the court will refuse to recognize his claim, as the proper office of a custom or usage in business is to ascertain and explain the intent of the parties; and it cannot be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties, or against the established principles of law. *Calland v. Trapet*, 70 Ill. App. 228, 231; *Blissell v. Ryan*, 23 Ill. 567.

The broker must prove such usage, and it is competent for the principal to introduce any evidence which tends to disprove any fact necessary to bring the case within the usage. *Loud v. Hall*, 106 Mass. 404, 407.

But if the principal has knowledge of, and consents to, a custom whereby the broker is entitled to claim commissions upon a sale made by the principal during the time in which the broker has the exclusive agency, he will be taken as consenting to be bound by such custom. *Harrell v. Zimbleman*, 66 Tex. 292, 294.

Yet, even in the absence of a contract making the right to compensation dependent upon the fact that the property should be sold by the agent, the law is to the same effect without

reference to custom, as it is understood that one requesting another to perform services for him should agree to pay a reasonable compensation for such services if performed. *Ibid.*

In this case the court further stated that the office of custom was largely to illustrate the intention of contracting parties in reference to matters on which the contract was not explicit, and, thereby terms not inconsistent with a contract might be held to be a part of it, in view of the presumed intention of the parties that the usual incidents to a relation formed by the contract should exist, but that if the contract between the broker and the principal was clear and explicit custom could not change it.

The fact, however, that a person engaged in buying and selling real estate at times deals through the agency of brokers, is not sufficient of itself to affect the principal with knowledge of the peculiar custom among them as to when their commissions are considered as earned. *Blake v. Stump*, 73 Md. 160, 10 L. R. A. 103.

Yet a local custom under which, when a piece of property is placed in the hands of one agent if he has no customer, he goes among other real-estate agents and solicits buyers, and when a sale is effected the commissions are divided between them, although not binding upon the owner, yet may be sufficient to entitle the broker to recover his commissions where he has employed such means for procuring a purchaser for his principal, as it is wholly immaterial to the principal what number of persons his own agent may employ to assist him in finding a purchaser. *Carter v. Webster*, 79 Ill. 435, 436.

A custom to pay commissions at a given rate upon finding purchasers for real estate cannot be testified to by one who by his own evidence has shown that he has no experience or knowledge of sales or commissions paid on similar sales. *Fotts v. Aechternacht*, 93 Pa. 138, 142.

In a case in which the proofs showed there was no special agreement as claimed by the broker, but that there was a custom among real-estate brokers as to commissions on selling real estate and procuring a purchaser, and the evidence of such custom was not objected to, although a question as to what was the customary commission was objected to, yet as the existence of a custom was shown without objection, it was held competent to ask what was the customary commission, and that if such custom existed it was to be inferred that the principal contracted for the broker's services in view of the custom in the absence of any proof of a different rate being agreed upon. *Morgan v. Mason*, 4 E. D. Smith, 636, 638.

In *Pratt v. The Bank*, 12 Phila. 378, the broker was allowed to recover upon proving the existence of a general custom in the city of Philadelphia by which, when property was placed in the real-estate broker's hands for sale, without any special terms, he was entitled to a commission for being present during the continuance of his agency whether the property was sold directly by him or otherwise. Upon appeal, however, the court ordered a new trial, as it did not appear that the custom was clearly proved.

Where the principal refuses to sell, and the broker seeks to recover commission at a certain per cent according to the usage in such cases in a town or city, the implied contract to pay such commission depends upon the consummation of the sale, and it must be shown that the custom was clear and so notorious that it must be presumed that the parties have a knowledge of it, and that the contract was made in reference to it, as without a sale no recovery can be had. *Powder v. Kane*, 5 Wis. 265, 268.

It has been held that a custom for real-estate 44 L. R. A.

brokers to receive commissions on sales made by them for themselves under which they are entitled to recover for their services where no sales are made, cannot be said, as a matter of law, to be unfair, unreasonable, or in violation of any legal right. *Green v. Wright*, 36 Mo. App. 208.

In *Viaux v. Old South Soc.* 133 Mass. 1, 10, the broker relied upon a usage to the effect that a broker, whose services were accepted by the seller and who introduced the seller to an ultimate purchaser, was entitled to a commission upon the amount for which the estate was sold, if ultimately purchased by the person so introduced whether or not the sale was finally effected by the same broker or by other parties; and the court stated that under the contract implied by the employment of the broker as broker as modified by this usage, he became entitled to his commissions when he found a purchaser, and brought the parties together, if a sale was made to the purchaser, but he was not entitled to recover unless he found and introduced a person who became a purchaser. *Tombs v. Alexander*, 101 Mass. 255, 256, 3 Am. Rep. 349, and *Loud v. Hall*, 106 Mass. 404, followed.

III. The necessity of a written contract.

A real-estate broker may be employed simply to find a purchaser either generally, or upon certain terms of payment, or he may be required by the terms of his employment to go further and procure from the purchaser a contract that is valid and binding between him and the seller, and in the latter class of cases before he can recover his commission he must procure such a binding contract unless the same is waived by the principal, else he will not be deemed to have completed his undertaking. *Platt v. Johr*, 9 Ind. App. 58.

The parties have a right to provide in their contract that the broker shall not only find a purchaser, but shall also procure from such purchaser a valid agreement in writing which will take the case out of the statute of frauds, and when this is the arrangement no commissions can be collected until such written agreement to purchase is furnished. *McFarland v. Lillard*, 2 Ind. App. 160.

It is the general rule under a contract to procure a purchaser that an oral agreement upon the part of the purchaser will not be a valid enforceable agreement, and if he refuses to complete the sale after such oral agreement without failure on the part of the seller, the principal, the obligation of the broker will not be fulfilled and he cannot recover his commissions. *Parker v. Walker*, 86 Tenn. 566, 569.

If the broker does not produce a purchaser to the owner who is ready, able, and willing to buy if the owner will carry out the sale, he must, in order to fulfil his contract, bring to the owner a valid contract from the purchaser so that the owner may hold the purchaser in damages if he fails to complete the purchase. *Huggins v. Hearne*, 74 Mo. App. 86, 87; *Wright v. Brown*, 68 Mo. App. 577.

And if a real-estate broker secures a valid contract of purchase signed by a person who is able specifically to perform it, or is financially able to answer in damages in case he should make default, he has performed his contract and is entitled to his commissions. *Chiple v. Leathe*, 60 Mo. App. 15, 20.

And the broker's contract to effect a valid sale is complete when he delivers or tenders to the owner a valid written contract containing the terms of the sale agreed upon, signed by the parties. *Hayden v. Grillo*, 35 Mo. App. 647, 654.

The burden of proof rests with the broker to

prove that he procured a valid contract under which his principal can compel specific performance, as the broker's recovery must be *secundum allegata et probata*. *Norman v. Reuther*, 25 Misc. 161.

And this is so for the reason that a written contract is an essential element to his right to commissions. *Barnard v. Monnot*, 3 Keyes, 203, 34 Barb. 90, 93.

And if an enforceable agreement is not entered into between the principal and the purchaser, and no fault is attached to the principal, the broker cannot recover his commissions. *Platt v. Kohler*, 65 Hun, 557, 560, *Felts v. Butcher*, 13 Iowa, 414.

If, however, the principal accepts the purchaser found by the broker either upon the terms previously proposed, or upon modified terms then agreed upon, and a valid contract is entered into between them, the commission is earned. *Coleman v. Meade*, 13 Bush, 358, 363. To the same effect, *Gibson's Estate*, 3 Pa. Dist. R. 147, 148.

And if the broker establishes such fact he makes out a prima facie case entitling him to commissions. *Lemon v. Lloyd*, 46 Mo. App. 452, 456.

But the broker must show that the parties brought together by him have entered into a contract enforceable between them in a court of equity. In other words, there must be an agreement by which the parties are legally bound. *Michener v. Belrn*, 9 Pa. Co. Ct. 637; *Haines v. Bequer*, 9 Phila. 51; *Bainard v. Monnot*, 34 Barb. 90, 93, 3 Keyes, 203, 1 Abb. App. Dec. 108.

So, the party secured by the broker must actually contract for the purchase of the property at a price acceptable to the owner. *Keys v. Johnson*, 68 Pa. 42, 43; *Glentworth v. Luther*, 21 Barb. 145; *Conkling v. Krakauer*, 70 Tex. 735; *Gross v. Stevens*, 32 Minn. 472, 474.

Again the terms of the sale must be reduced to writing and subscribed by the contracting parties. *Bab v. Hirschbels*, 33 N. Y. S. R. 423.

The doctrine arises from the fact that a contract to procure a purchaser not only implies that the purchaser shall be one able to comply, but also the idea that the seller and the purchaser must be bound to each other in a valid contract. *Parker v. Walker*, 86 Tenn. 566, 569; *Wilson v. Mason*, 156 Ill. 304.

There must also be a subscription to the contract by the party selling or his agent, and it is not sufficient that there be a subscription by the purchaser alone. *Haydock v. Stow*, 40 N. Y. 363.

And a contract or memorandum in writing binding upon both parties is a sale effected within the meaning of an agreement, to pay commissions on a sale of the land, although a formal deed is not executed and delivered. *Rice v. Mayo*, 107 Mass. 550, 552.

If the purchaser proves acceptable to the owner, and a written contract is duly executed by the parties the broker can do no more, and his duty is ended. *Donchue v. Flanagan*, 28 N. Y. S. R. 757.

Yet, if the agreement is signed by some other person not lawfully authorized in writing to do so, it will not be binding upon the purchaser under the statute of frauds, and therefore the broker cannot recover commissions thereunder as upon a performance of his contract. *Wilson v. Mason*, 156 Ill. 304.

And if the statute of frauds would be a good defense to an action by the principal against the purchaser for the enforcement of a contract, it is not such a contract as will entitle the broker to recover his commissions upon a sale of the property. *Ibid*.

If the contract provides that the land "must 44 L. R. A.

be sold to a person ready, willing, and able to purchase," it is not enough that there has been a contract of sale made, as there must be a sale before the commission can be said to be earned. *Stewart v. Fowler*, 37 Kan. 677.

And if the contract, entered into through the broker's agency, is of such a character that the party contracting by the exercise of an option can relieve himself of the obligation to complete the same, and does not in fact become the purchaser, the broker cannot recover his commissions as upon a performance of his contract. *Kimberly v. Henderson*, 29 Md. 512, 515.

So, if the broker has found a party willing to purchase, and duplicate contracts are entered into which vary in their terms, and are radically different, so that they cannot be reconciled, he cannot recover his commissions, as such services do not produce a purchaser. *Pierce v. Truitt* (Pa.) 12 Atl. 661.

If the broker produces an informal agreement to be signed by the parties the principal may show that the contract is merely provisional, and does not express all the terms of the contract as understood by the broker, and that the deal is never consummated because no final agreement is ever made by the principal with the party found by the broker. *Buxton v. Beal*, 49 Minn. 230.

If the broker finds a party who offers a price which his principal agrees to take, but before the agreement becomes obligatory upon both such party refuses to consummate it on the ground of some real or supposed defect in the title, the broker has not performed his contract so as to entitle him to his commissions, especially where such proposed purchaser has not committed himself to a purchase, and his principal is not offering the property free from objections to title. *Blankenship v. Ryerson*, 50 Ala. 426.

In *Gilchrist v. Clarke*, 86 Tenn. 583, the broker had communicated to the owner the fact that the purchaser had expressed his willingness to purchase at a given sum, and was authorized to close the trade, but as the sale fell through by the fault of the purchaser, and as the broker had neglected to secure a valid written contract of sale signed by the purchaser, his claim for commissions was disallowed, as his principal was without cause of action against the purchaser to compel specific performance and an acceptance of his title, which was good.

If the contract with the broker requires an actual sale to be made through his agency, a mere unfulfilled provisional arrangement, not dependent upon the principal's actions, is not sufficient to entitle him to recover commissions, and he must show a binding contract enforceable as between the parties, and a conveyance of the land pursuant thereto. *Condict v. Cowdrey*, 130 N. Y. 273, 280.

In *Pratt v. Kohler*, 65 Hun, 557, 560, the broker had not performed his contract, and his claim for commissions was refused, as the fact that a binding contract was never entered into was not prevented by any act on the part of the principal, but the purchaser objected to the terms of the written contract as more onerous than those of the primary verbal arrangement. No change of mind on the principal's part was shown, neither did it appear that he refused to carry out the contract upon his authorized terms, but he had received no benefit from the contract or from the broker's efforts, and he was not in a position to compel specific performance of the contract or to recover damages.

A mere authority or memorandum authorizing a party to offer a certain sum for the principal's property, signed by the proposed purchas-

er, does not amount to an agreement to purchase whereby the broker can claim commissions, especially where the purchaser subsequently refuses to deal with the party. *Montgomery v. Knickerbacker*, 27 App. Div. 117.

In the case of an option to the broker which states the price and some of the conditions of sale, and that "the details are to be settled later in conformity with the above understanding" under which the broker gives up the notion of purchase, and assumes the position of broker to procure a purchaser, and introduces purchasers who indorse the option and agree to purchase "at the within mentioned terms and price," but with a reduction in the price, which contract one of the purchasers does not consider binding upon him, as if he made up his mind to carry out the transaction, a proper contract was to be drawn up, such contract is properly submitted to the jury, as it is for them to say whether there is a meeting of the minds of the parties sufficient to constitute a valid contract of sale and purchase upon which the broker can recover his commissions. *Follinsbee v. Sawyer*, 8 Misc. 370.

And if the quantity of land is not known, the fact that the owner neglected to have it surveyed is no excuse for the broker's not making a binding contract of sale with the purchaser, so as to give him a right to recover damages in lieu of commissions,—especially where the contract gave him the power to have the survey made himself at his principal's expense. *Smith v. Tate*, 82 Va. 657. In this case the sale made was a mere conditional verbal one not binding upon the purchaser.

In *Crombie v. Waldo*, 137 N. Y. 129, 133, the court refused to allow the broker's claims for commissions although they drew up what appeared to be the best agreement they could get without any direction or suggestion from the principal, as the agreement was of no avail to the principal, did not bind the other parties, could not be enforced against them, could not be performed by their principal, and was practically a nullity.

Yet, a mere undertaking on the part of the broker to "sell" does not imply that he is to procure a written agreement from the purchaser. *McFarland v. Lillard*, 2 Ind. App. 160.

And if an agent, employed to sell land, finds a purchaser who is ready, able, and willing to purchase upon the terms given by his principal, the contract of sale need not be in writing as a condition precedent to the agent's right to recover for his services,—especially if the principal is unable or refuses to perform on his part. *Vaughan v. McCarthy*, 59 Minn. 199; *Barnard v. Monnot* 33 How. Pr. 440, 1 Abb. App. Dec. 108, 3 Keyes, 203; *McFarland v. Lillard*, 2 Ind. App. 160; *Hildebrand v. Lillis*, 10 Colo. App. 522; *Buckingham v. Harris*, 10 Colo. 459; *Finnerty v. Fritz*, 5 Colo. 178.

The rule last stated is based upon the fact that the agent who is the procuring cause of the sale is always entitled to his commissions. *Scott v. Clark*, 3 S. D. 486; *Zelmer v. Antisell*, 75 Cal. 509.

But where the broker, pursuant to his employment, produces a purchaser who is willing and ready to take the property on the terms acceptable to the principal, and the principal enters into a written contract with him expressing the terms of the sale, and the principal is solvent and able to perform the contract, the broker then becomes entitled to his commissions, although the purchaser may afterwards refuse to perform, without any fault on the part of the principal. *Love v. Owens*, 31 Mo. App. 501, 510; *Gilder v. Davis*, 137 N. Y. 504, 20 L. R. A. 398. To the same effect *Love v. Miller*, 53 44 L. R. A.

Ind. 294, 21 Am. Rep. 192; *Burns v. Oliphant*, 78 Iowa, 456, 459; *Rice v. Mayo*, 107 Mass. 550; *Veazie v. Parker*, 72 Me. 443; *Goss v. Stevens*, 32 Minn. 472; *Coleman v. Meade*, 13 Bush, 358; *Keys v. Johnson*, 68 Pa. 42; *Fraser v. Wyckoff*, 63 N. Y. 445, 448; *Martin v. Silliman*, 53 N. Y. 615; *Lloyd v. Matthews*, 51 N. Y. 124; *Duclos v. Cunningham*, 102 N. Y. 678; *Knapp v. Wallace*, 41 N. Y. 477; *Gonzales v. Broad*, 57 Cal. 224; *McCreery v. Green*, 38 Mich. 184, 185; *Shepherd v. Hedden*, 29 N. J. L. 345; *Kerfoot v. Steele*, 113 Ill. 610; *Collins v. Fowler*, 8 Mo. App. 588.

But the contract signed must be sufficient to bind the purchaser to specifically perform the same on his part. *Simonson v. Kissick*, 4 Daly, 143; *Crombie v. Waldo*, 42 N. Y. S. R. 225.

The above rule is based upon the theory that the failure to carry out such a contract is a matter that concerns only the parties to it, the one in the right having a complete remedy against the other at fault which he may prosecute or not as he pleases. *Donohue v. Flanagan*, 28 N. Y. S. R. 757.

And when a purchaser enters into a contract a bona fide case is made out by the broker, and the presumption will prevail that such party is able to perform it. *Stewart v. Smith*, 50 Neb. 631.

So, a binding contract in writing which only passes the equitable title, of which specific performance can be decreed, is sufficient to entitle the broker to recover commissions where his acts have led up to such contract. *Ward v. Cobb*, 148 Mass. 518.

Where the contract has been reduced to writing with sufficient definiteness to witness the bringing of the minds of the parties together, on the defendant's terms, the fact that the broker subsequently meets the principal and endeavors to procure a new contract, or another contract between the same parties, or one substituted in the place of the purchaser, will not in any way affect the broker's right to commissions. *Levy v. Ruff*, 4 Misc. 180, Affirming 3 Misc. 147.

If the contract for the sale of real estate as made between the principal and the purchaser is in a certain sense optional and provides for a sum of money as liquidated damages to be paid by the party failing to perform, yet, if the principal signs and approves of it, the broker has earned his commissions, although in the end the purchaser may not take a conveyance, and may prefer to pay the liquidated damages. *Gilder v. Davis*, 138 N. Y. 504, 20 L. R. A. 398; *Leete v. Norton*, 43 Conn. 219, 226.

In the latter case the court stated that the principal could not be allowed to deny that such sum of money was an equivalent as between himself and the broker by whose aid he made the contract, and thus avoid payment of commissions, even though the money may not be paid, as the broker has rendered services for him which he agreed were an equivalent to procuring an exchange of the property. *Leete v. Norton*, 43 Conn. 219, 226.

Where the broker brings the minds of the parties to meet on the terms embraced in an informal agreement, the fact that the parties subsequently agree to modify the terms by requiring all cash, and that the purchaser is not able to fulfil the new conditions, will not affect the broker's right to commissions, as all that is required of the broker is that the purchaser should be ready and willing to enter into the contract on the terms of the informal contract,—especially as the evidence does not show that the purchasers were unwilling or unable to carry out the terms of such informal contract. *Levy v. Ruff*, 4 Misc. 180, Affirming 3 Misc. 147.

But in *Bennett v. Egan*, 3 Misc. 421, 424, the broker's claim for commissions was refused, although the contract was signed by both the principal and the purchaser, as the parties subsequently disagreed as to the terms of the purchase-money mortgage and the principal refused to enter into any additional contract. The court in this case found that the contract was not enforceable against the purchaser, and only amounted to an agreement on the purchaser's part to execute a contract to purchase or forfeit a certain amount.

So, in *Levy v. Kottman*, 11 Misc. 372, the court also refused the broker's claim, as the only evidence of a contract was a receipt given on a Sunday "on account" of the purchase "price" on "the sale of premises," which provided for a contract to be drawn up thereafter, as such receipt only amounted to an option.

The above case is distinguished from that of *Simonsen v. Kissick*, 4 Daly, 143, upon the ground that in that case a consideration had been paid on account of and as part of the purchase money, and the contract was one enforceable in a court of equity, and not a mere option.

In the last-mentioned case the agreement, which was signed by both parties, certified that the principal sold to the purchaser the property in question at a given sum and was accepted by the purchaser, who paid the earnest money mentioned therein. It was contended that it was not sufficient to bind the purchaser, as his name was not mentioned in the body thereof, and that it imposed no obligations upon him and did not bind him to do anything, and that it was a mere option; but the court held there was a sufficient contract shown to enable the broker to recover as upon a performance of his contract.

The case of *Bennett v. Egan*, 3 Misc. 421, was similar in the circumstances to *Levy v. Kottman*, 11 Misc. 372, *supra*, but in that case the written contract or receipt was stronger as it was signed by both parties and not by the seller alone, and in relation to it the court stated that "the question, therefore, arises whether the said written instrument of itself was or was not an enforceable contract for the sale and purchase of the real estate therein referred to," and after a full disclosure of all the authorities concluded that it was not.

Under a contract to pay commissions if the sale is made or closed with a certain purchaser, the broker must prove that the trade was closed, as under such a contract the sale must be closed and consummated and the mere finding of a purchaser ready, able, and willing to take the property is not a sufficient performance of the contract, and the fact that the sale is not made owing to default on the part of either of the parties. *Lyle v. University Land & Invest. Co.* (Tex. Civ. App.) 30 S. W. 723, 725. In this case the purchaser demanded a deed in a certain form, which was refused, and it did not appear that the principals were bound to give it.

Under a contract to negotiate a sale,—that is to procure a valid contract of purchase enforceable by the vendor if his title is perfect, or if he does not procure such contract, to bring the parties together in order that the principal may secure such a contract, unless he is willing to trust to an oral agreement,—it is not sufficient for the broker to merely find a purchaser financially able, and who verbally agrees to purchase upon the terms of the principal, and makes a deposit, but who neither signs a binding agreement to purchase, nor is produced to the vendor as a person ready and willing to enter into such a contract. *Gunn v. Bank of California*, 95 Cal. 349.

In *Dillon v. Duralde*, 2 Rob. (La.) 163, 165, 44 L. R. A.

It is said that no brokerage is due in a case of a sale until it is actually effected, and the broker cannot in such a case claim to be reimbursed his expenses incurred in advertising or procuring certificates from the recorder of mortgages, etc., or in taking a journey,—especially where no evidence is offered of the same.

The Maryland cases assert that it is not sufficient for the agent to procure a purchaser who enters into a written contract to purchase, but the purchaser must actually purchase, by complying with the terms agreed upon, unless his failure to do so is caused by the fault of the principal. *Kimberly v. Henderson*, 29 Md. 512; *Richards v. Jackson*, 31 Md. 252, 1 Am. Rep. 49.

In this holding it would seem that the Maryland cases stand alone, as the prevailing rule is, that when the broker has produced a purchaser, willing, able, and ready to purchase upon his principal's terms, and a valid and binding contract is entered into with such purchaser by the principal, the broker has performed his contract, and is entitled to his commissions.

Although the parties may agree that no commission shall be paid or earned unless the broker procures from the purchaser a valid written agreement, yet even in such a case the principal may waive such condition by accepting a purchaser and selling to him. *McFarland v. Lillard*, 2 Ind. App. 160.

And there are cases which uphold an oral agreement when the same is accepted by the parties and acted upon by them and the purchaser is satisfied to carry out the same.

So, if the agreement to purchase is not reduced to writing, and is therefore not binding, but the parties proceed thereon and complete the transaction by the delivery of the conveyance and the payment of the purchase money, the broker is entitled to his commissions, for the reason that the sale made by him is recognized and acted upon by the parties, and his principal has the benefit of his services in bringing about the sale. *Watson v. Brooks*, 8 Sawy. 316, 319.

And it is not of the essence of the contract between the principal and the broker that the agreement of sale should be valid and enforceable; it may be verbal or written, plain or obscure in its terms, loaded with conditions or free from any; it may raise a complete barrier to its fulfillment, if objection to some of its provisions were made but all are unavailing to defeat the broker's right where he acts in good faith if the parties have with full knowledge met upon a common ground and accepted what was offered as expressive of their minds. *Folinsbee v. Sawyer*, 8 Misc. 370.

So, a binding written contract is not required where the principal is in a situation to execute it himself. *Gelatt v. Ridge*, 117 Mo. 553, 560.

It is not absolutely essential that there should be shown a contract binding on the party produced when the purchaser stands ready to perform his part of the contract. *Middleton v. Thompson*, 103 Pa. 112, 119; *Keys v. Johnson*, 68 Pa. 42; *Clendenon v. Pancoast*, 75 Pa. 213; *Sweeney v. Ten Mile Oil & Gas Co.* 130 Pa. 193; *Reed v. Reed*, 82 Pa. 426; *Green v. Lucas*, 33 L. T. N. S. 584; *Levy v. Ruff*, 4 Misc. 180, Affirming 8 Misc. 147.

And if the purchaser is not only able but willing to complete an oral agreement for sale, and the principal, the vendor, refuses to sell or is unable to fulfil the terms upon his part, or to make a good title, or if the trade falls through by reason of any default on the part of the principal, the commissions will be considered earned. *Parker v. Walker*, 86 Tenn. 566, 569.

So, the mere fact that the contract of sale is not in writing and signed by the purchaser is not alone sufficient to deprive the broker of his rights if the purchaser does not take advantage of his rights under the statute of frauds. *McFarland v. Lillard*, 2 Ind. App. 160.

And the necessity of a written contract of sale may be rendered unnecessary if the agent brings the parties together, and the purchaser offers to complete the contract provided the vendor will make the conveyance; and in such a case the agent has done all that he can do. *Hayden v. Grillo*, 35 Mo. App. 647, 654.

If the case shows a parol contract of sale made before the commencement of the broker's action to recover commissions upon the principal's terms, such fact is *prima facie* evidence that a purchaser has been found ready to purchase the property, and the mere fact that the principal is unable or refuses to consummate the sale does not affect the broker's right, in the absence of evidence that the contract would not have been consummated had the principal been ready to make the deed and give possession to the purchaser. *Mooney v. Elder*, 56 N. Y. 238, 240.

And even where there is an intention to reduce an oral agreement to writing, but before the contract is so reduced the owner or principal recedes therefrom, he is nevertheless liable for the broker's commissions. *Levy v. Ruff*, 4 Misc. 180; *Attingham* 3 Misc. 147; *Barnard v. Monnot*, 3 Keyes, 203; *Krahner v. Hellman*, 16 Daly, 132; *Kailey v. Baker*, 132 N. Y. 1; *Gilder v. Davis*, 137 N. Y. 506, 20 L. R. A. 398.

In *Clendenon v. Pancoast*, 75 Pa. 213, there was no binding contract and so in *Sweeney v. Ten Mile Oil & Gas Co.* 130 Pa. 103, it affirmatively appeared that no such contract was made, and also in *Reed v. Reed*, 82 Pa. 426, in which case, while the accepted purchaser was considering the matter on a time option allowed for that purpose the principal sold to another. These cases clearly show that a binding contract of sale is not necessary where the party procured by the broker stands ready to perform his part of the proposal, and the failure to do so occurs through the fault or inability of the principal. They are further supported by the later case of *Middleton v. Thompson*, 163 Pa. 112, 119, which holds the same doctrine.

And if the principal has acted for himself in concluding the sale to the purchaser found by the broker, and is satisfied with the situation, and the contract with the broker is unconditional, the question of the enforceability of the contract between the principal and the purchaser cannot be considered by the jury, as such question was not contemplated by either the principal or the broker at the time. *Baird v. Flecher* (S. D.) 76 N. W. 931.

The doctrine that there need be no written contract of sale shown by the broker as procured by him in the above class of cases is based upon the rule that a broker authorized to effect a sale or to find a purchaser is not authorized to make any contract with the proposed purchaser on behalf of his principal, and even if a sale falls of consummation because there is no binding contract between the principal and the purchaser, it is the principal's fault for which the broker is in no way responsible. *Gonzales v. Broad*, 57 Cal. 224; *Phelan v. Gardner*, 43 Cal. 311; *Barnard v. Monnot*, 3 Keyes, 204; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292.

Under a contract giving the broker power to sell or to find a satisfactory customer within a given time, it is not necessary that the broker should have entered into a valid written agreement binding upon both parties, in order to entitle him to commissions, and a written note

or memorandum by the purchaser to the broker, stating in substance that he would take the lands at the principal's price and on the conditions named, is sufficient, and is all that the broker is legally authorized and required to do, and is sufficient evidence of a production of a purchaser, especially when the purchaser is anxious to complete the matter. *O'Connor v. Semple*, 57 Wis. 243.

And the court will not consider the omission to obtain a written contract material when it does not appear through whose oversight the omission occurred, when the broker has produced a purchaser, and the principal has undertaken to enter into a written contract with him, and has received the earnest money thereon, and the principal has waived his right of objection by accepting and retaining the money paid on the contract. *Kyle v. Rippey*, 20 Or. 447, 453.

The broker has performed a contract to sell the land or to find a purchaser within a limited period when he makes a verbal sale to a responsible party and gives notice within a reasonable time thereafter and produces the purchaser, and in such a case it is not essential that he should produce the purchaser so that all the necessary papers can be executed by the date given. *O'Connor v. Semple*, 57 Wis. 243.

In a case where the purchaser had paid earnest money to the broker and the principal brought suit against the broker to recover the same, it was held that it was not material to the determination of the broker's right to recover or deduct his commissions from such amount, whether the contract of sale as made by the broker was binding upon the purchaser or not, and that the principal could not rely upon the validity of such contract for the purpose of enabling him to retain the earnest money and yet deny its validity for the purpose of defeating the broker's right to commissions. *Christensen v. Woolley*, 41 Mo. App. 53.

IV. Necessity of consummated sale.

In some cases the broker's performance of his contract of sale has been questioned upon the ground that the sale has not been consummated.

Upon this question the general rule is that a broker employed to find a purchaser is entitled to his commissions when he finds one able and willing to consummate the sale. *Reeves v. Vette*, 62 Mo. App. 440, 443.

And if the principal actually consummates the sale made by the broker he is liable for commissions. *Drehsback v. Rollins*, 39 Kan. 268; *Redfield v. Tegg*, 38 N. Y. 212.

If the broker produces a bona fide purchaser,—that is a purchaser who is able, ready, and willing to purchase and to perform the contract upon his principal's terms, or upon modified terms accepted by the principal,—he is entitled to his commissions without reference to the consummation of the sale, unless the failure to consummate it, where the title is good, is chargeable to such purchaser and not to the fault, refusal, or defective title of the principal. *Smith v. Schiele*, 93 Cal. 144, 149; *Middleton v. Fluida*, 25 Cal. 81; *Blood v. Shannon*, 29 Cal. 395; *Phelan v. Gardner*, 43 Cal. 311; *Nelson v. Lee*, 60 Cal. 555; *Phelps v. Prusch*, 83 Cal. 628; *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447, 448; *Blodgett v. Sioux City & St. P. R. Co.* 63 Iowa, 606, 609; *Ford v. Easley*, 88 Iowa, 603; *Brown v. Wilson*, 98 Iowa, 316, 318; *Cassaday v. Seeley*, 60 Iowa, 509; *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447, 448; *Cook v. Fiske*, 12 Gray, 493; *Pollinsbee v. Sawyer*, 8 Misc. 370; *Gilder v. Davis*, 137 N. Y. 504, 20 L. R. A. 398; *Hodgkins v. Mead*, 130

N. Y. 676; *Martin v. Bliss*, 57 Hun, 159; *Fraser v. Wyckoff*, 63 N. Y. 448; *Gilchrist v. Clarke*, 86 Tenn. 583, 585; *Parker v. Walker*, 86 Tenn. 569; *Cheatham v. Yarbrough*, 90 Tenn. 77, 79; *Woodall v. Foster*, 91 Tenn. 195, 197; *McArthur v. Slauson*, 53 Wis. 41; *McGavock v. Woodlief*, 20 How. 69, 16 L. ed. 884; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292.

Where the agreement of a real-estate broker was to make a sale his commissions were held to be earned when a contract was entered into which was mutually obligatory upon the principal and the purchaser, even though the purchaser afterwards refused to execute his part of the contract of purchase. *Wilson v. Mason*, 158 Ill. 304. To the same effect, *Greene v. Hollingshead*, 40 Ill. App. 195; *Short v. Millard*, 68 Ill. 292; *Kerfoot v. Steele*, 113 Ill. 610; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Coleman v. Meade*, 13 Bush, 358; *Veazle v. Parker*, 72 Me. 443; *Ward v. Cobb*, 148 Mass. 518; *Rice v. Mayo*, 107 Mass. 550; *Francis v. Baker*, 45 Minn. 83; *Love v. Owens*, 31 Mo. App. 501; *Christensen v. Wooley*, 41 Mo. App. 53; *Parker v. Walker*, 86 Tenn. 566; *Willes v. Smith*, 77 Wis. 81.

And the fact that the sale is never consummated does not affect the force or application of the above rule. *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146, 150.

But the failure to consummate the sale must not be due to any fault of the broker. *Gibson v. Gray* (Tex. Civ. App.) 43 S. W. 922, 925; *Conkling v. Krakauer*, 70 Tex. 735; *Gauthier v. West*, 45 Minn. 192; *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447; *Yoder v. White*, 75 Mo. App. 156. See also cases *supra*.

And when the broker has brought the minds of the buyer and seller to an agreement on all the terms of sale, and a purchaser is able, ready, and willing to buy, there is a constructive consummation of the sale so far as the broker is concerned. *Sayre v. Wilson*, 86 Ala. 151.

When property is placed with the broker for sale, in the absence of a special agreement to the contrary, the broker is not bound to consummate a sale or procure a customer ready and willing to purchase upon the terms agreed upon, but when he does succeed in doing either, his commission is earned and he may maintain an action for the same. *Walsh v. Hastings*, 20 Colo. 243, 247; *Hallack v. Hinckley*, 19 Colo. 38.

So, a broker is not required to complete a valid contract of sale binding upon both his principal and the purchaser, before he is entitled to a commission. *Hildebrand v. Lillis*, 10 Colo. App. 522; *Buckingham v. Harris*, 10 Colo. 459; *Finnerty v. Fritz*, 5 Colo. 178.

This is so for the reason that the completion of the sale when the broker is only employed to find a purchaser devolves upon the owner. *Swigart v. Hawley*, 40 Ill. App. 610, 611.

So, the fact that the contract between the principal and the purchaser is not performed will not affect the broker's right to compensation where he has procured a purchaser, brought the parties together, who have agreed between themselves upon the terms, and have signed a valid contract. *Bach v. Emerich*, 35 Jones & S. 548, 551; *Jewett v. Emson*, 2 Robt. 165; *Stillman v. Mitchell*, 2 Robt. 523; *Barnard v. Monnot*, 3 Keyes. 203; *Smith v. Smith*, 1 Sweeney. 562; *Glider v. Davis*, 137 N. Y. 504, 20 L. R. A. 398; *Burns v. Oliphant*, 78 Iowa, 456, 459.

And the mere fact that the purchaser caused the property to be conveyed to another, his father, will not defeat the broker's right to recover commissions. *Anderson v. Wedeking*, 102 Iowa, 446. To the same effect, *Clifford v. 44 L. R. A.*

Meyer, 6 Ind. App. 633; *Barnett v. Gluting*, 3 Ind. App. 415.

So, it cannot be presumed that a purchaser has declined to consummate a trade, even though it may be conceded that he cannot be compelled to do so. *Crevier v. Stephen*, 40 Minn. 288.

If the purchaser produced is a man of means and abundantly able peculiarly to carry out the contract, and evidences his readiness and willingness to do so by executing the same, and paying the earnest money, the fact that the contract is never carried out for reasons existing between the parties to it, of which the broker is not responsible, cannot, so far as the merits of the law of the case are concerned, bar his right to commissions. *Lang v. Hand*, 57 Ill. App. 134. To the same effect, *Burns v. Oliphant*, 78 Iowa, 456, 459.

In *Smith v. Schiele*, 93 Cal. 144, 149, a contract which authorized the broker "solely to sell," and agreed to pay certain commissions on the full amount of the sale, was construed as simply intending to confer upon the broker the exclusive right to sell the property, and not as making the payment of the commissions contingent upon the consummation of the sale.

Under a contract that the broker is to receive commissions "upon the consummation of said sale at a sum to be approved and accepted by" his principal, the broker can recover commissions when the principal and purchaser enter into a written agreement for sale at a certain price, part to be paid down in cash, and the balance at a future date, the principal to retain possession of the property until the same is paid for. *Micks v. Stevenson* (Ind. App.) 1 Repr. 178, 51 N. E. 492.

An instruction to the jury in an action by a real-estate broker to recover commissions for finding a purchaser, which places the right to commissions solely upon the fact whether the broker actually sold the farm himself or not, is erroneous and contrary to the well-established question of law upon the subject. *Wetzell v. Wagoner*, 41 Mo. App. 509, 516.

And if the sale is actually consummated to a purchaser found by the broker, he is entitled to his commissions even though it afterwards transpires that such purchaser is unable to meet deferred payments as they become due. *Wray v. Carpenter*, 16 Colo. 271, 273.

In the above case property was placed in the broker's hands for sale at a certain figure upon certain commission if successful. The broker found the alleged purchaser, introduced him to the principal, and negotiations between the parties were carried on. The testimony of the broker and his witnesses showed a completed sale, while that of the principal and the purchaser strongly contradicted it, but the preponderance of evidence was not shown to be in the principal's favor so as to warrant the court in interfering with the broker's verdict; the court therefore refused to disturb such verdict.

Where no commissions were to be paid until the principals received their share of the purchase money, the court held that whatever the meaning of the expression "consummate a sale," standing by itself, was, yet, in order to ascertain the sense in which it was used in the contract, reference must be had to what followed, namely, that the commission was not to be paid until the defendants received their share of the purchase money, and that in such a case it meant that the commission was earned and payable as soon as (and not before) the parties became purchasers of the land by entering into a binding contract to that effect, and that the contract had been so far carried into execution that the defendants had received their full

share of the purchase money. *Olsen v. Jodon*, 38 Minn. 460, 468. In this case the court below, upon the principal's motion, granted a dismissal, and a new trial was refused, but upon appeal the order was reversed.

Where the commissions are payable within a given time from the date of sale, it is the duty of the broker to procure the conveyance to the purchaser in order to avail himself of the commissions, as such undertaking is to pay on a perfected sale. *Curtis v. Watson*, 64 Vt. 549.

And a consummated sale by the delivery of the deed and the payment of the purchase money is not necessary when the purchaser is solvent and enters into a valid and binding contract. *Watson v. Brooks*, 8 Sawy. 316, 319.

And the broker's right to the agreed commissions does not depend upon the final acceptance by the purchaser of a conveyance of the property sold. *Gunn v. Bank of California*, 99 Cal. 349.

So, it makes no difference to whom the conveyance is actually made provided the broker is the procuring cause of the sale, as such conveyance is but an incident to the transaction. *Clifford v. Meyer*, 6 Ind. App. 633; *Barnett v. Gluting*, 3 Ind. App. 415.

Under an agreement in writing to find a purchaser, which stipulated that, if the principal himself sells the property within the life of the agreement, the broker is to be allowed a certain percentage, the word "sale" does not necessarily and in all connections mean that a conveyance must be made, or that the title must pass. *Shainwald v. Cady*, 92 Cal. 83.

In *Wilson v. Mason*, 158 Ill. 304, the court refused to follow the classes of cases which hold that the broker is not entitled to his commissions unless the sale is actually accomplished by the delivery of the deed of the land from the principal to the purchaser, and the payment of the purchase money by the latter, or unless it is proved that the sale is prevented by the fault of the principal, and also the cases which hold that the broker is entitled to his commission when the minds of the principal and the purchaser meet in a verbal agreement for the sale by the one and the purchase by the other and regarded them as extreme and exceptional. The cases holding this doctrine will be found *infra*.

In the case of *Mooney v. Elder*, 56 N. Y. 238, 240, the principal contended that the commissions were not due as no conveyance was made at the time of the action, and relied upon the case of *Bull v. Price*, 7 Bing. 237, 5 Moore & P. 2, in support of its contention, but the court distinguished the case then before it from that case inasmuch as the true construction of the contract in the latter case showed that the commission was to be paid out of the purchase money received by the principal, and was not therefore due until the actual receipt of the money, or until such time as the principal made default in not receiving it, while in the case then before the court the commissions were not payable out of the purchase money, and were due as soon as the broker had fully and successfully performed his stipulated service.

Some cases, however, hold that the broker's commissions depend upon the entire completion of the sale by the purchaser.

Thus, it has been held that a broker employed to sell real estate must produce a person who ultimately becomes a purchaser before he is entitled to his commissions. *Richards v. Jackson*, 31 Md. 250, 1 Am. Rep. 49; *Kimberly v. Henderson*, 29 Md. 512.

So, the courts have held that the right of a broker to his commission on a sale depends entirely upon the completion of the sale. *De San-*
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tos v. Taney, 13 La. Ann. 151, 152; *Blanch v. New Orleans Improv. Bkg. Co.* 2 Rob. (La.) 63; *Didion v. Duralde*, 2 Rob. (La.) 163.

The holding of the courts in these cases is opposed to the general trend of the decisions, and is distinctly dissented from by the Indiana courts.

In *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192, the court dissented from the doctrine laid down in *De Santos v. Taney*, 13 La. Ann. 151, 152, and pointed out that even in that case there was an express opinion given by Justice Spofford to the contrary in which he said that it was not necessary that the consideration should have passed, and that he considered brokerage earned as soon as the broker had effected a complete bargain between the parties. See also *Wilson v. Mason*, 158 Ill. 304, 310, wherein this doctrine is also dissented from.

But where there is a special contract for the payment of the balance of the broker's commissions when the contract with the purchaser is fulfilled and the balance of the purchase money paid, and the bonds and mortgages are received and the deed delivered, and the broker is to waive all further claims in case the transaction falls through, the broker must prove that the contract was carried out, or that it was prevented by his principal, before he can recover the balance of his commissions. *Seymour v. St. Luke's Hospital*, 28 App. Div. 119, 122.

This principle is upheld by the cases of *Hinds v. Henry*, 36 N. J. L. 328; *Young v. Hunter*, 6 N. Y. 203; *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352; and *Dorrington v. Powell*, 52 Neb. 440,—which show that the terms of a special contract must be fulfilled, and must control the standing of the parties, and that if there is a special contract for payment of commissions or compensation on the making of a sale or disposition of property, the broker cannot recover commissions for merely finding a purchaser if the sale is never consummated. To the same effect, *Cremer v. Miller*, 56 Minn. 52.

Where the contract requires an actual sale to be effected through the agency, it is not sufficient to show a provisional arrangement which has failed because of the nonfulfilment of a condition, not dependent upon the act of the vendor, to a binding and enforceable agreement, for the sale and conveyance of the land must be proved. *Levy v. Kottman*, 11 Misc. 372; *Condict v. Cowdrey*, 130 N. Y. 274.

And under a contract, not only to find a purchaser, but to make an actual sale of the property upon the terms proposed by his principal, where the broker takes the proposition and acceptance of a purchaser to his principal, an acceptance of the same by the principal does not make the latter liable to the broker for commissions, when the sale is not consummated,—especially where the consummation is not in the principal's power. *Hyams v. Miller*, 71 Ga. 608, 618.

So, a real-estate broker is not entitled to recover commissions for a conditional sale which fails of actual consummation by no fault or authority of the owner of the property. *Neilson v. Lee*, 60 Cal. 555, 567; *Hinds v. Henry*, 36 N. J. L. 333; *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352.

In *Felts v. Butcher*, 93 Iowa, 414, no enforceable contract of sale was shown to have been made between the principal and the purchaser, and as the claim in the petition was for a sale of the land, the compensation of the broker in that case depended upon a consummated sale, and not upon mere negotiations for a sale, and as such a sale was not proved the broker's claim was not allowed.

In the above case, however, the court ad-

mitted that the broker would have been entitled to recover if a sale had been made within the prescribed terms which the principal wrongfully refused to execute by making a conveyance.

A contract to the effect that if a sale is made within the time limited in the option, and on terms mentioned, the principal will pay the broker "on the completion of the transfer of said property" a certain commission in cash, "but if for any reason a sale is not consummated there shall be no commission paid or any obligation whatever in the premises," and if there is any unexpected delay, "and a sale should be ultimately consummated" to a customer whom the broker has found and who has come to the principal through his negotiations, the broker is to have a certain commission "when the sale is actually consummated," must be construed as meaning that the broker is only entitled to his commissions when the contract of sale is carried out by transfer of the property and the payment of the purchase money, and under it the broker is not entitled to commissions unless such contract is completed or consummated by the transfer of the property, and the payment or securing of the purchase money in accordance with the terms upon which he is authorized to sell, or which the principal accepts as such. *Flower v. Davidson*, 44 Minn. 46.

If under a contract for a sale, and not a mere contract to sell, the principal and the purchaser introduced make a contract for the purchaser to pay a certain sum in cash, and a further sum at a future time, and to execute a mortgage for the balance of the purchase price, at which time the principal is to make a deed and give up possession, and upon the purchaser's failure to pay the further sum of money and execute the mortgage the money already paid is to be forfeited to the principal, such an instrument is a contract to sell, and not a sale itself, and the broker's commissions are not earned upon the making of such an instrument until the sale is finally completed. *Stewart v. Fowler*, 37 Kan. 677.

And if the broker states that he will not charge any commissions unless the trade goes through and is consummated, he is not entitled to commissions where the sale is not consummated owing to the default of the purchaser. *Little v. Rees*, 34 Minn. 277.

And the broker's commissions were refused under an authority to effect a purchase at a certain price at fixed commissions, where he made a contract to purchase with the agent of a corporation which then occupied the property but had no title to it, a copy of which contract was signed by both agents and sent to his principal, but the trade was never consummated, and the agent of the owner of the property had no authority to make the contract, and the authority given by the party occupying it who represented the owner had expired. *Stinde v. Scharff*, 36 Mo. App. 15, 19.

V. Time of performance.

Under a contract of employment to sell real estate the broker is entitled, in the absence of a revocation, to a reasonable time in which to find a purchaser. *Henderson v. Vincent*, 84 Ala. 99, 100; *Biddison v. Johnson*, 50 Ill. App. 173; *Lane v. Albright*, 49 Ind. 275, 279; *Stedman v. Richardson*, 100 K^y 79; *Carroll v. Pettit*, 67 Hun. 418; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 384, 22 Am. Rep. 441; *Feldman v. O'Brien*, 23 Misc. 341, 344; *Buehler v. Weiffenbach*, 21 Misc. 30; *Satterthwaite v. Vreeland*, 3 Hun. 152; *Shepler v. Scott*, 85 Pa. 329; *Darrow v. Harlow*, 21 Wis. 303, 94 Am. Dec. 541. 44 L. R. A.

The law fixes the time of performance as of the date when the broker produces to his principal a party with whom the owner is satisfied, and who contracts for the purchase at a price acceptable to the owner. *McConaughy v. Mahannah*, 28 Ill. App. 169, 173; *Glentworth v. Luther*, 21 Barb. 145.

And a broker may be said to have earned his commissions in finding a purchaser as soon as the purchaser signs the contract with the principal. *McConaughy v. Mahannah*, 28 Ill. App. 169, 173; *Glentworth v. Luther*, 21 Barb. 145; *Kock v. Emmerling*, 22 How. 69, 18 L. ed. 292.

If the employment is to find a purchaser at a stated price and upon given terms, and the broker has expended his time and performed labor in getting parties interested, he will be allowed a reasonable length of time in which to complete his labors, unless a definite time has been agreed upon within which he is to procure a purchaser. *Wilson v. Dyer*, 12 Ind. App. 320.

But in case of the failure of the broker to find a purchaser within a reasonable time, and after a reasonable opportunity to do so, the principal is at liberty to sell the property at less than the fixed price without incurring liability for commissions. *Henderson v. Vincent*, 84 Ala. 99, 100. As to the effect of a sale by the principal, see note to *Hoadley v. Savings Bank of Danbury* (Conn.) *ante*, 321.

If, however, the time of performance is specified the contract must be performed within such time.

Under a contract to negotiate a sale within a certain number of days, the brokers complete their part, and their commissions are earned when they produce a purchaser within the time specified, ready, willing, and able to purchase upon the terms stated in the contract of employment. *Oullahan v. Baldwin* 100 Cal. 648, 655; *Antisdel v. Canfield* (Mich.) 5 Det. L. N. 777, 77 N. W. 944; *Pace v. Griffin*, 71 Mo. App. 524, 529; *Langhorst v. Coon*, 53 Neb. 765; *Von Hermann v. Wagner*, 81 Hun. 431, 433; *Schultz v. Griffin*, 5 Misc. 499, 500; *Moses v. Bierling*, 31 N. Y. 462.

If the time of performance has been extended, the broker must perform his contract within such extension of time as may have been granted by his principal. *Zelmer v. Antisell*, 75 Cal. 509, 512; *Fultz v. Wimer*, 34 Kan. 576, 580.

And where a stipulated time is mentioned it becomes the essence of the contract, which must be performed by the broker within the period mentioned. *Watson v. Brooks*, 11 Or. 271, 273.

So, the nature of property, such as an oil producing property makes it liable to fluctuate in value, and raises the presumption that time is of the essence of the transactions concerning it, and time will therefore be presumed to be the essence of all brokers' contracts in relation to such property. *Kelly v. Marshall*, 172 Pa. 396, 399; *Vincent v. Woodland Oil Co.* 165 Pa. 402.

Yet, if the delay in closing the sale within the time specified in the contract between the broker and his principal is caused by any negligence, fault, or fraud on behalf of the principal, the broker will be entitled to his commissions. *Fultz v. Wimer*, 34 Kan. 576.

So, the mere fact that there is some delay between the time of negotiations of the purchase and the time it is concluded by the principal himself will not of itself affect the broker's right to commission, where such negotiations are commenced by the broker, and have not fallen through, the principal not abandoning his intention. *Lynch v. McKenna*, 58 How. Pr. 42, 45.

And upon a contract for commissions on a sale "effected in anywise through the broker's influence or instrumentality within a period of

sixty days," the broker will be entitled to commissions for inducing a purchaser to begin negotiations within such period upon a sale not effected until after such period. *Goffe v. Gibson*, 18 Mo. App. 1.

If the broker has an option which expires at a given date and he finds a party ready and willing to buy upon the terms named, of which the principal has notice, and a meeting of the parties is fixed for the day before the option expires, the broker's right cannot be defeated by the principal's default in not closing the bargain within the time specified in the option. *Vanderveer v. Suydam*, 83 Hun, 116, 118.

Where the broker closed the deal and sent notice thereof by mail to his principal within the prescribed time his right to commissions was not affected by a casualty or failure of the public mails whereby the information miscarried. *Gibbons v. Sherwin*, 28 Neb. 146, 153.

And the principal will be liable for commissions after the termination of the contract, where the purchaser purchases on the introduction of the broker, and the sale is the result of the services and influence of the broker in defense of the termination of the agency, under a contract that stipulates that if a customer is introduced through the agency of the broker, and if a sale is afterwards consummated with such customer, the principal will pay the commissions whether the time of the agreement has expired meanwhile or not. *Leslie v. Boyd*, 124 Ind. 320; *Williams v. Leslie*, 111 Ind. 70, followed.

So, under an agreement stipulating that if the property is withdrawn from the market within twelve months of the date, the principal will pay a certain commission, the principal will be liable for commissions upon a sale made by the broker after that date and before the termination of the agency, as the duration of the contract is not fixed by its terms, and the agency of the broker still continues. *Leslie v. Boyd*, 124 Ind. 320.

Under a contract which authorizes the broker to place the property in the market "only for a short time," without further limitation for any definite period, where the broker finds a purchaser within two weeks, to whom the principal refuses to convey, on the ground of an increase of value without other notice to the broker, the time, two weeks, may be regarded as fairly coming within the definition of a "short time." *Smith v. Fairchild*, 7 Colo. 510.

And under a contract giving the broker power to produce a purchaser or sell the lands, the whole to be closed out on or by a given date, the broker has a reasonable time after such date to bring the purchaser and his principal together, and such language does not admit of the construction that the broker is not only bound to make a sale but likewise to produce a purchaser within the time, and its object is to give him power to make or negotiate a sale or produce a satisfactory customer by the time given, and in such a case it is not necessary that all the papers should be ready to complete within the time. *O'Connor v. Semple*, 57 Wis. 243.

And the clear intention and construction of a contract that the broker is to have an additional compensation if he sells out the lots within one year, that he is to have a year in which to sell out, and even though, under such a contract, the broker does not employ his whole time, yet he cannot be deprived of his right by the revocation of such contract by the principal, provided he proves that he is using diligence in the business. *Glover v. Henderson*, 120 Mo. 367.

So, the broker can recover under a contract which is not completed for two years after the

time mentioned, where there is no abandonment of the transaction, and the broker retains his relation in the matter, and the delay in the fulfillment of the contract is occasioned by legal proceedings to perfect the title, owing to defects discovered at the time originally fixed to complete the contract. *Michaels v. Gahren*, 9 App. Div. 405.

In the above case it was shown that the whole subject was one continuous and connected transaction from the time of the signing of the memorandum between the principal and the purchaser, and the conveyance to the purchaser upon the terms mentioned in the memorandum, which virtually carried out the contract negotiated by the broker in the original memorandum of sale procured by him.

In *Metcalf v. Kent*, 104 Iowa, 487, a written contract by which the broker had the exclusive right to sell the property upon certain terms and conditions, or on different terms if the parties should take it, on a certain commission in case the property was sold during the pendency of the contract or to a person whom the broker found, showed the property to, or directed to the property, or secured as a customer after the expiration of the contract, or if he secured a purchaser who would purchase on the terms mentioned, which contract was to be good until a given date within which the sale was made, was construed as giving the broker the exclusive right to sell between the dates mentioned, and as entitling him to commission named on any sale which was made between those dates.

Under an agreement naming a certain amount for services in selling or endeavoring to sell in either of two alternatives, first, in case of a sale, whether by the broker or by the principal without his intervention to any person within a year, or second, of a sale at any time afterwards, and before the principal has given the broker thirty days' notice in writing of a revocation of his authority, the provisions for notice cannot be said to apply during the first year, as it will render the distinction of time in the agreement wholly without meaning, and a binding agreement for sale made between the principal and a third person will be a sale within the contemplation of the agreement. *Chapin v. Bridges*, 116 Mass. 105.

If, however, the broker fails to show that the sale was effected within the time during which he was authorized to make the sale, he fails to make out a case for the recovery of commissions as a broker. *Von Hermann v. Wagner*, 81 Hun, 431, 433.

If the principal has notified the broker that the sale must be effected by a given date otherwise the authority will be revoked, commissions cannot be claimed on a sale by the principal after that date, even to the purchaser originally found by the broker, as the limitation in respect to time is reasonable and bona fide. *Neal v. Lehman*, 11 Tex. Civ. App. 461, 462.

The above rule applies even though he may have made efforts to sell the property, and was the first to call the attention of the parties, who subsequently became purchasers, to the property, unless the delay is caused by the negligence, fault, or fraud of the owner. *Zelmer v. Antisell*, 75 Cal. 509, 512; *Fultz v. Welmer*, 34 Kan. 570; *Wilson v. Sturgis*, 71 Cal. 220.

And if the evidence shows that the sale is brought about after the expiration of the time limited by the contract through the interposition of a third person, and with new incidents, the broker cannot claim commissions, and the mere fact that he opened negotiations during the time is not sufficient under such circumstances to entitle him thereto. *Beauchamp v. Higgins*, 20 Mo. App. 514, 517.

Commissions are not earned under an offer by the owner to sell for a specified price to a certain person, or anyone whom such person might designate, commissions to become payable in case of a sale effected before a date fixed, unless it is proved that a purchaser who is not only willing but also able to comply with the terms of the offer has been found prior to the expiration of the term of the contract. *Deschamp v. Gould*, 6 Quebec Off. Rep. (Q. B.) 367.

And a reasonable time for the examination of the title of property offered for sale cannot be implied in a case where the limit for acceptance is definitely fixed and settled by the terms of the offer itself, and therefore where the time is fixed within which the broker is to procure the purchaser, he must produce such a person not only able, but willing, to consummate the purchase within the stipulated time, in order to meet his obligation and entitle him to commissions. *Watson v. Brooks* 11 Or. 271, 273.

Under an agreement to pay commissions on the purchase of property, payable on the delivery of the deed within thirty days from date, the words "within thirty days from date" were construed as specifying the time at which the purchaser is bound to receive the deed under the contract with the seller. *Beebe v. Roberts*, 3 E. D. Smith, 194.

And in the case of an option to buy or sell real estate on or before certain dates such options will expire at the time mentioned without notice or declaration of forfeiture, and a mere prolongation of negotiations until the evening of the last day will not warrant the holder of the option in believing that no forfeiture exists or will be insisted upon. *Cummings v. Town of Lake Realty Co.* 86 Wis. 382.

So, if the purchaser produced by the broker does not purchase for cash within the time limited in the agreement between the broker and the principal, but subsequently purchases and pays in instalments at considerable intervals, and the owner does not cause the delay in the sale and is not guilty of negligence, fraud, or fault, the principal incurs no liability for commissions. *Fultz v. Wimer*, 34 Kan. 576.

Under a contract giving the broker the exclusive privilege of sale for the space of six months, and until the cancelling of the agreement, and which reserved the right to withdraw the sale of the property and to cancel the contract by payment of commissions, the words "and until the cancelling of this agreement" must be construed with reference to the other provision in the contract upon the subject of cancellation, and it manifestly relates to the withdrawal of the property according to the terms agreed upon before the expiration of the time mentioned in the contract, and under such contract the broker's right will cease, at the expiration of the six months, and therefore he cannot recover commission upon a sale of the property made by the principal at a much later date without his assistance. *Learned v. McCoy*, 4 Ind. App. 238.

And in the case of an exchange of an advowson where the principal agrees to pay the broker a certain sum "one third down, the remaining two thirds when the abstract or conveyance is drawn out," and in which the one third is paid, and the abstract is delivered by the principal, but none is delivered by the other party, and the negotiations drop, the broker cannot maintain an action for the remaining two thirds of his commissions, as the event upon which the right thereto is to arise has not occurred. *Alder v. Boyle*, 4 C. B. 635, 16 L. J. C. P. N. S. 232, 11 Jur. 591.

If no time is originally fixed within which the broker is to sell, and the principal subse-

quently lowers his price and then limits the time within which a sale is to be made, the principal may sell after such period has expired without being liable for commissions. *Satterthwaite v. Vreeland*, 3 Hun. 152.

Where the broker is authorized to sell within a given time, for a certain commission, and before the expiration of such time the principal demands the delivery of the papers from the broker who states that before he will let the time expire he will purchase himself, which offer is not accepted by the principal and is not within the exercise of the power of sale, the broker is not entitled to his commissions, and all that he can recover under the circumstances is some compensation for his services. *Tower v. O'Neill*, 66 Pa. 332.

And where after the property is offered at the price named by the principal, but before the property is examined or any offer made for it, the principal raises the price, and afterwards the proposed purchaser examines the property and offers the price given to the broker in the first instance, which offer is declined and the sale is never consummated, an offer without more is an offer in the present to be accepted or refused when made, and there is no time which the jury can consider reasonable or otherwise for the other party to consider it, except by the agreement or concession of the party making it, and until it is accepted it may be withdrawn though that may be at the next instant after it is made, and a subsequent acceptance will be of no avail. *Vincent v. Woodland Oil Co.* 165 Pa. 402. In this case the court stated that in that instance the principal's offer was not an open or continuing one, and time was not only of the essence of the contract but was intended to be urgent, as the nature of the property was such as to render it liable to fluctuation in value.

Evidence as to the time when by the usage of trade commissions are considered to be earned by parties acting as brokers between parties buying and selling is properly rejected in an action on a contract by the seller to pay commissions where there is also a contract made by the broker with the purchaser,—especially where such party took no part in the actual transaction between the parties. *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416.

So, where the agreement of the agency expired at a given date, a letter written by the principal after he had declined to extend the agency is not admissible in an action by the broker to recover commissions or damages on behalf of the broker, even though in reply to a letter of the broker written during the agency, in which the broker stated that he could have completed the sale but for the principal's delay in having a survey made, and that he could sell it if the agency were extended for a certain time. *Smith v. Tate*, 82 Va. 657.

And under a contract to give the broker a certain sum if he sells for a sum in cash or approved paper, to be paid the broker within thirty days from the date of the sale, the broker is not entitled to commissions upon finding a purchaser and requesting the principal to convey, as such an act is not a performance of the contract which provides that the payment must be made within thirty days from the date of the sale, which meant thirty days after the sale is perfected, and not that payment is to be made within thirty days after the broker finds a party willing to purchase. *Curtis v. Watson*, 64 Vt. 549.

But the placing of property by the owner in the hands of brokers for sale for any definite time does not create a lien on the property in favor of the broker for commissions, in case

the owner himself sells at some subsequent time. *Babcock v. Merritt*, 1 Colo. App. 84.

Upon the question of a sale by the principal within the time mentioned in the contract, see *note to Hoadley v. Savings Bank of Danbury (Conn.) ante*, 321.

VI. In case of a special contract.

The general obligation which a broker assumes or undertakes may be varied by contingencies, and broadened or narrowed by special contract. *Parker v. Walker*, 86 Tenn. 566, 569.

If a special contract relating to commissions is entered into between the principal and the broker, the broker can only recover upon complying with the terms of such contract. *Barber v. Hildebrand*, 42 Neb. 400; *Fultz v. Wimer*, 34 Kan. 576, 580; *Pearson v. Mason*, 120 Mass. 53, 58.

So, the rights and liabilities of the parties must be determined by the terms of such an agreement exclusively. *Hinds v. Henry*, 36 N. J. L. 328, 332; *Bower v. Jones*, 8 Bing. 65, 1 Maule & S. 140; *Warde v. Stuart*, 1 C. B. N. S. 88; *Jacobs v. Kolff*, 2 Hilt. 133.

And if an express contract exists no contract will be implied, and the action must be upon the express contract, and the recovery must be under its terms, and not upon a *quantum meruit*. *Illingsworth v. Slosson*, 19 Ill. App. 612, 614; *Walker v. Brown*, 28 Ill. 378, 81 Am. Dec. 287; *Ford v. McVay*, 55 Ill. 119; *Sickels v. Pattison*, 14 Wend. 257, 28 Am. Dec. 527; *Orynski v. Menger*, 15 Tex. Civ. App. 448.

So, the general holding that where brokers are given property for sale, or to find a purchaser, and through their efforts a customer is found, or the seller and buyer are brought together, that the broker is entitled to his commissions according to the customary charge, has no application to a case where there is a special contract, nor is any proof of custom admissible when the parties have covered the points by an express contract. *Illingsworth v. Slosson*, 19 Ill. App. 612, 614; *Collender v. Dinmore*, 55 N. Y. 200, 14 Am. Rep. 224; *Sanford v. Rawlings*, 43 Ill. 92.

And the broker must establish that he performed the special contract in every particular. *Bennett v. Egan*, 3 Misc. 421, 422.

And this rule holds except where the conditions have not been waived by his principal by an authority to make a new contract. *Armes v. Cameron*, 8 Mackey, 435, 436.

Under a special contract that the remainder of the commissions is to be paid when the contract with the purchaser is fulfilled, and the remainder of the purchase money, and bonds and mortgages are received and the deed delivered, the broker to waive all claim to further commissions in the event of the transaction not being fulfilled, before the broker can recover the remainder of his commissions he must show that the contract is performed or that performance is prevented by the act of his principal. *Seymour v. St. Luke's Hospital*, 28 App. Div. 119, 123. To the same effect, *Hinds v. Henry*, 36 N. J. L. 328; *Young v. Hunter*, 6 N. Y. 203; *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352.

And where the broker seeks to recover upon such a contract he cannot depart therefrom in evidence upon the trial, and base his right to recover upon evidence of the principal showing a different contract offered by him to contradict the evidence of the broker, and to disprove the alleged contract sued on. *Cremer v. Miller*, 56 Minn. 52.

In the case of a special contract to negotiate a purchase at a fixed commission, the broker's

services are not ended until he makes all necessary arrangements whereby the principal acquired the title to the property, and it is not enough to procure a contract for the sale from parties who are unable to make a valid conveyance. *Kerfoot v. Steele*, 113 Ill. 610, 613, 617.

Commissions cannot be recovered for merely finding a purchaser upon a sale never consummated, where there is a special contract for payment of commissions on the making of a sale or disposition of the property. *Dorrington v. Powell*, 52 Neb. 440.

Under an executory contract, whereby a certain amount is to be secured by a mortgage, with a building loan, and a provision that the title is to pass in ten days after the purchaser has diligently prosecuted the work on the houses, and not later than a certain date; the purchaser to be liable for damages in case of failure to perform the contract; in the absence of an agreement between the parties that the broker is not to be entitled to his commissions until the executory contract of sale is fully performed, he is entitled to commissions. *Hodgkins v. Mead*, 20 N. Y. S. R. 671.

In a case where a special contract with the defendant's testator was testified to by a single witness, the plaintiff's son, and no other evidence or circumstance proved it, and such testimony, which was not entirely free from improbability, showed that the witness was to be paid extra for the work he did in drawing up the contract and also a fee in case it went through, and that the amount paid by the decedent to the witness's father for commissions on the sale was in excess of the usual commission, the facts should be submitted to a jury, and a direction to find for the plaintiff is error. *Kavanagh v. Wilson*, 70 N. Y. 177.

Under an express promise to pay one half commissions when the sale is effected, based upon the broker's promise to abstain from further efforts, it is sufficient for the broker to establish the fact that he occupied the relation of broker in respect to the sale; was employed to effect such sale, first called the attention of the purchaser to the property; notified his principal of the fact; and was at the time of the making of the special contract conducting the negotiations and such special contract is based upon a valid consideration as an agreement to pay for services rendered, and the question is one wholly for the jury. *Ware v. Kerwin*, 24 App. Div. 198.

In case a purchase is effected by means of foreclosure proceedings under a contract to pay a certain amount of commissions whether the property is bought by or for the principal directly or indirectly in the principal's name or that of another, or by one in the interest of the principal, whether through the broker or anyone representing such estate either at public or private sale or otherwise, the purchase to be made in the name of a third person, the broker cannot claim additional compensation for services rendered in carrying out such purchase, performed anterior to the execution of the foreclosure deed, in and about the consummation of the title in his principal, as such services are fairly within the contract as "in connection with said purchase,"—especially as such acts were voluntary and without claim or notice of claim for additional compensation, the broker's services not terminating with the procuring of the agreement to sell in such a case. *Kerfoot v. Steele*, 113 Ill. 610, 613, 617.

And unpaid commissions were refused on a sale forfeited by reason of nonpayment of the purchase money, under an agreement with a proviso that the price might be payable in instalments, the broker to retain a certain

amount from the first two and one half of the subsequent instalments until the commissions were paid, and a supplementary contract that if the purchasers forfeited their contracts, all forfeited instalments paid to the broker should be retained as commissions, and if they effect a resale on credit the future instalments were to be divided until the principal should receive a certain amount per acre. *Holbrook v. Investment Co.* 30 Or. 259.

VII. In case of an exchange.

In the case of a broker employed to procure an exchange of property the courts have drawn a distinction between an engagement "to effect an exchange" and "to procure the execution of a contract for an exchange."

Upon this subject it has been said that it is one thing to agree with the broker to pay him a stipulated sum to obtain from a third person a valid contract to make a prescribed exchange, and another thing to agree to pay a fixed sum to effect or negotiate an exchange which will vest in the employer or principal a good title to designated lots subject only to specified encumbrances, and in the latter case the commissions are not earned until the broker finds a person able and ready to make the exchange, and convey to his employer the title which, alone, by the terms of his offer and of the broker's employment, the principal of the latter agreed to take and has a right to demand. *Barnes v. Roberts*, 5 Bosw. 73.

The same distinction is recognized in the case of *Kalley v. Baker*, 132 N. Y. 1.

And also in *Moskowitz v. Hornberger*, 20 Misc. 558, Affirming 19 Misc. 429.

In cases where the broker, employed to effect the execution of a contract for an exchange, procures a binding and enforceable contract to be entered into between his principal and the other party to the exchange, he becomes entitled to his commissions unless there is a special agreement to the contrary. *Kalley v. Baker*, 132 N. Y. 1.

And the rule holds even though the trade is broken off because of the defect in the title to the property to be taken in exchange. *Collins v. Fowler*, 8 Mo. App. 580.

So, if the minds of the parties have met and they have fully agreed upon the terms of exchange it matters not whether the contract is in writing or not. *Moses v. Helmke*, 18 Misc. 357.

Where, however, the contract is "to effect an exchange," the rule would seem to be that no commissions are earned until the exchange is made.

The distinction between the two classes of cases is recognized by the cases of *Moskowitz v. Hornberger*, 20 Misc. 558-560, Affirming 19 Misc. 429; *Woolley v. Lowenstein*, 83 Hun, 155; *Emens v. St. John*, 79 Hun, 99,—in which the contract was to make or effect an exchange.

In the first-mentioned case the broker effected the exchange, so far, at least, that through his efforts a valid contract was entered into by competent persons upon terms and conditions agreeable to his principals, even as to details which were carefully expressed which was ordinarily all that the broker could do; yet as he was employed "to effect an exchange" it was necessary for him to prove that the person procured was able, as well as willing, to carry out the contract made, and that the trade fell through by reason of the inability or capriciousness of his employer to consummate it. *Moskowitz v. Hornberger*, 20 Misc. 558-560, Affirming 19 Misc. 429.

In *Woolley v. Lowenstein*, 83 Hun, 155, the broker employed to make an exchange of prop-

erty was required to show that the person whom he introduced to his principal was the owner of the property to be exchanged, or was able to convey it.

And the mere fact that the broker procures a party who signs a contract for the exchange or sale of property will not entitle the broker to commissions when he knows that such party has no interest in the property and does not disclose it to his principal. *Norman v. Beuther*, 25 Misc. 161.

And if the broker's commissions are contingent upon the title of the property to be taken in exchange by his principal being satisfactory, he cannot recover his commissions where such title is doubtful, and is therefore refused by his principal. *Emens v. St. John*, 79 Hun, 99.

Yet, although in a limited sense it may be true, in a case of an exchange effected by a broker, that the broker is bound to prove that the person procured by him to make the exchange has a good marketable title to the property he contracted to give his principal in exchange, yet the fact that such person executes a formal contract to convey carries with it the legal presumption (which is proof in the first instance) that he was able to perform his undertaking, and therefore in such a case the onus is upon the principal to prove that the title offered by such contracting party was for some reason defective, as, when a person is in possession of property and is shown to be the beneficial owner thereof, the presumption is that every instrument has been executed, and everything has been done to render his title legal. *Moskowitz v. Hornberger*, 20 Misc. 558, Affirming 19 Misc. 429.

Although it may be true that a real-estate broker is not entitled to his commission as a matter of law until the trade is completed and the papers passed, and that the mere signing of an agreement to exchange property, which was never carried out, does not entitle him to commissions for introducing the parties, yet such rule will not apply where there is a special contract entered into between the parties on the question of commissions. *Pearson v. Mason*, 120 Mass. 53, 58.

And no error is committed by the court, in an action by a real-estate broker to recover commissions on an exchange, in ruling out the offer of the principal to show that the title to the property to be taken by him in exchange was in one party, and another party paid the consideration, when it is shown that the party with whom he is dealing in the exchange has a legal title vested in him. *Mason v. Hinds*, 47 N. Y. S. R. 163, 166.

Under an authority to exchange property free and clear for certain other property subject to certain mortgages for which the principal would pay a certain commission, "if the exchange is made," so far as the broker is concerned, the exchange is made when the contract is signed, in the same way as upon a contract to pay commission if a house is sold, in which case the broker procuring a party ready to sign the contract for the house is entitled to his commissions; and such expression does not mean if the deeds passed commissions would be paid. *Kalley v. Baker*, 29 N. Y. S. R. 677.

VIII. Negotiations by principal.

In many cases the question has arisen as to whether or not there has been a performance of the contract on the broker's part, where the sale has been negotiated or closed by the principal himself.

The general rule deducible from the decisions upon the question would seem to be that if there is nothing peculiar in the contract of employment it is not necessary that the broker should

negotiate the sale when he has found, or procured, or if he has introduced, or given the name of, a purchaser who is able, ready, and willing to purchase the property upon the terms named by the principal, and the principal has entered into negotiations with such purchaser, and concluded a sale with him; and in such cases the broker has performed his contract, and is entitled to his commissions. *Scott v. Patterson*, 53 Ark. 49, 52; *Dolan v. Scanlan*, 57 Cal. 261, 263; *Howe v. Werner*, 7 Colo. App. 530, 532; *Lincoln v. McLatchie*, 36 Conn. 136; *Schlegel v. Allerton*, 65 Conn. 260; *Doonan v. Ives*, 73 Ga. 295; *McConaughy v. Mahannah*, 28 Ill. App. 169, 173; *Lawrence v. Atwood*, 1 Ill. App. 222; *Carter v. Webster*, 79 Ill. 435; *Pate v. Marsh*, 65 Ill. App. 482, 483; *Adams v. Decker*, 34 Ill. App. 20; *Keeler v. Grace*, 27 Ill. App. 427, 429; *Monroe v. Snow*, 131 Ill. 126; *Mears v. Stone*, 44 Ill. App. 444, 447; *Platt v. Johr*, 9 Ind. App. 58; *Williams v. Leslie*, 111 Ind. 70; *Hanna v. Collins*, 69 Iowa, 51, 52; *Blodgett v. Sioux City & St. P. R. Co.* 63 Iowa, 606; *Kelly v. Stone*, 94 Iowa, 316; *Dreisback v. Rollins*, 39 Kan. 268; *Ratta v. Shepherd*, 37 Kan. 20; *Viley v. Pettit*, 96 Ky. 576; *Kimberly v. Henderson*, 29 Md. 513; *Richards v. Jackson*, 31 Md. 250, 1 Am. Rep. 40; *Chapin v. Bridges*, 116 Mass. 105; *Ranson v. Weston*, 110 Mich. 240; *Putnam v. How*, 39 Minn. 363; *Crevier v. Stephen*, 40 Minn. 288; *Armstrong v. Wann*, 29 Minn. 126; *Hamlin v. Sculte*, 34 Minn. 534; *Haug v. Haugan*, 51 Minn. 558; *Stinde v. Blesch*, 42 Mo. App. 578, 581; *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Pari*, 52 Mo. 249; *Timberman v. Craddock*, 70 Mo. 638; *Goffe v. Gibson*, 18 Mo. App. 1; *Gaty v. Foster*, 18 Mo. App. 639; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Blackwell v. Adams*, 28 Mo. App. 61; *Jones v. Berry*, 37 Mo. App. 125, 126; *Milan v. Porter*, 31 Mo. App. 563; *Henderson v. Mace*, 64 Mo. App. 393, 396; *Bass v. Jacobs*, 63 Mo. App. 393, 396; *Gelatt v. Ridge*, 117 Mo. 553; *Wetzell v. Wagoner*, 41 Mo. App. 500, 518; *Brennan v. Roach*, 47 Mo. App. 290, 296; *Wright v. Brown*, 68 Mo. App. 577; *Woods v. Stephens*, 46 Mo. 556; *Gaty v. Sack*, 19 Mo. App. 477; *Nicholas v. Jones*, 23 Neb. 813; *Butler v. Kennard*, 23 Neb. 357; *Shepherd v. Hedden*, 29 N. J. L. 334; *Bach v. Emerich*, 3 Jones & S. 548, 551; *Jewett v. Emson*, 2 Robt. 165; *Bennett v. Egan*, 3 Misc. 421, 422; *Stillman v. Mitchell*, 2 Robt. 523; *Barnard v. Monnot*, 8 Keyes, 203; *Arnold v. Wood*, 13 N. Y. Week. Dig. 302; *Smith v. Smith*, 1 Sweeney, 552; *Smith v. McGovern*, 65 N. Y. 574, 575; *Brundage v. McCormick*, 69 Hun, 65, 66; *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431, 432; *Wyckoff v. Taylor*, 13 Daly, 564; *Lloyd v. Matthews*, 51 N. Y. 124; *Gemunderv. Hauser*, 6 Misc. 210, 214; *Baer v. Koch*, 2 Misc. 334, 366; *Susendorff v. Schmidt*, 55 N. Y. 319; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 382, 22 Am. Rep. 441; *King v. Bauer*, 29 N. Y. S. R. 413; *Ames v. McNally*, 6 Misc. 93, 94; *Gold v. Serrell*, 6 Misc. 124, 126; *McKnight v. Thayer*, 48 N. Y. S. R. 620, 622; *Morgan v. Mason*, 4 E. D. Smith, 638, 639; *Levy v. Coogan*, 16 Daly, 137; *Harris v. Burtnett*, 2 Daly, 189; *Doran v. Bussard*, 18 App. Div. 36, 37; *Keys v. Johnson*, 68 Pa. 43; *Scott v. Clark*, 3 S. D. 486; *Royster v. Mageveney*, 9 Lea, 143; *Arrington v. Cary*, 5 Baxt. 600, 611; *Byrd v. Frost* (Tex. Civ. App.) 29 S. W. 46.

The same principles are deducible from the case of *Baird v. Glecker* (S. D.) 76 N. W. 931, in which the principal was present and acted for himself, and was entirely satisfied with the situation.

And the same is announced in *Leviston v. Landreaux*, 6 La. Ann. 26, where the negotiations conducted partly by the broker and partly

by the principal resulted in a binding contract being entered into by the principal upon the terms given to the broker.

So, if the principal reserved the right to sell yet the broker will still be entitled to his commissions if he was the procuring cause of the sale made by the principal. *Graves v. Bains*, 78 Tex. 92, 95.

In *Wyckoff v. Bliss*, 12 Daly, 324, 327, it is said that there is a difference between the duty of the broker employed to find a purchaser at a fixed price, and that of a broker employed to find a party willing to make a trade of property satisfactory to the employer, and that in the latter case the duty of the broker is often performed where he brings the parties together and leaves them to negotiate and come to an agreement between themselves.

And even where there has been no direct communication between the broker and the principal, it must be taken affirmatively that the latter was induced to enter into the negotiations which resulted in the purchase through the means employed by the broker for that purpose. *Gleason v. Nelson*, 162 Mass. 245.

So, if the negotiations between the principal and the purchaser are brought about by the broker it matters not when, where, or under what circumstances he found the purchaser, so long as his agency continues and the sale is made, and the question whether he was present at the sale or had no knowledge of it becomes an immaterial fact. *McKnight v. Thayer*, 48 N. Y. S. R. 620.

And the question whether the final negotiations between the purchaser and the principal's attorney, which resulted in a sale, can be regarded as a continuance of the negotiations which the broker induced the purchaser to enter into with the principal, is in no sense one of law, but one determinable by the evidence, and the court will not entertain the question upon appeal unless the question is certified to in the court below. *Hanna v. Collins*, 69 Iowa, 51.

So, the doctrine applies even where the principal does not mention the price, and the broker produces a purchaser with whom the principal afterwards negotiates a sale. *Buhl v. Noe*, 51 Ill. App. 622, 626.

It also applies where the broker's introduction or disclosure of the purchaser to the principal is the foundation on which the negotiations are begun and conducted, and the sale is made. *Keener v. Harrod*, 2 Md. 63, 56 Am. Rep. 706, 708; *Wilkinson v. Martin*, 8 Car. & P. 1.

And the fact that other property is subsequently added will not defeat the broker's right where he is the means of the negotiations of the sale. *Ranson v. Weston*, 110 Mich. 240.

Yet, in order to entitle a broker to commissions where the owner himself makes a sale to the party introduced by the broker, it must appear that the owner assented to the terms upon which the broker could have sold the land; but if the owner refuses to sell at the highest offer produced by the broker, and then proceeds in person, or through another broker, to sell for a better price to another, the rule cannot be applied. *Armes v. Cameron*, 8 Mackey, 435, 437.

The reason of the rule is that fair dealing between the parties demands the owner to disclose his intention to the broker before concluding the sale to the purchaser found by the broker, and that the owner of property will not be permitted to avail himself of the services of an agent who procures a purchaser, and effect a sale himself to such purchaser through information derived from the broker, and thereby deprive the agent of his commission. *Cook v. Forst*, 116 Ala. 395; *Dreisback v. Rollins*, 39 Kan. 268; *Redfield v. Tegx*, 38 N. Y. 212; *Plant*

v. Thompson, 42 Kan. 664; Jones v. Adler, 34 Md. 440, 443; Keener v. Harrod, 2 Md. 63, 56 Am. Rep. 706, 708; Beale v. Creswell, 3 Md. 196. See, as to broker's commissions as affected by the negligence, fraud, or default of the principal, *note* to Brackenridge v. Claridge (Tex.) 43 L. R. A. 593.

So, the rule is founded upon the doctrine that brokers are persons whose business it is to bring buyer and seller together, and they need have nothing to do with the negotiations of the bargain. *Keys v. Johnson*, 68 Pa. 42, 43; *Gibson's Estate*, 3 Pa. Dist. R. 147, 148; *Hartley v. Anderson*, 150 Pa. 391; *Inslee v. Jones*, *Brightly* (Pa.) 76; *Middleton v. Thompson*, 163 Pa. 112, 119; *Morris v. Buddy*, 20 N. J. Eq. 236.

And it is also based upon the fact that the making of the contract is a matter for the principal himself. *Gonzales v. Broad*, 57 Cal. 224; *Phelan v. Gardner*, 43 Cal. 311; *Barnard v. Monnot*, 3 Keyes, 204; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 202.

It is not necessary that the whole contract should be completed by the broker alone in order to entitle him to commissions. *Butler v. Kennard*, 23 Neb. 357, 359.

And if, in such a case, the parties think proper to take the matter out of the broker's hands, and carry on the negotiations themselves, the broker earns his commissions if a sale is afterwards effected. *Ludlow v. Carman*, 2 Hill. 107, 112.

And the same principle also applies in the case of a sale concluded by another agent of the owner and the purchaser. *Brennan v. Roach*, 47 Mo. App. 294, 296.

But although it is not indispensable that the purchaser should be introduced to the owner by the broker, or that the broker should be personally acquainted with the purchaser, yet in such cases it must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the broker. *Sussdorf v. Schmidt*, 55 N. Y. 319.

The purchaser must be produced by the broker, and be found by his efforts and exertions, and be the fruit of his labor. *Lloyd v. Matthews*, 51 N. Y. 124.

If the broker actually draws the attention of the purchaser to the property, it matters not that the negotiations are carried on and completed by the principal, especially when it is not shown that his agreement with the principal has expired or been revoked. *Heffner v. Chambers*, 121 Pa. 84.

And, although a purchaser, after being sent to view the property by the broker, does not return, but acts on subsequent and later-acquired information, and goes directly to the principal and negotiates the bargain with him, such fact will not relieve the latter of his obligation to pay the broker's commissions. *Hanford v. Shaper*, 4 Daly. 243; *Chuton v. Butler*, 1 E. D. Smith, 150; *Ludlow v. Carman*, 2 Hill. 107.

So, in the case of an exchange of property it is sufficient if the party desiring to trade his property solicits the services of a broker who finds a person willing and able to make the deal, and brings the parties together, and they enter into negotiations which are ultimately concluded even upon varied terms. *Knowles v. Harvey*, 10 Colo. App. 9.

And, inasmuch as matters of exchange always proceed by negotiation, and mutual concession, the principal should not be permitted to escape liability to pay for the services which have been rendered him by the broker, where the properties are ultimately exchanged by the consent of the one who employed the broker, and on terms satisfactory to him. *Carson v. Baker*, 2 Colo. App. 248.
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And in such a case the owner and the buyer cannot by any arrangement disappoint the claim of the agent for remuneration. *Vreeland v. Vetterlein*, 33 N. J. L. 247, 249.

And the fact that the broker subsequently draws the writings and receives the purchase money will strengthen his case. *Shepherd v. Hedden*, 29 N. J. L. 334, 337.

So, it is sufficient if the purchaser introduced by him, and the principal, enter into a valid, binding, and enforceable contract. *Wilson v. Mason*, 158 Ill. 304; *Lang v. Hand*, 57 Ill. App. 134.

And in such cases the broker is entitled to his commissions irrespective of whether the contract is ever carried out by the conveyance of the property and the payment of the purchase money. *Flower v. Davidson*, 44 Minn. 46.

And the rule has been held to apply where a purchaser is produced by the broker with whom the seller himself negotiates and effects a sale, although the sale itself may be finally abandoned. *Potvin v. Curran*, 13 Neb. 302, 305.

Again, if the contract negotiated by the principal with the purchaser introduced by the broker provides for the payment of a sum by way of liquidated damages in case of nonperformance by the parties, and such contract is in a sense optional with either party, the broker will be entitled to recover even though the purchaser refuses to make the conveyance and elects to pay the damages. *Gilder v. Davis*, 137 N. Y. 504, 20 L. R. A. 398.

And his right to compensation is complete where the parties are brought together and a sale is made through his instrumentality without reference to whether the owner at the time the sale was effected had knowledge of the fact that he was making the sale through such instrumentality. *Butler v. Kennard*, 23 Neb. 357; *Hartley v. Dorr*, 15 Neb. 451; *Anderson v. Cox*, 16 Neb. 10; *Potvin v. Curran*, 13 Neb. 303; *Goffe v. Gibson*, 18 Mo. App. 1.

It is not absolutely necessary that the principal should know that the purchaser is a customer of the broker if he is in fact the broker's production. *Lloyd v. Matthews*, 51 N. Y. 124; *Bryan v. Abert*, 3 App. D. C. 180, 186.

The rule especially applies if the broker's acts are not misleading. *Hanford v. Shaper*, 4 Daly. 243.

And the broker's right will not, in the absence of fraud, be affected by such circumstances, as it is wholly unimportant whether the principal knew that his purchaser was sent by the broker or not, and it is sufficient if that was a fact. *Adams v. Decker*, 32 Ill. App. 17; *Lloyd v. Matthews*, 51 N. Y. 124.

This is so for the reason that the right of the broker to recover depends upon the fact that he has procured the purchaser, and not upon the knowledge on the part of the principal of that fact at the time of the sale. *Millan v. Porter*, 31 Mo. App. 563, 576; *Tyler v. Parr*, 52 Mo. 249; *Goffe v. Gibson*, 18 Mo. App. 4.

And ignorance of such fact will be no defense in an action to recover commissions, where the evidence shows that the sale is made through his efforts, and that the principal has expressly promised to pay his commissions after he has seen the purchaser, and has told the broker not to advertise further as he was negotiating with him. *Sussdorf v. Schmidt*, 55 N. Y. 319, 321.

If the broker does not agree with the purchasers on the terms of sale, and does not assist in the negotiations, and the principal does not know that the broker is concerned in the negotiations until after the sale is effected, and where in sending the purchaser to the principal the broker said, "Don't be too fast to buy, and, in your conversation with him, talk as if you

didn't want to buy the farm."—he will still be entitled to recover when such statements have not injured the principal and have resulted in a sale on terms satisfactory to the principal, although the principal asserts that he did not know of the broker's agency, and that if he had he might have refused to make the sale, as the principal has not terminated the agency, or taken steps to inform himself in regard to his connection with or his influence in effecting the sale, no fraud or mistake existing, the agreement not calling for him to fix the sale, but only to find a purchaser. *Kelly v. Stone*, 94 Iowa, 316.

It is, however, necessary that the principal should know that the broker was instrumental in making the sale, and when he is told by the purchaser that he has received information of his desire to sell the property, and the price he wants for it, the principal should then inquire from him the source of his information. *Lloyd v. Matthews*, 51 N. Y. 124.

And in such cases the principal may prove by a purchaser that the broker had no influence on him in the sale made by the principal, as it is necessary that the broker should do something in order to earn his commissions. *Doonan v. Ives*, 73 Ga. 295, 301.

If the principal does not bar himself from selling, and the broker notifies an intending purchaser, without disclosing his principal's name, and such purchaser subsequently learns from another source who the principal is, and purchases directly from him without the broker's knowledge, and without knowing that the broker has anything to do with the sale, the broker cannot be said to be the means by which the negotiations were effected so as to be entitled to his commissions. *Anderson v. Smythe*, 1 Colo. App. 253.

And if the evidence adduced by the broker does not sustain his claim that the sale was made with a knowledge of negotiations between the broker and such purchaser, he cannot recover commissions upon a sale made by his principal to such purchaser,—especially where the purchaser testifies that he never agreed to take the property from such broker. *Hurd v. Nelson*, 100 Iowa, 555, 557.

Where, however, the evidence clearly establishes the fact that the parties are brought together, and negotiations carried on, by and through the agents; that they participated and aided in the transaction at the time of its consummation, and were up to that time recognized and regarded by the principal as his agents, the mere fact that the principal has in his absence, the transfers made and money paid by and through another agent, cannot affect the relation of the parties, nor can the principal by his own act disregard the services performed, and refuse to pay the agreed price; and therefore the broker is entitled to his commissions. *Howe v. Werner*, 7 Colo. App. 530, 532.

And a broker who shows the property to several parties, and finally calls the attention of the purchaser to several pieces of property including the one in question, names the price, and advises him to buy, and subsequently such purchaser buys directly from the principal, who has no notice of any such previous conversation or negotiation, cannot recover commissions, as the principal is at liberty to sell himself, has no knowledge of the instrumentality of the broker, and deals with the purchaser as an original client in good faith, and makes new terms of sale. *Cathcart v. Bacon*, 47 Minn. 34.

If the principal expressly agrees to pay the broker a specific sum as commission if the negotiations between himself and the purchaser are successfully carried out, and a sale or exchange

is finally consummated on terms agreed upon between the parties, the broker will be entitled to his commissions. *Haug v. Haugan*, 51 Minn. 558.

Again, mere delay between the time of negotiation of the purchase and the time that it is concluded by the principal in person does not detract from the broker's right to commissions, where it is evident that the negotiation started by the broker has not fallen through, and that the principal has not abandoned his intention of purchasing. *Lynch v. McKenna*, 58 How. Pr. 42, 45, in which the action was brought for commission for purchasing a house.

Commissions were allowed in a case where after a failure to negotiate a sale with the purchaser introduced by the broker the principal again placed the property in the broker's hands, and the broker again opened negotiations with such purchaser, with whom his principal concluded a sale at a reduced price without taking the property out of the agent's hands or giving him any notice thereof. *Schlegel v. Allerton*, 65 Conn. 280.

In *Lincoln v. McClatchie*, 36 Conn. 186, the broker recovered commissions as the sale was not effected by the principal wholly without the broker's assistance, upon facts showing, *inter alia*, that a party attracted by the broker's advertisement of other houses upon the same street got the reduced price from the broker as the consideration for the premises and reported it to the intending purchaser, who examined the premises, entered into negotiations with the principal personally, which resulted in the sale for the higher price by the principal himself, without any personal interview or dealing with the broker, although the purchaser had notice before purchasing that the property was in the broker's hands for sale.

When the principal takes it out of his power to carry out any contract the broker may make, by executing a lease of the premises and binding himself to sell to such lessee at any time during the lease, the transaction must be considered as to its effect upon the principal's contract with the broker, and not simply as to whether he made the contract of sale enforceable in any event against the purchaser, and therefore under such contract the broker will be entitled to his commissions under a provision contained in the contract with his principal that upon a withdrawal of the property he was to pay the broker the same commission as though he had made a sale to an independent purchaser. *Rucker v. Hall*, 105 Cal. 425.

But where there was a special contract to sell at a special price and the principal himself conducted the negotiations and made a sale to the purchaser at a reduced price, the broker was not allowed to recover commissions in the absence of proof that the purchaser produced was ready and willing to buy at the price stipulated in the contract, or that the principal prevented his making such sale. *Cullds v. Ptomey*, 17 Mont. 502, 509.

And in the case of real estate listed with a broker to be sold for a certain sum net to the owner, the broker to receive as compensation any sum in excess thereof for which he effected a sale, if the broker informs a party that he can purchase for the net price, and then introduces him to the owner who completes the sale at that price, the broker cannot recover commissions upon the sale so negotiated. *Beatty v. Russell*, 41 Neb. 321.

Before the broker can recover commissions in a case where he introduces the purchaser and at the same time informs his principal that if such party purchases he claims the usual commission, in which the negotiations by the prin-

principal with such purchaser are not successful, but after the principal sells the property to his brother, who then sells to such purchaser, he must show that the sale to the brother and the subsequent sale to such purchaser are made for the purpose of defrauding him of his commissions, as in the absence of such evidence he cannot recover. *Bennett v. Kidder*, 5 Daly, 512.

And where a broker who is to sell separate parcels at a specified price brings a party and his principal together, and negotiations are commenced by the principal with the purchaser, which terminate in a valid sale of a parcel for the price specified, upon which the broker receives his commissions, and afterwards the principal informs such purchaser that he has other parcels, and another parcel is then sold by the principal for the price and upon the terms at which it was given to the broker without the latter's knowledge, the broker is not entitled to commissions upon the latter sale, especially as he gave no information in regard to it and took no part in it. *McClave v. Paine*, 49 N. Y. 561, 10 Am. Rep. 431, 432.

And the broker cannot recover on a special contract to pay a certain sum for a sale for a given amount, where the principal himself sells for a less amount, after the broker has entered upon the contract, and his advertisement is seen by the purchaser, who writes to a third party for a more complete description of the land, which is obtained from the broker and sent him by letter, where the purchaser applies directly to the principal and negotiates with him, even though the broker's efforts are evidently instrumental in enabling the defendant to sell. *Charlton v. Wood*, 11 Heisk. 19, 24.

In the above case, however, the court did not pass upon the question whether or not the broker would be entitled to recover reasonable compensation for loss and expense incurred by him in advertising the property for sale, as that question was not before the court.

IX. Acceptance of purchaser by principal.

The general rule is that the broker undertakes to furnish a purchaser, and is bound to act in good faith in presenting a person as such, and when one is presented the principal is not bound to accept him, or to pay the commissions, — unless he is ready and able to perform the contract on his part according to the terms proposed. *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146, 149; *Coleman v. Meade*, 18 Bush, 358, 363; *Francis v. Baker*, 45 Minn. 83, 84; *Conkling v. Krakauer*, 70 Tex. 735; *Nesbitt v. Helser*, 49 Mo. 383, 385; *Woods v. Stephens*, 46 Mo. 556, 557; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Hayden v. Grillo*, 26 Mo. App. 293; *Love v. Owens*, 31 Mo. App. 501; *Wolff v. Rosenberg*, 67 Mo. App. 403.

The purchaser found must be one whom the principal agrees to accept. *Pratt v. Patterson*, 7 Phila. 135.

So, the principal must be satisfied with the purchaser, who must actually purchase the property at a price satisfactory to the owner. *Williams v. Leslie*, 111 Ind. 70, 72; *Keys v. Johnson*, 68 Pa. 42, 43; *Glentworth v. Luther*, 21 Barb. 145; *Conkling v. Krakauer*, 70 Tex. 735; *Donohue v. Flanagan*, 28 N. Y. S. R. 757.

And the principal must have a reasonable opportunity to inquire into and satisfy himself in relation to the purchaser found by the broker. *Greene v. Hollingshead*, 40 Ill. App. 195, 197.

And the broker's claim to commission upon the price is contingent upon the acceptance by his principal of the offer made, and upon an actual sale effected. And if employed, without any special agreement, to find a purchaser, he 44 L. R. A.

is not entitled to claim commissions upon a sale which the owner declines to make, and which falls of actual consummation, as the principal always has a *locus poenitentiae* until he agrees to an actual sale. *Pratt v. Patterson*, 7 Phila. 135, 136.

The principal does not part with the control of his property by employing a broker to find a purchaser, nor does he bind himself irrevocably to pay the broker a commission for the sale to a purchaser whom upon inquiry and reflection he refuses to accept. *Ibid*.

And if an unsatisfactory purchaser is found, the owner may refuse to accept him, and he is under no obligation to pay the broker for his services. *Sayre v. Wilson*, 86 Ala. 151.

When the broker produces a purchaser who is ready and willing to enter into a contract, it is for the principal to decide whether the person presented is acceptable and the broker's position depends upon such acceptance; but if the principal does accept him either upon the original or modified terms, and a valid contract is entered into, he becomes a purchaser within the meaning of the contract of the broker, and the duties of the latter are at an end, and the commissions are earned as soon as an enforceable contract is executed. *Birmingham Land & Loan Co. v. Thompson*, 86 Ala. 146; *Sayre v. Wilson*, 86 Ala. 151; *Henderson v. Vincent*, 84 Ala. 99; *Coleman v. Meade*, 18 Bush, 358, 360; *Walker v. Osgood*, 98 Mass. 348, 98 Am. Dec. 168; *Rice v. Mayo*, 107 Mass. 550; *Glentworth v. Luther*, 21 Barb. 145; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 441; *Short v. Millard*, 68 Ill. 293; *Lapsley v. Horridge*, 71 Ill. App. 652; *Wilson v. Mason*, 158 Ill. 304; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Francis v. Baker*, 45 Minn. 83, 84; *Hamlin v. Schulte*, 34 Minn. 534; *Betz v. Williams & W. Land & Loan Co.* 46 Kan. 45; *Driesback v. Rollins*, 39 Kan. 268; *Redfield v. Teggs*, 38 N. Y. 212; *Viley v. Pettit*, 96 Ky. 576; *Wolff v. Rosenberg*, 67 Mo. App. 403; *Adams v. Decker*, 34 Ill. App. 17, 20; *Parker v. Walker*, 86 Tenn. 566; *Kock v. Emmerling*, 22 How. 69, 16 L. ed. 292.

And the rule is the same where the principal accepts the purchaser presented by the broker, although the sale is never actually completed. If the failure of the purchaser to complete the sale results from the inability of the principal to make a good title without any fault on the part of the broker. *Wilson v. Mason*, 158 Ill. 304.

The question of the broker's right to commissions upon a sale never consummated owing to a defective title will be found fully discussed in *note* to *Brackenridge v. Claridge* (Tex.) 43 L. R. A. 593.

So, the rule prevails in such cases, even though the sale is not completed or executed by payment of the consideration to the principal. *Francis v. Baker*, 45 Minn. 83, 84.

If the acts of the broker are accepted by the principal as a performance of his undertaking, the broker is entitled to his commissions, although an acceptance will not exist, unless the principal has knowledge at the time he is dealing with the purchaser that he is the one produced by the broker. *Bidgett v. Sioux City & St. P. R. Co.* 63 Iowa, 606, 609. As to the failure of the broker to report the purchaser found by him, see XIV. *infra*.

And if the sale is actually completed, the principal must be taken to have favorably determined the financial responsibility of the purchaser produced, and the broker is entitled to his commissions, even though it may afterwards transpire that such purchaser is unable to meet

deferred payments as they become due. *Wray v. Carpenter*, 16 Colo. 271.

If the proposed purchaser has been accepted by the principal, the burden is upon him to show that the purchaser was not able to comply with the contract. *Davis v. Morgan*, 96 Ga. 518, 520.

The principal's acceptance of the purchaser estops him from alleging anything against the claim, except fraud on the part of the broker in inducing the acceptance, or wrong done by him causing failure of the purchaser to perform. *Greene v. Hollingshead*, 40 Ill. App. 195, 197.

But the principal must knowingly receive or consummate the sale as the result of the broker's labor. *Thomas v. Merrifield* (Kan. App.) 53 Pac. 891.

The broker must, however, show that his principal accepts the offer as made by the proposed purchaser where it differs from the terms given to the broker by this principal. *Forrester v. Price*, 6 Misc. 308, 309.

Yet, a broker may enter into a contract with reference to the property, and his principal may accept and approve the contract without thereby accepting it as the performance by the broker of his contract. *Reiger v. Bigger*, 29 Mo. App. 421, 427.

If the broker has procured a person who is able and willing to purchase upon the principal's terms, the refusal of his principal to accept such person as purchaser will not deprive him of his right to commissions, and a noncompliance by the broker with a condition precedent to his right to recover will not avail the principal upon proof that compliance was prevented by his act. *Weinstein v. Golding*, 17 Misc. 613, 615, 616; *Gaty v. Foster*, 18 Mo. App. 639, 644, to the same effect.

So, if the broker's evidence shows that he has bound a purchaser ready, willing, and financially able to make the purchase absolutely on the terms fixed by the principal, and that the principal accepted such purchaser, and entered into a contract with him in respect to the sale and purchase of the property, he establishes a prima facie case entitling him to recover his commission. *Lemon v. Lloyd*, 46 Mo. App. 452, 456; *Zeldier v. Walker*, 41 Mo. App. 118; *Hayden v. Grillo*, 26 Mo. App. 289; *Love v. Owens*, 31 Mo. App. 501; *Millan v. Porter*, 31 Mo. App. 563.

But if the proposition is not accepted by the principal, it is incumbent upon the broker to show that the purchaser was willing and able to purchase or exchange upon the terms offered by the owner. *Lockwood v. Halsey*, 41 Kan. 166.

The fact that a new clause requiring the purchaser to give a satisfactory bond is inserted in a new contract tends to indicate that the principal knew of the actual financial condition of the purchaser, and in such a case the principal cannot free himself from his obligation to pay commission on the ground that during the negotiations the broker untruefully and in breach of good faith alleged that the purchaser had a certain amount of money, even if he knew the purchaser had no money and was influenced by such statement, and, with full knowledge of his financial condition, used and accepted the benefit of the services. *Irwin v. Mowbray*, 24 N. Y. S. R. 751. In this case the court refused to disturb a verdict allowing the broker's commissions, as, in addition to the above, it was also proved that the purchasers informed the principal of their financial condition.

Where a person is found who expresses willingness to take at the price, and the principal after accepting her as a purchaser, declines to execute the contract, in the absence of proof of the pecuniary responsibility of the purchaser 44 L. R. A.

the legal presumption is that such purchaser is solvent and able to perform the contract, and is a purchaser willing to take, and a meeting of the minds of the parties is proved. *Krahner v. Heilman*, 16 Daly, 132.

The broker recovered his commissions in a case where the minds of the parties met and were expressed in the payment of money, and the giving of a receipt signed by the principal and his wife as follows: ". . . received from . . . the sum of \$10 part of purchase money on sale of my house . . ."—which contract the purchaser subsequently refused to complete, as the broker was not chargeable with any imperfection in the making of such agreement or receipt, and as the purchaser found was accepted by the defendant. *Heinrich v. Korn*, 4 Daly, 74.

And where the principal, according to his own evidence, accepted the proposed purchaser without objection, recognized him as answering all the requirements, and there was no suggestion that he was not entirely solvent, and the real cause of the failure to complete the sale was due to the principal's own inability to make a good title, the broker's right to recover does not depend upon the question whether or not he had established the ability of the purchaser to pay, and it is error for the court to so charge the jury. *Davis v. Morgan*, 96 Ga. 518, 520.

And where the principal accepts a purchaser as able and willing to complete a contract which provides that he shall build when no cash is paid, and the purchaser enters into a bond and deed of trust, and the owner is to furnish the money, evidence of the subsequent insolvency of the purchaser is inadmissible in an action by the broker to recover his commissions, the principal having accepted him as a purchaser, able and willing to complete the contract. *Ross v. Fickling*, 11 App. D. C. 442.

So, where the principal knows the status of the proposed purchaser, as where she is a married woman, incapable by the state law of binding herself personally for payment of the purchaser's money, and he does not object or decline to consummate the sale on other specified grounds, the objection is to be construed as waived by him. *Sayre v. Wilson*, 86 Ala. 151.

And it is harmless error to allow the purchaser to state that he has prepared and filed plans and specifications as tending to show his willingness to carry out the agreement, especially when the principal has expressly admitted "that they were able to buy the property, and willing to do it." *Landberger v. Murray*, 6 Misc. 605.

Yet, in a case in which the proposed purchaser called upon the principal and offered the price named by the broker, provided the principal would accept a certain amount in cash, and take the balance in mortgage payable in a certain number of years, which offer the principal refused, the broker's claim for commissions was disallowed as there was no acceptance or performance. *Forrester v. Price*, 6 Misc. 308, 309.

X. Broker's presence at sale by principal.

In the absence of a contract to the contrary, the general rule is that if the broker is merely to find or procure a purchaser, it is not necessary that he should be present at the time the negotiations are entered into with the purchaser, or be an active participator in the instrument of sale, provided he can show that the same was effected through his agency, and that the parties were brought together and the sale resulted from his acts as its procuring cause.

The above rule is supported by the following

authorities: *Henderson v. Vincent*, 84 Ala. 99; *Driesback v. Rollins*, 39 Kan. 268; *Hambleton v. Fort* (Neb.), 78 N. W. 498; *Lloyd v. Matthews*, 51 N. Y. 124; *Arnold v. Wood*, 13 N. Y. Week. Dig. 302; *Bickart v. Hoffman*, 46 N. Y. S. R. 886; *McKnight v. Thayer*, 48 N. Y. S. R. 620, 622; *Glentworth v. Luther*, 21 Barb. 147; *Baker v. Thomas*, 12 Misc. 432, 433, *Reversing* on other grounds 11 Misc. 112, 113; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 381, 22 Am. Rep. 441; *Wyckoff v. Bissell*, 24 App. Div. 66, 67; *Roush v. Loeffler*, 3 Ohio Dec. 628, 629; *Douville v. Comstock*, 110 Mich. 698, 701; *Kelso v. Woodruff*, 88 Mich. 303; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Sussdroff v. Schmidt*, 55 N. Y. 819; *Lreyer v. Rauch*, 42 How. Pr. 22; *Crevier v. Stephen*, 40 Minn. 288.

And it is not absolutely necessary that the broker should have knowledge of the sale made by his principal to the purchaser found by him, at the time of the sale, provided such purchaser is procured by him. *McKnight v. Thayer*, 48 N. Y. S. R. 620, 622.

XI. Ratification of broker's acts.

In some cases the liability of the principal for commissions has turned upon the question whether the performance of the broker's contract when not strictly within the terms thereof has been ratified by the principal, and has thus become a perfect performance of the contract.

It is a general rule that if a sale is not authorized in the first instance, there can be no recovery of commissions, unless it is ratified by the principal. *Forj v. Crown*, 120 Cal. 551; *Stillman v. Fitzgerald*, 37 Minn. 186.

So, if a real-estate broker exhausts his authority, and his acts are not ratified by his principal, the latter is not bound thereby, and the broker is not entitled to his commissions. *Harwood v. Triplett*, 34 Mo. App. 278, 278.

The unauthorized acts of an agent done on behalf of his principal may be ratified in any manner which expresses the principal's assent thereto, and it is not necessary that such ratification should be in writing. *Goss v. Stevens*, 32 Minn. 472, 474; *Brown v. Eaton*, 21 Minn. 409, 410; *Smith v. Schiele*, 93 Cal. 144, 149.

And a ratification of the broker's act, where the original employment is wanting, may in some circumstances be equivalent to an original retainer, but only when there is a plain intent to ratify. *Little Rock v. Barton*, 33 Ark. 436, 444; *Fierce v. Thomas*, 4 E. D. Smith, 354, 355.

But an alleged principal is not bound by an approval of an act already done, made under a misapprehension of the real nature of the facts, as to constitute a ratification the principal must be acquainted with that which has actually been done. *Dean v. Bassett*, 57 Cal. 640.

And the ratification must be with full knowledge of all the material facts, and if such facts be either suppressed or unknown the ratification is treated as invalid because founded in mistake or fraud. *Halsey v. Monteiro*, 92 Va. 581, 583; *Owings v. Hull*, 9 Pet. 307, 9 L. ed. 246; *Merrill v. Lathan*, 8 Colo. App. 263; *Copeland v. Stoneham Tannery Co.* 142 Pa. 446; *Ford v. Brown*, 120 Cal. 551.

It must be shown that the principal was aware of the terms of the sale in order for him to be able to ratify it, and the mere fact that certain letters show that he knew of a sale is not sufficient to prove knowledge of the particular conditions upon which the sale was made. *Maze v. Gordon*, 96 Cal. 61.

And this is so for the reason that in order to make a valid ratification the principal must not have labored under a mistake or a misapprehension of the real nature of the facts, or have had reasonable grounds for such mistake or mis-

apprehension. *Halsey v. Monteiro*, 92 Va. 581, 583.

By ratifying the contract made by the broker with an intending purchaser, and accepting such purchaser upon the terms mentioned in such contract, the principal waives any objection that he might take upon the ground of the broker exceeding his authority. *Smith v. Schiele*, 93 Cal. 144, 149.

The failure of the principal to specifically object to the unauthorized terms of a sale made by a broker is not sufficient to entitle the broker to commissions. *Smith v. Keeler*, 51 Ill. App. 267, 268.

And a broker who is authorized to sell real estate will be entitled to his commissions on negotiating an exchange of the property, where his acts are not disavowed from, but are adopted by his principal. *Redfield v. Tegg*, 38 N. Y. 212.

Yet, it is only by an assent to the sale as made by the broker, or by availing himself of what the broker has done, that the principal can become liable to pay commissions. *Smith v. Keeler*, 51 Ill. App. 267, 268.

And if the broker negotiates a contract different from that prescribed by the principal, and the latter ratifies it, and the contract as finally made is satisfactory to the principal, the broker's claim is complete. *Gilder v. Davis*, 137 N. Y. 504, 20 L. R. A. 398. To the same effect *Keys v. Johnson*, 69 Pa. 42, 43; *Glentworth v. Luther*, 1 Barb. 145.

And if he deviates from the original price and terms, and consents to a modification thereof, and concludes a sale with the person procured by the broker, he ratifies the broker's departure from his instructions, and is liable for commissions. *Jones v. Henry*, 15 Misc. 151; *Levy v. Coogan*, 16 Daly, 137; *Gold v. Serrell*, 6 Misc. 124; *Goss v. Stevens*, 32 Minn. 472, 473.

So, if after a purchaser is introduced by the broker the principal negotiates with such purchaser and deviates from the terms given by him to his broker, and consents to a sale upon modified terms with the same purchaser, he ratifies the broker's acts, and cannot escape liability for commissions. *Levy v. Coogan*, 16 Daly, 137.

The ratification by the principal of the unauthorized sale made by a broker will relate back to the acts of the agent or broker, and be equivalent to a prior authority. *Goss v. Stevens*, 32 Minn. 472, 474; *Stewart v. Mather*, 32 Wis. 344; *Nesbitt v. Helser*, 49 Mo. 383.

And in case of a ratification the substituted terms become a part of the original agreement, and can be enforced as such, and the compensation will be measured thereunder. *Gelatt v. Ridge*, 117 Mo. 563; *Woods v. Stephens*, 46 Mo. 556; *Nesbitt v. Helser*, 49 Mo. 383.

And, even if the sale is not made in strict conformity to the original contract, although it may be more advantageous to the principal, still if ratified and approved by the principal, such fact will be equivalent to a prior authority to act, and will be equal to finding that the broker completed his part of the contract. *Nesbitt v. Helser*, 49 Mo. 383.

It is a general rule, founded on common sense and justice, that the law will imply both a request and promise by a principal, who, knowing all the facts, stands by consenting when it is his duty to object to services rendered for his benefit by his agent or broker; but that, in order to create liabilities, in the absence of an express request and promise to pay, the relation of the parties and circumstances under which the services are rendered must be such as to show, not only the services for the benefit of the persons receiving them, but that he knew, or had reasonable grounds to believe the person

rendering them expects to be paid therefor. *Villey v. Pettit*, 36 Ky. 576.

A deed executed by the principal to the purchaser, after the commencement of the suit by a real-estate broker to recover commissions, is good evidence to show a ratification by the principal of the broker's acts. *Gelatt v. Kidge*, 117 Mo. 553.

The acts of the members of a copartnership in the case of an option to a broker to dispose of real estate, and a sale in accordance therewith upon a consideration satisfactory to the parties as evidenced by their accepting notes and collecting them when due, amount to a ratification of the transaction as entered into by him, the broker. *Copp v. Longstreet*, 5 Colo. App. 282.

So, the act of the principal, who knew that a written contract of sale had been given the purchaser, in receiving his check in part payment, and retaining the same for about ten days, expressing satisfaction with the sale, until he discovered that he could not buy out a lease that was upon the premises, and that the land had advanced in value, when he returned the check, and sought to avoid the sale, will amount to a ratification of the contract which otherwise was invalid, as the purchaser was ready, able, and willing to pay the price agreed. *Lawson v. Thompson*, 10 Utah, 462.

In *Markham v. Washburn*, 45 N. Y. S. R. 683, it was conceded that the sale was made through the broker's instrumentality but the defendants denied the authority of their attorney to employ the broker, and to bind them by an agreement to pay commissions, but as the evidence showed a ratification of the broker's acts the court allowed him compensation for his services,—especially as the intention to ratify their attorney's acts was unequivocally manifested, and was apparent by a promise made by one of the defendants to pay a sum which the attorney had agreed should be paid the broker for his services.

But an authority to sell for \$900 in cash, and \$1,000 payable in one year, is not complied with by a sale for \$100 in cash, \$800 in thirty days, and \$1,000 in one year, where the sale is repudiated by his principal, as different from that which the broker was authorized to make. *Harwood v. Triplett*, 34 Mo. App. 273, 278.

And a contract by which a certain amount is to be paid within a given number of days, the balance to be secured by a deed of trust and note, is not a performance of an authority to make a sale upon specific terms of so much cash down, and the balance to be secured upon mortgage for a certain number of years with interest at a given per cent,—especially where the purchaser refuses to carry out such contract, and the principal has not ratified his broker's acts. *Hoyt v. Shipherd*, 70 Ill. 309, 311.

So, the ratification of a contract to pay commissions upon a sale at a specified sum, or any less sum to be fixed by the principal within a certain time upon his being paid a certain amount of the purchase price when the property is sold, or a purchaser found, under which a purchaser is found at a given sum, is not shown where the principal is informed by the broker that the sale is for a less sum, and so induces her to take a still less sum as net for the purchase money, as the supposed ratification of the sale is made in the absence of material information, and after the time specified in the original contract between the principal and the broker. *Ford v. Brown*, 120 Cal. 551.

But the conduct of the parties to an exchange may be such as will justify the jury in believing that the exchange of the deeds is an approval of the land received by his principal from

the party found by the broker and an actual transfer of the property of both parties, although there may be a conflict in the evidence as to whether or not the principal's contract with the other party was subject to a condition. *Quitzow v. Perrin*, 120 Cal. 255.

And evidence which shows that the broker failed to procure a valid written contract with the purchaser or to produce him to the principal, and that at the time the principal was notified of the sale the broker offered to bring the purchaser to him for the purpose of reducing the contract to writing, which the principal said was not necessary as he knew the purchaser, such acts will prove a waiver by the principal of the requirements imposed by law upon the broker, and entitle the broker to his commissions as upon a performance of the contract. *Gerhart v. Peck*, 42 Mo. App. 644, 651; *Following Hayden v. Grillo*, 35 Mo. App. 647.

XII. Position of purchaser found.

It may be asserted, in connection with the question of the broker's performance of his contract with his principal that the general rule as to the position of the purchaser found by the broker is that the purchaser produced must be of sufficient financial responsibility. *Birmingham Land & Loan Co. v. Thompson*, 66 Ala. 146, 149; *Sayre v. Wilson*, 86 Ala. 151, 156; *Phelan v. Gardner*, 43 Cal. 306; *Waterman v. Bothinghouse*, 82 Cal. 650; *Dolan v. Scanlan*, 57 Cal. 261; *Anderson v. Smythe*, 1 Colo. App. 253; *Lawrence v. Weir*, 3 Colo. App. 401; *Buckingham v. Harris*, 10 Colo. 455; *Finnerty v. Fritz*, 5 Colo. 174; *Smith v. Fairchild*, 7 Colo. 510; *Owl v. Canon Gypsum Co. v. Ferguson*, 2 Colo. App. 219, 221; *Carson v. Baker*, 2 Colo. App. 248; *Hildebrand v. Lillis*, 10 Colo. App. 522; *Schmidt v. Keeler*, 63 Ill. App. 487, 489; *Swigart v. Hawley*, 40 Ill. App. 610, 611; *Wilson v. Mason*, 158 Ill. 304; *Foster v. Wynn*, 51 Ill. App. 401, 402; *Carter v. Webster*, 79 Ill. 435; *McConaughy v. Mahannah*, 28 Ill. App. 169; *Adams v. Decker*, 34 Ill. App. 17; *Monroe v. Snow*, 131 Ill. 126, 130; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Lawrence v. Atwood*, 1 Ill. App. 222; *Slevens v. Griffin*, 14 Ill. App. 63, 66; *Beardon v. Washburn*, 59 Ill. App. 161; *Barnett v. Gluting*, 3 Ind. App. 415; *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447, 448; *Learned v. McCoy*, 4 Ind. App. 238; *Cox v. Haun*, 127 Ind. 325; *Fischer v. Bell*, 61 Ind. 243; *Love v. Miller*, 53 Ind. 204, 21 Am. Rep. 192; *Greusel v. Dean*, 98 Iowa, 405, 407; *Cassady v. Seeley*, 69 Iowa, 509, 510; *Garcelon v. Tibbets*, 84 Me. 148; *Jones v. Adler*, 34 Md. 440; *Kimberly v. Henderson*, 29 Md. 512; *Melvin v. Aldridge*, 81 Md. 650; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Scribner v. Hazeltine*, 79 Mich. 370, 371; *Cramer v. Miller*, 56 Minn. 52; *Cullen v. Bell*, 43 Minn. 226, 227; *Hamlin v. Schulte*, 34 Minn. 534; *Armstrong v. Wann*, 29 Minn. 126; *Francis v. Enker*, 45 Minn. 83; *Grosse v. Conley*, 43 Minn. 188; *Putnam v. How*, 39 Minn. 363; *Baars v. Hyland*, 65 Minn. 150; *Flower v. Davidson*, 44 Minn. 46; *Gauthier v. West*, 45 Minn. 102, 103; *Cartheart v. Bacon*, 47 Minn. 34; *Zeidler v. Walker* 41 Mo. App. 118, 121; *Smith v. Smith*, 1 Sweeney, 552; *Donohue v. Flanagan*, 28 N. Y. S. 757; *Moses v. Bierling*, 31 N. Y. 462; *Mooney v. Elder*, 56 N. Y. 236; *Barnard v. Monnot*, 3 Keyes, 203; *Lynch v. McKenna*, 59 How. Pr. 42; *Stillman v. Mitchell*, 2 Robt. 523, 537; *Holly v. Gosling*, 3 E. D. Smith, 262; *Chilton v. Butler*, 1 E. D. Smith, 150; *Doty v. Miller*, 43 Barb. 529; *Glentworth v. Luther*, 21 Barb. 145; *Gilder v. Davis*, 137 N. Y. 504, 20 L. R. A. 308; *Sibbald v. Bethlehem Iron Co.* 83 N. Y. 378, 22 Am. Rep. 41; *Condict v. Cowdrey*, 46 N. Y. S. R. 896; *Duclos v.*

Cunningham, 102 N. Y. 678; Diamond v. Hartley, 38 App. Div. 87; Levy v. Ruff, 4 Misc. 180; Mullenhoff v. Gensler, 39 N. Y. S. R. 441, 443; Hay v. Platt, 66 Hun. 488, 490; Felner v. Kobre, 13 Misc. 499, 500; Moses v. Heimke, 18 Misc. 357; Kalley v. Baker, 132 N. Y. 1; Fisk v. Henarie, 13 Or. 156, 161; Kock v. Emmerling, 22 How. 69, 16 L. ed. 292.

Under a contract to produce a purchaser, the broker is bound to show the performance of the contract of sale by the production of a contracting party capable of performing the contract. Phelan v. Gardner, 43 Cal. 306, 311; Davis v. Gassette, 30 Ill. App. 41; Metzen v. Wyatt, 41 Ill. App. 487; Iselin v. Griffith, 62 Iowa, 668, 670; Coleman v. Meade, 13 Bush, 358, 363; Kimberly v. Henderson, 29 Md. 512, 515; Keener v. Harrod, 2 Md. 63; Nesbitt v. Helser, 49 Mo. 383, 385; Hayden v. Grillo, 26 Mo. App. 289, 293, 35 Mo. App. 647, 42 Mo. App. 1; McGavock v. Woodlief, 20 How. 221, 227, 15 L. ed. 884, 886; Kock v. Emmerling, 22 How. 69, 16 L. ed. 292.

So, the purchaser produced must be solvent. Felner v. Kobre, 13 Misc. 499, 500; Christensen v. Wooley, 41 Mo. App. 53; Carpenter v. Rynders, 52 Mo. 278; Bailey v. Chapman, 41 Mo. 536; Love v. Owens, 31 Mo. App. 501; Gaty v. Foster, 18 Mo. App. 639; Nesbitt v. Helser, 49 Mo. 383; Hayden v. Grillo, 26 Mo. App. 289, 293.

The party found by the broker must be one capable of becoming the purchaser. Kimberly v. Henderson, 29 Md. 512, 515; Keener v. Harrod, 2 Md. 63, 56 Am. Dec. 706; McGavock v. Woodlief, 20 How. 221, 15 L. ed. 884.

He must possess the ability, and be in a condition to purchase. Iselin v. Griffith, 62 Iowa, 668, 670.

He must be one who is ready to buy. Knapp v. Wallace, 41 N. Y. 477.

So, the purchaser must be eligible. Coleman v. Meade, 13 Bush, 358, 360; Buckingham v. Harris, 10 Colo. 455; Finnerty v. Fritz, 5 Colo. 174; Smith v. Fairchild, 7 Colo. 510.

The purchaser must be satisfactory to the principal. Glenworth v. Luther, 21 Barb. 145; O'Connor v. Semple, 57 Wis. 243; Sayre v. Wilson, 86 Ala. 151, 156.

He must be one who is able to complete the sale. Green v. Dean, 98 Iowa, 405, 407; Wilson v. Mason, 158 Ill. 304.

The purchaser must be acceptable to the principal. Donohue v. Flanagan, 28 N. Y. S. R. 757; Anderson v. Smythe, 1 Colo. App. 253; Francis v. Baker, 45 Minn. 83, 84.

The purchaser must be one who will comply with the conditions fixed by his principal for the property proposed to be sold. Henderson v. Vincent, 84 Ala. 99; Buckingham v. Harris, 10 Colo. 455; Finnerty v. Fritz, 5 Colo. 174; Smith v. Fairchild, 7 Colo. 510.

The person produced must be a qualified purchaser. McLaughlin v. Wheeler, 1 S. D. 497.

The purchaser must be able specifically to perform the contract, or to answer in damages in case of failure. Hayden v. Grillo, 35 Mo. App. 647, 654; Chipley v. Leathe, 60 Mo. App. 15; Wright v. Brown, 68 Mo. App. 577.

If the broker produces a party who in binding form offers to purchase upon the principal's terms he has found a purchaser within the meaning of the agreement. Greene v. Hollingshead, 40 Ill. App. 195, 197.

And such position must exist even with respect to the time of performance of the contract by the purchaser found by the broker. Mullenhoff v. Gensler, 39 N. Y. S. R. 441; Watson v. Brooks, 11 Or. 271, 273.

In Levy v. Kottman, 8 Misc. 504, the plaintiff 44 L. R. A.

proved the finding of a purchaser on the defendant's terms who was willing to purchase, paid a certain amount of the purchase price, and was able to carry out the contract. The broker was therefore allowed his commissions.

And under a contract promising a broker a certain commission if he could get a certain price for the property, it was only necessary for him to show that he found a purchaser ready and willing to purchase upon the terms of the authorization. Martin v. Ede, 103 Cal. 157.

The financial position of the purchaser may become a question of fact for the jury upon the consideration of the question whether or not the broker has fulfilled his agreement so as to entitle him to commission, where the principal's terms are "ready cash" and are accepted by the purchaser who is afterwards unable to meet the same. Lemon v. Lloyd, 46 Mo. App. 452, 456. In that case, however, the undisputed evidence showed the purchaser to be a man of considerable means, abundantly able to pay ready cash as soon as the principal performed the condition precedent required of him by the contract, and that he was accepted by the principal.

The above doctrine is well exemplified by the case of Butle v. Baker, 17 R. I. 582, in which the question was whether it is enough to entitle a broker to his commission that he has produced a person as a purchaser, who is ready and willing to purchase upon the seller's terms, and that a contract has been entered into to that effect between the seller and the person produced, or whether it must also appear that the person produced is of sufficient pecuniary ability to make the purchase. The court stated that the production of a person as a purchaser is an implied representation by the broker to his principal that the party is able financially, as well as ready and willing, to purchase, especially where the case does not show that the principal has any previous knowledge of the purchaser, or exercised any independent judgment of his own concerning his ability to purchase and more so where in signing the receipt and thereby accepting the purchaser he relies, as he has a right to do, upon the implied representations arising out of the broker's duty under his contract. In this case it was contended that the signing of a receipt was a sufficient acceptance of the purchaser without reference to his financial ability.

The above case sustains the principles adopted by the court in Iselin v. Griffith, 62 Iowa, 668, 670, in which it is said: "Something more than a mere offer to purchase should be shown, such an offer might be made by one without means, or in any condition to comply with the terms of the same. An offer from such a one ought not to be considered as constituting the performance of the plaintiff's undertaking to negotiate a sale of land." It is also borne out by McGavock v. Woodlief, 20 How. 221, 15 L. ed. 884; Barnard v. Monnot, 3 Keyes, 203, 33 How. Pr. 440, 1 Abb. App. Dec. 108; Simonsen v. Kissick, 4 Daly, 143; Duclos v. Cunningham, 102 N. Y. 678; Kimberly v. Henderson, 29 Md. 512; Sievers v. Griffin, 14 Ill. App. 63; Leahy v. Hair, 33 Ill. App. 461; Zelder v. Walker, 41 Mo. App. 118; McLaughlin v. Wheeler, 1 S. D. 497.

This ruling is based upon the theory that the broker's duty to his principal requires him to give to the latter such knowledge as he possesses in relation to the purchaser's financial responsibility, or, if he has no such knowledge, to at least so notify his principal, before the principal enters into the contract of sale with the purchaser, in order that he may have an op-

portunity to investigate the matter for himself. *Butler v. Baker*, 17 R. I. 582.

In order to entitle the broker to claim commissions it is enough that the purchaser is the customer of the broker, and it is not absolutely essential that such fact should be known to the principal at the time, provided it absolutely exists as a fact. *Lloyd v. Matthews*, 51 N. Y. 124.

Yet, to be a producer the party presented must be a client or customer of the broker producing him, and not one then sustaining that relation to another broker under the same employment. *Tinsley v. Scott*, 69 Ill. App. 352.

It is not necessary, however, that the purchaser should have been previously known to the broker. *Gemunder v. Hauser*, 6 Misc. 210, 214; *Lloyd v. Matthews*, 51 N. Y. 124, 133.

And the mere fact that the purchaser produced and procured by the broker was himself acting on behalf of another will not affect the agent's right to commissions where such a party is ready, willing, and able to buy upon the terms prescribed by the principal. *Gelatt v. Ridge*, 117 Mo. 553.

The evidence, however, must show that the broker procured a buyer who was willing to enter into a definite contract to purchase the land, or was able to complete the purchase. *Hammond v. Mitchell*, 61 Ill. App. 144, 147.

So, an unqualified acceptance by the purchaser of the terms of sale which the broker was authorized to make by his principal must also be proved. *Hannan v. Fisher*, 82 Mich. 208, 213.

And the burden of proof unquestionably is upon the broker to prove the performance of the contract by showing that the purchaser whom he produced is not only ready, but also in a condition, to perform the contract on his part or to respond in damages for failing so to do, and if this is not shown the broker cannot recover. *Hayden v. Grillo*, 26 Mo. App. 289, 293; *Zeldler v. Walker*, 41 Mo. App. 118, 11; *Cook v. Forst*, 116 Ala. 395; *Balliey v. Smith*, 103 Ala. 643; *Plant v. Thompson*, 42 Kan. 664; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Hammond v. Mitchell*, 61 Ill. App. 144, 147; *Leahy v. Hair*, 33 Ill. App. 461; *Rees v. Spruance*, 45 Ill. 808, 310; *Iselin v. Griffith*, 62 Iowa, 668, 670; *Newton v. Ritchie*, 75 Iowa, 91, 93; *Dent v. Powell*, 80 Iowa, 456; *Francis v. Eddy*, 49 Minn. 447; *Satterthwaite v. Vreeland*, 8 Hun. 152; *Kirwin v. Barney*, 27 Misc. 181; *Gilder v. Davis*, 137 N. Y. 504, 20 L. R. A. 398.

And it rests upon him to establish the fact that he has procured for his principal a valid contract under which the principal can compel performance, and that this naturally implied that the person with whom the principal contracts is one who is able to perform, as his recovery must be *secundum allegata et probata*. *Norman v. Reuther*, 25 Misc. 161, 163.

And this upon the ground that it is a part of his undertaking to produce a person of sufficient financial ability. *Iselin v. Griffith*, 62 Iowa, 668; *Coleman v. Meade*, 13 Bush, 358; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Leahy v. Hair*, 33 Ill. App. 461; *Zeldler v. Walker*, 41 Mo. App. 118; *Wright v. Brown*, 68 Mo. App. 577.

The same principles apply in cases where the contract between the broker and the purchaser is verbal and incapable of being legally performed because it is obnoxious to the statute of frauds and perjuries. *Hutten v. Renner*, 74 Ill. App. 124; *Wilson v. Mason*, 158 Ill. 304.

Under an agreement that if the sale goes through and the broker gets the parties then in negotiation to give a certain price, he is to have a certain commission, it is not enough to en- 44 L. R. A.

title him to recover that he procures a purchaser who is accepted by the principals with whom they make a verbal agreement for the sale of the land, as the purchaser must not only be accepted and agree to purchase, but must also carry out the agreement unless prevented by the fault of the principal. *Paumly v. Head*, 33 Ill. App. 134.

And this is said to rest upon the theory that the pecuniary responsibility of the purchaser was or ought to have been known to the broker. *Iselin v. Griffith*, 62 Iowa, 668, 670, in which case the broker found a purchaser, but his principal had sold the land and was therefore unable to make a conveyance.

And the broker must show, not only that the proposed purchaser was willing to accept the offer, but also that he was ready, and able, on his part to perform all the terms of the purchase, even in a case in which the principal rejects the purchaser introduced by the broker. *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Wilson v. Mason*, 158 Ill. 304.

If the broker produces no evidence even tending to show that his proposed purchaser is financially able to make the purchase he cannot recover. *Zeldler v. Walker*, 41 Mo. App. 118, 121.

And a statement made by the purchaser to the principal, naming persons from whom he might inquire as to his financial standing, is not sufficient to prove that the broker has produced a person of sufficient financial ability to make the purchase where it is the only evidence thereof. *Ibid.*

Again, evidence which merely shows that the proposed purchaser orally agreed to buy, without proof of his ability to do so, is not sufficient to entitle the broker to recover. *Schmidt v. Keeler*, 63 Ill. App. 487, 489.

So, the mere fact that neither the readiness nor the ability of the purchaser to buy was disputed at the time, is not sufficient to bind the principal for the payment of commissions, especially where, by his pleading, the principal has denied every element of the broker's case, and there is no evidence that either the readiness or ability of the purchaser was ever admitted. *Ibid.*

And in such cases it is proper to ask the purchaser questions as to his state of mind, after he left the broker's office, concerning the purchase of the property. *McGuire v. Carlson*, 61 Ill. App. 295, 297; *Mansell v. Clements*, L. R. 9 C. P. 139.

Thus, evidence by the purchaser that when he left the broker his mind was not to purchase the property, and that he did not see him again, that he was in a quandary whether to purchase or rent, but practically abandoned the idea of purchasing, and such was the only interview or communication the broker had with such purchaser, is not sufficient to prove that the purchaser was ready and willing to purchase, nor is it strong enough to prove that such purchaser would have purchased had no further effort to sell to him been made by anyone. *McGuire v. Carlson*, 61 Ill. App. 295.

But where the purchaser testifies that he is ready to carry out the contract, the word "ready" implies that he is able, and willing to do so, especially where no question is made about it in the court below. *Smith v. Keeler*, 51 Ill. App. 267, 268; *Crouse v. Rhodes*, 50 Ill. App. 121; *Morton v. Lamb*, 7 T. R. 125; *Rawson v. Johnson*, 1 East, 203.

The purchaser may state that he was prepared, and filed plans and specifications, as such facts show a willingness to carry out the agreement,—especially when the principal has admitted that he was able to buy the property

and willing to do so. *Landsberger v. Murray*, 6 Misc. 605.

Where time is made the essence of a contract the broker must procure the contract with the purchaser within such time, and he cannot set up the fact that the purchaser would have completed the bargain if he had had a reasonable time for the examination of the title, as such a condition cannot be implied where the limit is definitely fixed by the term of the contract. *Watson v. Brooks*, 11 Or. 271, 273.

And where, upon the last day of the period limited for the payment of the residue of the purchase money by the purchaser and the delivery of the deed by the principal, the purchaser was not prepared to pay and take the deed, and asked for additional time in which to obtain the money, and the principal held himself in readiness to complete the sale on his part for four weeks thereafter, but the purchaser did not obtain the money and consummate the sale, the broker's claim for commissions was disallowed as he had not found a purchaser of sufficient pecuniary ability to consummate the sale. *Butler v. Baker*, 17 R. I. 582.

The same principle was involved in the case of *Mullenhoff v. Gensler*, 39 N. Y. S. R. 441, where the evidence showed that the principal's offer was to sell if the purchaser produced was ready to pay cash "the next morning," the purchaser found requiring thirty days in which to complete the sale, as the evidence was not sufficient to prove the performance of the contract by the production of a purchaser able to close the trade without delay.

In an action to recover money received by a broker on behalf of his principal, in which the broker made a counterclaim for commissions, evidence was admitted in the court below on behalf of the broker to show transactions and payments made by the purchaser at the time the contract of sale was made, for the purpose of establishing his ability to perform the contract, but upon appeal upon the ground that such evidence was wrongfully admitted, the court did not agree upon its admissibility, and therefore did not rule on the point, as the case was reversed upon another ground. *Dent v. Powell*, 80 Iowa, 456.

A complaint which fails to aver that the purchaser alleged to have been found by the brokers was ready, able and willing to carry out the alleged sale, or to aver facts showing a waiver by the principal of these requisites, is defective, and a demurrer based on those grounds will be sustained. *Sayre v. Wilson*, 86 Ala. 151.

And the question of the acceptance by the purchaser in a case where the evidence shows that the broker procured a purchaser, and, *inter alia*, that on the morning of the day definitely fixed as the limit such purchaser informed the broker that he would take the property, but wished the principal would take a mortgage on account of the purchase money, when the principal declared that such request let him out, and he would not sell, and persisted in his refusal, although the purchaser was willing to take the property anyhow and pay for it, and insisted upon the purchase and declared his willingness and readiness to pay as soon as the papers were prepared, is properly left to the jury, and it is for them to say whether the acceptance is conditional or absolute so as to constitute the finding of a purchaser ready, able, and willing to perform the contract. *Clendenon v. Pancoast*, 75 Pa. 218.

Other cases hold, however, that the burden of proving the financial ability of the purchaser is on the principal, on the ground that it is to be presumed, unless the contrary appears, that the person procured as a purchaser is solvent, 44 L. R. A.

and peculiarly able to make the purchase. Among these cases will be found *Goss v. Broom*, 31 Minn. 484; *Hart v. Hoffman*, 44 How. Pr. 168; *Simmonson v. Kissick*, 4 Daly, 143; *Cook v. Kroemeke*, 4 Daly, 268; *Buckingham v. Harris*, 10 Colo. 455; *Grosse v. Cooley*, 43 Minn. 188; *Crevier v. Stephen*, 40 Minn. 288.

In *McFarland v. Lillard*, 2 Ind. App. 160, 166, it is said that it is not always necessary for the broker to allege and prove the financial condition of the purchaser, as the same will often be presumed.

In most of these cases, however, the decisions are based upon the particular facts and circumstances therein shown, which may be taken as sufficient to relieve or shift the burden of proof from the broker to the principal.

In the case of *Hart v. Hoffman*, 44 How. Pr. 168, it was held that it was not necessary for the broker to prove that the party produced as a purchaser had the pecuniary ability to conclude the trade, as the purchaser upon being presented to the principal stated that he was ready to buy, and without making any inquiries or objection, the owner absolutely refused to sell, and under such circumstances no proof was offered or called on the subject, and it was presumed that the purchaser was able to close the sale. This case, however, must not be taken as intending to qualify the rule that the broker must produce a purchaser "of sufficient ability," as the broker's case, which involved the necessity of showing the production of a purchaser of pecuniary ability, was made out by a presumption of law in the place of testimony.

And a distinction may be drawn in the case of *Mullenhoff v. Gensler*, 39 N. Y. S. R. 441, in which the burden of proof was cast upon the broker, and the above case of *Hart v. Hoffman*, as the purchaser procured by the broker in the former case was not in a financial position to carry out the contract according to the terms given by the principal to the broker.

It may also be stated that in the case of *Hart v. Hoffman*, 44 How. Pr. 168, the point was not taken on the trial in the court below, nor was there any proof of the purchaser's insolvency, and the solvency or insolvency of the purchaser had nothing to do with the prevention of the sale, and the testimony showed that the broker's right to commission was never disputed, but, on the other hand, was always conceded, and solvency was *prima facie* established. The court stated that solvency, not insolvency, was presumed in the absence of proof to the contrary.

If the principal seeks to avoid his liability for commissions, upon the ground that the purchaser is not in a financial position to complete the contract, he must plead it specially and assume the burden of proving it, as such financial ability will often be presumed, and this is especially so where the principal has accepted the offer. *McFarland v. Lillard*, 2 Ind. App. 160; *Goss v. Broom*, 31 Minn. 484; *Cook v. Kroemeke*, 4 Daly, 486; *Hart v. Hoffman*, 44 How. Pr. 168.

In the case of *McFarland v. Lillard*, 2 Ind. App. 160, 166, it was conclusively shown by a special verdict that the principal repudiated the sale, not on account of the purchaser's financial ability, but because the principal's wife was dissatisfied. He had moreover accepted the purchaser's offer.

In *Cook v. Kroemeke*, 4 Daly, 486, the broker introduced two parties willing to purchase, with one of whom the principal made an appointment to meet at the broker's office, which he failed to keep and refused to execute a contract and also to sell, and gave no evidence of reason for doing so. The court held that it was for the principal to prove that the persons intro-

duced as purchasers were not able, peculiarly, to pay the price they agreed, or were willing to contract to give, and that until that was shown they were each presumed to be solvent and able to pay what they expressed a readiness to pay.

So in *Goss v. Broom*, 31 Minn. 484, it was to be presumed that the purchaser was solvent, and able to perform the obligations assumed by him under the contract, as the conduct of the defendant, disregarding the contract made with the purchaser, did not seem to have been affected by any consideration as to the responsibility of the latter.

Willingness on the part of the proposed purchaser to carry out the contract is evidenced by his executing a binding contract to that effect, and paying the purchase money. *Grosse v. Cooley*, 43 Minn. 188.

And the presumption of the purchaser's ability is strongest in a case where he enters into a binding contract with the principal, in the absence of evidence to the contrary. *Stewart v. Smith*, 50 Neb. 631.

So, the fact that the party found by the broker to carry out an exchange executed a formal contract to convey carries with it the legal presumption that he is able to perform his undertaking, and therefore the *onus* of proving the title offered, to be defective, is thereby shifted upon the principal, as the presumption is that, where one is in possession of property and is shown to be the beneficial owner, every instrument has been executed, and everything has been done to render his title legal. *Moskowitz v. Hornberger*, 20 Misc. 558, 560, *Affirming* 19 Misc. 429.

And so long as the purchaser procured by the brokers in a case of an exchange has a good title, they earn their brokerage when they produce him to their principal, and he offers to make a binding contract for the exchange. *Moskowitz v. Hornberger*, 20 Misc. 558, 563, *Affirming* 19 Misc. 429.

And upon an exchange of property in which the principal sought to be relieved upon the ground that the broker had misrepresented the amount of taxes payable on the property to be taken in exchange, but the principal had the tax bills before him at the time of the negotiations, and examined, or might have examined, them at that time, had he chosen to do so, the question of the defendant's condition to pay such taxes is immaterial so far as the plaintiff's right to recover commissions is concerned. *Mason v. Hinds*, 47 N. Y. S. R. 163, 166.

And a tender of the purchase money on the part of the purchaser is not necessary in order to entitle the broker to his commissions, when the principal has refused to recognize the contract made by the broker, and has repudiated the same. *Harwood v. Diemer*, 41 Mo. App. 49.

The question of the necessity of the tender of the purchase money, and of the pecuniary responsibility of the purchaser, as supporting the broker's claim when the contract is not fulfilled owing to the principal's default, etc., will be found discussed in *note* to *Brackenridge v. Claridge* (Tex.) 43 L. R. A. 593.

XIII. Effect of purchaser's default.

An oral agreement on the part of the purchaser of land is not a valid and binding agreement, and if under such a contract the purchaser refuses to complete the sale of the land without fault upon the part of the principal there is no performance of the broker's contract. *Smith v. Schiele*, 93 Cal. 144, 149; *Midleton v. Findla*, 25 Cal. 81; *Blood v. Shannon*, 29 Cal. 395; *Phelan v. Gardner*, 43 Cal. 311; *Nelson v. Lee*, 60 Cal. 555; *Phelps v. Prusch*, 83 Cal. 628; *Wilson v. Mason*, 158 Ill. 304; 44 L. R. A.

Whitney v. Cochran, 2 Ill. 209; *Hamlin v. Schulte*, 34 Minn. 534; *Farmly v. Head*, 33 Ill. App. 134, 136; *Christensen v. Wooley*, 41 Mo. App. 53; *Yoder v. White*, 75 Mo. App. 155; *Parker v. Walker*, 86 Tenn. 566, 569; *Gilchrist v. Clarke*, 86 Tenn. 583.

The inability of a party to an exchange to carry out the purchase by reason of a defective title according to the terms specified is a bar to the broker's recovery, as there is no performance of his contract. *Slemssen v. Homan*, 35 Neb. 802; *Zittle v. Schlesinger*, 46 Neb. 844; *Emens v. St. John*, 79 Hun, 99; *Norman v. Reuther*, 25 Misc. 161; *Barber v. Hildebrand*, 42 Neb. 400.

The broker's right may be defeated by the arbitrary refusal of the purchaser to comply with the terms, even though he might at one time express himself as able, ready, and willing to purchase. *Hildebrand v. Lillis*, 10 Colo. App. 522.

The failure of the purchaser to comply with the terms may be evidenced by his not keeping appointments, his departure from the state without notice, and without at any time manifesting any desire or offer to return, or to consummate the sale; and in such cases the broker cannot recover his commissions. *Ibid*.

Where the principal stands ready to perform the contract and to enter into a contract on the conditions authorized, and the party produced by the broker refuses to conform thereto by entering into a binding obligation, the broker has failed to effect the purpose of his employment, and he has not found a purchaser ready and willing to take on the agreed terms, and the principal is not liable for commissions. *Platt v. Kohler*, 65 Hun, 557, 560; *Feiner v. Kobre*, 13 Misc. 499, 600.

Under a contract to pay the broker when the purchaser pays the principal a certain amount on account of the price, and executes notes and mortgages for the balance of the purchase money, where the purchaser gives the notes and mortgages, but does not pay the stipulated amount, either at the time of making the deed or upon the giving of the notes, the failure by the purchaser to pay the money bars any claim by the broker for commissions, although the principal may extend the time of payment and use all reasonable means to procure the money. *McPhail v. Buell*, 87 Cal. 115. In this case the principal was compelled to take back the property.

And if the purchaser is only willing to make an option contract, and prefers under such a contract to forfeit a small sum paid upon the execution of the contract, rather than accept the property, and the contract is thereby made null, the broker cannot recover his commission as if an actual sale had been made or agreed upon. *Algier v. Carpenter Place Land Co.* 51 Kan. 718.

And the failure of the purchaser to pay ready cash under a contract calling therefor is a proper element of fact for the consideration of the jury upon the question whether or not the broker has so completed his contract as to entitle him to commissions. *Lemon v. Lloyd*, 46 Mo. App. 452, 456.

And if the person produced is able to purchase only by resort to an unfaithful device the broker has not earned his commissions. *Zittle v. Schlesinger*, 46 Neb. 844.

So, if the principal insists upon something which he has a right to insist upon as a condition of sale, to which the vendee refuses to assent and in consequence an enforceable contract is not entered into, the broker has not procured a complete meeting of the minds of both parties. *Bennett v. Egan*, 3 Misc. 421, 423.

Where the purchaser, the broker, and principal

pal met for the purpose of executing a deed and mortgage, but the purchaser refused to take the property unless a deduction in price was made, on the ground of a flaw in the measurement, which the principal refused to do, and returned the earnest money, the broker was not entitled to his commissions as the purchase was not completed owing to the fault of the purchaser, no valid excuse existing for his objection. *Sloman v. Bodwell*, 24 Neb. 790.

And where nothing was said relative to the kind of deed to be given, and the principal had a good title, but the purchaser refused to complete unless he had a warranty deed, which the principal refused, but offered a quitclaim deed in the usual form with special covenants, and the sale was not executed, the broker was not entitled to his commissions. *Garcelon v. Tibbetts*, 84 Me. 148.

If preliminary arrangements are made, and the parties agree upon the terms, and both parties are willing to take the property in exchange if the title to the land is valid, the right of the broker to his commissions depends upon the question of the title, and any defect therein warranting a refusal of the title will bar his recovery of commissions. *Emens v. St. John*, 79 Hun, 99.

And the mere fact that he obtains a party who signs a contract for the exchange or sale of property is not sufficient to support a claim for commissions, where the party so contracting has no interest in the property, which fact is known to the broker, and is not disclosed to his principal; and the fact that such party afterwards signed a contract for the purchase of the property to be given in exchange will not avail the broker. *Norman v. Reuther*, 25 Misc. 161.

Where there is a condition in the contract made by a broker with his principals on the exchange of land that a perfect title to land acquired must be shown by the abstract to be furnished for that purpose the party must be able to show the title the contract required, as in such a case the contract rested upon the title furnished by the abstracts. *Barber v. Hildebrand*, 42 Neb. 400.

And a broker is not entitled to recover his commissions in effecting an exchange where his principal has consented to take the property in exchange, and such assent is expressed in a memorandum signed by him, which calls for a formal contract upon a given date at a certain place, where the defendant attended at the agreed time and place, and was ready to execute such formal contract, but the other party did not appear, although the broker claimed that he had power to represent such party, and the defendant declined to consummate the exchange in his absence, in consequence of which the exchange fell through. *Feiner v. Kobre*, 13 Misc. 499.

But if the broker's right to commissions has already accrued, the fact that the parties have refused to carry out the contract will not affect his right to recover the same, where the purchaser found was of sufficient ability to carry out the transaction upon the terms stated. *Seymour v. St. Luke's Hospital*, 28 App. Div. 110, 122; *Knapp v. Wallace*, 41 N. Y. 479; *Kalley v. Baker*, 132 N. Y. 1.

So, if the principal and the purchaser are equally bound by a valid agreement for the sale and purchase of the property, the subsequent unwillingness to carry out the purchase on the purchaser's part cannot affect the validity of the agreement into which they have entered, and if the same has been brought about by the agent he has performed his undertaking. *Parker v. Walker*, 86 Tenn. 566, 570; *Watson v. 44 L. R. A.*

Brooks, 8 Sawy. 316, 319; Rice-Dwyer Real Estate Co. v. Ruhiman, 68 Mo. App. 503.

And the same is the case even though the contract is executory in form, and the principal refuses to complete performance thereof. *Wilson v. Mason*, 158 Ill. 304.

Upon the question of refusal of the principal to enforce performance of a valid contract, and the consequent release of the purchaser, see *note to Brackenridge v. Claridge (Tex.) 43 L. R. A. 593*.

And the broker's right to commissions in case of a valid written agreement for sale is not affected by the fact that the purchaser refuses to complete, on the ground that a lease contains certain covenants, as the contract of sale was mutually binding upon the parties. *Rosenberg v. Smith*, 25 Misc. 774.

If the broker is merely to find a purchaser, the fact that the terms of the contract between the principal and such purchaser include credit to be given the purchaser by the principal at his own risk will not of itself affect the broker's claim, on failure of the purchaser to pay or perform the contract accordingly. *Greene v. Hollingshead*, 40 Ill. App. 195, 197.

So, where a valid contract of sale is entered into between the principal and the purchaser, the broker's right to commissions is not defeated by reason of the default of such purchaser in making some of the payments on the property, and evidence tending to show such default is properly excluded in an action to recover such commissions. *Coles v. Meade*, 5 Pa. Super. Ct. 334, 335.

And the mere fact that, upon the purchaser's failure to make payments according to the terms of the contract, he is told by the defendant's attorney that "the matter is at an end" will not excuse the principal from liability for commissions where the plaintiff has effected a sale within the terms of his contract, and the defendant has kept the amount paid by the purchaser, and voluntarily given up the right to sue for the balance of the purchase money or to obtain a decree for specific performance upon a contract mutually binding between them. *Ward v. Cobb*, 148 Mass. 518.

The test, however, of the broker's right to recover commissions does not depend upon his procuring a contract that can be specifically enforced against the purchaser, but upon the question of his finding a purchaser able, ready, and willing to purchase upon the principal's terms. *McLaughlin v. Wheeler*, 1 S. D. 497.

Yet, the fact that the purchaser has declined to consummate the sale cannot be presumed, even though it may be conceded that he cannot be compelled to do so. *Crevier v. Stephen*, 40 Minn. 288.

The question of the effect of the principal's refusal or neglect to enforce a binding and enforceable contract against the purchaser will be found discussed in *note to Brackenridge v. Claridge (Tex.) 43 L. R. A. 593, 1 f.*

XIV. Failure of broker to report purchaser.

It would seem that in order to bind the principal upon a sale made by him to a purchaser found by the broker, the latter should notify the principal of the fact that the purchaser is a party whom he has found or procured.

The principal is entitled to know who the proposed purchaser is and with whom he is expected to enter into a contract, and so long as there is uncertainty as to the purchaser the broker cannot claim performance of his contract and demand his commissions. *Gerding v. Haslin*, 141 N. Y. 514, 519.

Where there is no special authority all that the real-estate broker is justified in doing under

his general authority is to find a purchaser, and notify his principal thereof, and he has no authority to conclude a sale in the first instance. *Hamilton v. Cutts*, 6 Mackey, 208, 219, 220; *Ryon v. McGee*, 2 Mackey, 17.

When the agent and the purchaser have come to an agreement as to terms and nothing remains to be done except to consummate the transaction, it is the duty of the agent to advise his principal what he has done, as it may be necessary to bring the parties together to complete the sale and effect the transfer. *Williams v. Bishop*, 11 Colo. App. 378.

If the broker has not the sole agency, there is an implied undertaking that he is to have his commission if the sale is made within a reasonable time and before his principal sells, and in such a case he must notify his principal of the purchaser found by him. *Darrow v. Harlow*, 21 Wis. 303, 94 Am. Dec. 541.

The broker's claim was refused where he had not the exclusive right to sell, and after he had found a purchaser, but before he had notified the owner thereof, the latter found and closed a sale with another purchaser. *Baars v. Hyland*, 65 Minn. 150.

And the same result followed in a case where the negotiations were had directly with the owner, who was ignorant of the fact that the purchaser had previously interviewed his agent, as the latter had not disclosed the fact. *Slevvers v. Griffin*, 14 Ill. App. 63, 66.

But where the negotiations which were begun by the broker were concluded by the principal himself, and the broker's services brought about the sale and were the efficient cause thereof, although it was not shown that the purchaser had informed the principal of his previous negotiations with the broker, the broker recovered his commissions, as it was not essential that the prior negotiations should be made known. *Graves v. Bains*, 78 Tex. 92, 95.

If, however, the broker has made the sale and then the principal repudiates the agent or puts it out of his power to complete the sale by a previous sale, the agent need not produce a purchaser, as the presumption is that the broker has obtained a written contract or can produce the purchaser. *Huggins v. Hearne*, 74 Mo. App. 86, 87; *Hayden v. Grillo*, 35 Mo. App. 455.

If, however, the purchaser is not presented by the broker as a customer procured by him, and the principal does not accept the broker's services as the basis of subsequent negotiations, and does not voluntarily modify the terms previously given, and there is no evidence of bad faith or attempt to evade the principal's responsibility to the agent, the broker cannot recover upon a sale subsequently made by his principal. *Cathcart v. Bacon*, 47 Minn. 34.

And where the broker does not report his conversations and negotiations with the proposed purchaser of the property, and never brings his principal an offer for the property, his right to commission will be denied upon a sale made by the parties themselves some two years afterwards. *Hay v. Platt*, 66 Hun, 488; *White v. Twitchings*, 26 Hun, 503.

XV. Acts held sufficient performance.

In *Scott v. Patterson*, 53 Ark. 49, the sale was effected through the broker's introduction of a purchaser to the principal, and he was entitled to his commissions as upon a performance of the contract.

If the broker has obtained an optional contract sanctioned by his employer he should at least receive his commissions upon the sum paid and forfeited by the purchaser. *Glider v. Davis*, 137 N. Y. 504, 20 L. R. A. 398.

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And if specific values are put upon separate properties, and a certain amount is paid in cash, such dealing constitutes a sale, and not an exchange, so that the broker can recover his commissions on a contract for a sale effected thereunder. *Thornton v. Moody* (Tex. Civ. App.) 24 S. W. 331.

The broker performs a contract to pay commissions for a purchaser at a specified price when the purchaser executes a written contract and pays earnest money, and the terms are satisfactory to the principal,—especially where the evidence does not show that such purchaser refused to carry out his bargain or was unable to do so. *Grosse v. Cooley*, 43 Minn. 188.

And the broker is entitled to his commissions in the absence of evidence showing some culpable act of his defeating his claim, where he obtains a purchaser, and the purchase price is agreed upon between the parties, and the broker draws up a contract at the principal's request which is executed by both parties, and the principal receives a sum on account of the purchase money. *Brown v. Helmuth*, 50 N. Y. S. R. 524.

In *Dexter v. McClellan*, 116 Ala. 37, compensation was allowed for services rendered by officers of a private corporation in procuring a sale to it of land, no fraud or other wrongful act being proved.

The broker was entitled to his commissions, which were a share of the profits, where he sold under an agreement that the net proceeds of the sale were to be divided between the principal and himself, and the broker procured a purchaser for the entire tract, who was accepted by the defendant, and satisfactory contracts were made. *Coward v. Clanton*, 122 Cal. 451.

And if the agreement between the principal and the broker does not prescribe how and when the consideration is to be paid, and the same is not cash, such fact will not defeat the claim of the agent for commission, where he has produced the purchaser to whom the sale is made for the price asked, upon terms acceptable and satisfactory to the principal. *Dreilback v. Rollins*, 30 Kan. 268.

The broker recovered commissions where the principal gave the broker a description of the property, mentioned the price he would take, and the commission for effecting the sale, and the intending purchaser got the description of the property and the price from the broker, and the purchase was made. *Alexander v. Breeden*, 14 B. Mon. 154.

If under a contract that the broker is to advertise the property for a year free of charge in case no sale is made, but if a sale is made within a year, either by means of such advertising or otherwise, he is to have a certain commission, the broker performs the contract on his part by advertising as agreed, and the principal disposes of the property within the time without any release by the broker, the broker is entitled to recover. *Cook v. Blake*, 98 Mich. 389.

In *Hipple v. Laird*, 189 Pa. 472, the broker's claim was allowed although the purchaser stopped payment of his check upon the principal's refusing to release him from the written agreement entered into between the parties, the principal admitting that the broker procured such purchaser who was at the time willing to proceed, and also the contract entered into.

In *Hann v. Weber*, 18 Misc. 746, the broker's evidence as to his employment, the procuring of a purchaser, and the principal's consent, was denied by the principal, but as the questions of fact were fairly submitted to the jury, and an error in the admission of certain deeds was cured by the judge's charge upon the principal's

request, the court affirmed the plaintiff's judgment.

And commissions are earned in a case where one of several owners of real estate with authority to sell writes the broker requesting him to sell at a stated price, when such broker, without formally accepting the offer, effects a sale, the terms of which are accepted; and in such a case it is sufficient if the letter written to such broker contains a statement implying the terms of sale. *Fisk v. Henarie*, 18 Or. 156, 164.

Under an agreement for commissions on a sale of all lands sold by the brokers in a given county with the owner's knowledge, and also for commissions on all sales made to persons living in a certain town within such county on account of the broker's influence in the county, commissions are earned, and payable on a sale made to one living in such town, no matter whether the owner has knowledge that he is a customer of the broker or not, and it is immaterial that no time is fixed in the contract, as the same is fixed by presumption of law. *Boyd v. Watson*, 101 Iowa, 214.

The broker becomes entitled to his commissions under a power of attorney (irrevocable for fifteen days) to sell for a given sum in United States gold coin, upon a certain commission, under which he makes a sale but receives a check in payment, where his principal, without objecting to the mode of payment, refuses to consummate the sale upon the ground of a prior sale by himself, as the principal ought to object to the manner of payment at the time. *Blood v. Shannon*, 29 Cal. 393.

So, where the principal expressly agreed to pay the broker a specified sum as commissions, if the negotiations between himself and the purchaser found were finally completed, and a sale was finally consummated on terms agreed upon by the parties thereto, the broker recovered the stipulated commissions. *Haug v. Haugan*, 51 Minn. 558.

The broker was entitled to recover for services rendered, where the principal instructed him to secure an option at once, and before he went home, but fixed no limit, and the broker secured the option accordingly, and a certain person was treated by both parties as the owner, and there was nothing to show that he was not so, or that the principal ever raised an objection upon that ground at the trial. *Giles v. Swift*, 170 Mass. 461, 462.

If under an agreement that if the broker finds a party to trade for certain land the principal will pay him a certain amount, the broker becomes entitled to his commissions, when he introduces a person with whom his principal makes a written agreement for the sale of the property, upon the execution of such agreement, even though the sale is never completed. *Pearson v. Mason*, 120 Mass. 53, 58.

The broker also recovered his commissions under a parol agreement that in case he found a market at an aggregate price of not less than a given sum the principal would sell the land for that price, and pay the broker for his services, one half of the excess which he could procure to be given over and above the said aggregate sum, where the broker found a purchaser at a greater price, although the principal refused to convey to the party so found, as he had sufficiently performed the contract to entitle him to recover. *Hague v. O'Conner*, 41 How. Pr. 287.

And where the broker found a purchaser willing, and ready, and in a situation to take the property on his principal's terms, but the latter had made a sale through another agent, the broker's acts amounted to complete performance 44 L. R. A.

of the contract, as no written contract binding his principal was called for by an authority to find a purchaser who would purchase at a price satisfactory to his principal. *Fox v. Rouse*, 47 Mich. 558.

Under a contract for commissions if his efforts brought purchasers directly to his principal, the broker became entitled upon evidence showing that he brought the attention of the purchasers to the property who examined the title, and that he urged the sale, and was the cause of his application to the owner, there being no evidence to show that the agreement had expired by its terms or by notice of revocation before the sale was made to such purchaser. *Heffner v. Chambers*, 121 Pa. 84.

Where the sale or exchange is to be subject to the approval of the principal the broker must show that the contract of sale made by him had the approval of the principal, and an instruction to the jury that if they found from the evidence that the principal agreed with the broker to pay him a certain commission for finding a purchaser at an agreed price, and offered to accept as part payment property of a certain character within a certain radius of a town, and that the property offered in part payment fulfilled the requirements, they should find for the broker notwithstanding the principal refused to consummate the sale, is error. *Goin v. Hess*, 102 Iowa, 140, 143.

So, where the principal subsequently raised the price and notified the agent thereof, who through a subagent introduced a purchaser at a still higher price, but the principal claimed to have taken the matter out of his hands and to have still further raised the price, of which latter fact the brokers contended they had no notice, the finding of the jury sustaining the broker's right to commissions, as the purchaser found was ready, able, and willing to complete, was upheld. *Traynor v. Morse*, 55 Neb. 595.

Where, after the broker, employed by one of several co-owners of land, had performed his undertaking, the defendant and his co-owners refused to sign the contract or conclude the sale, and the defendant testified that he was not authorized to sell the property, but the facts showed that he had induced the broker to act in the premises and procure a purchaser upon the specified terms, the court held he was bound to make the agreement good or be responsible for the consequence, and that the broker was entitled to commissions, as the co-owner must be regarded as insuring the broker against the consequence arising from the want of such authority, such as the loss of the commission earned. *Oliver v. Morawetz*, 97 Wis. 332.

In *Thornton v. Moody* (Tex. Civ. App.) 24 S. W. 331, the facts showed that the broker could not make a sale for all cash, and that the principal agreed to take part real estate, and the purchaser signed a contract which the principal refused to sign as he had a better offer, and the broker recovered his commissions as the evidence showed that if the original contract was abrogated so far as it demanded a sale for cash alone, there was nothing said or done to set aside the agreement to pay the commission agreed on in the first contract, as the only change was as to the mode of payment, the other stipulation of the contract being the same in both.

Under a contract with the broker to make a sale "for \$15,000, about one half cash," which is silent as to a sale for any larger sum, and also as to receiving more than one half of the price in cash, and as to the form in which that half of the price which was not required to be cash should be paid, the authorization to sell for about one half cash, was, as to the re-

mainder, merely a permissive stipulation for the benefit of the purchaser and of the broker, and a sale for "\$15,000 cash on delivery of the deed" is within the contract. *Witherell v. Murphy*, 147 Mass. 417.

And under an original authority to purchase the whole estate, the title to which belonged to different persons or estates and could not be procured all at once, where the evidence showed that the broker obtained an agreement to sell the whole estate and to give a warranty deed and did something in respect to securing a title, got a conveyance of an undivided third which his principal accepted, and finally got the title to the whole estate, the broker is entitled to go to the jury on the question whether his principal did not accept partial performance under such circumstances that he was bound to pay what the broker's services were reasonably worth. *Giles v. Swift*, 170 Mass. 461, 462.

In the above case it was contended that the proceedings were unavailing to secure the land, as it was not proved that the party owned or was authorized to convey, but as the evidence tended to show that the principal was aware of such person's relation to the property, and instructed his broker to get the best document he could, as he was satisfied that an agreement from him would be carried out, and such contract was sufficient to bind the party, the principal could not contend that such agreement was unavailing.

Again, the broker recovered his commission or compensation in a case where a principal agreed to remunerate the broker for a sale negotiated by his introduction, and the broker procured a purchaser after his principal had altered his position in the matter by becoming an administrator, as the contract was personal in its character, and the recovery depended upon the question whether the broker had established a contract as made, and not upon the question of ownership. *Moore v. Dalber*, 92 Mich. 402.

In *Woods v. Stephens*, 48 Mo. 555, upon the purchaser's objecting to the quantity of the land the principal agreed to sell him a portion thereof, and the broker drew up the papers and aided in the sale, which was consummated, and the broker recovered his commissions though the sale was for a part instead of the whole property, as such fact was not a variance sufficient to prevent recovery based upon the amount of the purchase money actually received.

If the broker shows that he advertised and that his agent took several persons to see the property with a view to purchase, talked upon the subject with others, among whom was the purchaser, who testified that he purchased the property from the principal in person, paid him money thereon and took possession, he establishes a case sufficient to warrant the jury in finding that he endeavored to sell, and that the principal made an agreement to sell to the purchaser, sufficient to entitle the broker to commissions under an agreement to pay an agreed sum "if it is sold to any party within a year from this date, or at any time thereafter before I have given you thirty days' notice in writing of my intention to withdraw the property from the market." *Chapin v. Bridges*, 116 Mass. 105.

The broker's claim was allowed where he called the property to the attention of the defendant with whom he had previously dealt both as broker in selling and buying property, took him to see it and at his request apparently disappeared from all further negotiations upon the defendant's assurance that "he was not buying or selling without him," but he thought he could "do better with the vendor 44 L. R. A.

himself," and that when he bought he would "pay the commission in full." In consequence of which statements he refrained from making any other or further efforts or endeavors to earn a commission from the vendor, who upon the concluding of the purchase was told that there was no broker's commission, and that he might fix the purchase price accordingly, as the defendant's promise to pay was supported by a valuable consideration, namely the forbearance of the broker to proceed further in the matter. *Abraham v. Goldberg*, 6 Misc. 43.

And the broker recovered commissions where he was employed to sell lands which the principal intended to buy at a foreclosure sale for an amount sufficient to pay off the debt, interest, and costs, taxes, and expenses, when the principal purchased, and the broker reported sales of about half the land amounting to less than the amount wanted by the principal, when the best part of the land remained unsold, with which sale the principal expressed his satisfaction and promised to execute the proper deeds. *Smith v. Patrick* (Tex. Civ. App.) 43 S. W. 535.

In *McAllister v. Welker*, 39 Minn. 535, the broker's commissions upon a sale to one ready and willing to purchase on the principal's terms were allowed, although the principal alleged that he relied upon the broker's representations, and signed the contract as a mere memorandum containing only a description of the principal's farm and the price at which he would sell it, and further that the signature was obtained through false and fraudulent misrepresentations made for the purpose of defrauding.

In *Dalley v. Young*, 37 N. Y. S. R. 903, the broker recovered commissions under a contract that the price was to be a given sum, where after the broker had informed the principal that the purchaser would not pay the price and the principal had refused to take less, but did not terminate the agency, the principal himself sold for a smaller sum to the same purchaser, saying that "as long as he was doing the business himself he would not have to pay any commissions," as the facts put the parties in a position in respect to the subject of the contract the same as if the principal had told the broker to sell to the party at the price he had himself sold, and that such view of the matter was corroborated by the acts of the parties themselves, inasmuch as the principal had subsequently promised to pay, and had offered a sum to the broker after he had sold the premises.

So, in *Wasmer v. Lean*, 32 Neb. 519, the broker recovered his commissions, as it was shown that the principal stated that unless the property was sold quick he would not stand by his agreement to sell at the price named, which remark was made to one who was acting for the plaintiff and by whom the purchaser was introduced to the principal and the agreement was concluded, and the purchaser's evidence also showed that he first learned of the property through the plaintiff; often had conversations about it with him; that plaintiff recommended it at different times, and that plaintiff was present at the time of the purchase; and that the contract of sale was agreed upon as stated by the other witness, and the sale was really consummated by the plaintiff.

In *Gibbons v. Sherwin*, 28 Neb. 146, 153, the construction of a receipt given by the broker in the principal's name which named the price; a certain amount which was to constitute the first payment to be made by a given date, or the sum paid and specified therein was to be forfeited; and stated that upon the payment of the first amount certain contracts were to be delivered on which specified payments were to be made, and that upon payment of the whole

a warranty deed was to be executed subject to a mortgage, with interest on the whole sum, was held to be a question of law for the court, and not for the jury uninstructed, and was construed as not a mere option to purchase, as its terms throughout were the terms of a purchase and sale subject to forfeiture in case of default, and was therefore evidence of a sale by the broker.

In *Hewitt v. Brown*, 21 Minn. 163, the broker recovered his commissions upon a written agreement which gave him the right to sell upon a certain price and on certain terms, or any such modified terms as the principal might accept, which was carried out by an exchange in which an estimate of the value of the property was made to which the principal agreed, as the contract might be held to include an exchange as well as a sale of the property, especially if assented to by the principal.

And the broker's commissions were allowed under a written agreement whereby the principal agreed to pay a stipulated commission if a sale was brought about by the influence of the broker within a limited time, or if a purchaser was introduced through his agency within such time, with a stipulation that if a purchaser was introduced through the agency of the broker, and a sale was afterwards consummated with such purchaser, the principal would pay commissions whether the time of the agreement had expired or not, where, during his agency, he introduced a purchaser to whom the principal sold, no matter whether the sale was ultimately consummated through his instrumentality or otherwise. *Williams v. Leslie*, 111 Ind. 70, 72.

In *Journey v. Tallman*, 8 Jones & S. 436, evidence which shows that the property was placed in the broker's hands upon commissions if sold with a distinct authority to offer it at a certain price, and that the broker brought his principal and the party who afterwards purchased by an exchange to a difference of \$2,000, in cash only, and that the broker and witnesses produced by him were present at the closing up of the agreement, is sufficient to support a verdict in the broker's favor, as the same is not a little in quantity or insignificant in relation to the merits of the issue, and establishes a *prima facie* case,—especially where the broker also testifies that his principal tells him that the matter was carried through on the basis that he had given the broker, as that fact of itself is sufficient to sustain his recovery, unless it is overthrown by a preponderance of evidence.

And a judgment in the broker's favor will be justified by evidence showing constant inquiries made at his office through his advertising and other efforts, and that by that means information relative to the property reached the purchaser either directly or from some other person who had information directly from the same source, and that the principal retained the broker and agreed to pay the commissions, and did not dissent from them when he was informed what they would be, and made frequent calls at the broker's office, and finally went there with the purchaser and requested the broker to effect an agreement for an exchange. *Redfield v. Tegg*, 38 N. Y. 212.

In *Burke v. Cogswell*, 39 Minn. 344, the broker recovered his commission upon evidence which showed the cancellation of the original contract of sale and a release by quitclaim deed by the purchaser and her husband and a later sale to the father of the purchaser through the agency of the husband, who received a less commission than that payable under the broker's contract, and possession of the premises by the purchaser originally proposed by the broker and her husband, as all the facts and circumstances 44 L. R. A.

indicated but one transaction commencing with the broker's efforts and terminating in a deed to the husband's father.

The court refused to disturb a judgment in the broker's favor where the correspondence between the parties established the authority to sell upon deferred payments so that there was enough paid down to guarantee a sale, the deferred payments to carry interest with no material time mentioned except that it should not exceed five years, the details in respect to the times and amounts of payment and the security to be given being left to a considerable extent to the broker's discretion, the only restriction being the cash payment, and the extent of the time five years, the fact that the broker agreed to furnish an abstract of title not affecting such contract. *Fuller v. Brady*, 22 Ill. App. 174.

In *Baird v. Gleckler* (S. D.) 76 N. W. 931, the real question for consideration was whether the principal's promise was unconditional or not, and a charge to the jury to the effect that the evidence did not show such a sale as would have bound a purchaser was error, as such question was wholly immaterial, as there was no suggestion of fraud or mistake.

So, where the facts showed, *inter alia*, that the purchaser was presented to the defendant and at the latter's request the parties were left together to arrange the details of the sale, and a contract was signed and the purchaser paid a sum of money as part payment, but the plaintiff was not present and took no part in the details, nor in the form or contents of the contract between the parties, and his evidence in the main was confirmed by that of the original broker, it was held to be error for the court below to direct the jury to find for the defendant. *Crevier v. Stephen*, 40 Minn. 288.

And commissions were said to be earned in *Harvey v. Hamilton*, 155 Ill. 377, *Affirming* 54 Ill. App. 507, under a contract by the principal to lease a building at a certain rent for the first year with the privilege of buying at a certain price, or, if the building should not be suitable, to donate a certain quantity of land for building purposes, for which the broker was to be allowed a third interest in 5 acres located near the said works, where the broker, with the principal's approval, procured a company to lease the factory for two years from a given date at a certain rental for the first year, and an increased rental for the second year with the privilege of a renewal of the lease for an additional term of three years, under which the company carried on business for five years with indifferent success, and then removed, as the construction of the contract did not lead to the supposition that a permanent location at the place indicated was meant, the word "location" as therein used applying to either of the results which the parties contemplated producing, as a location was secured when an accepted lessee of the factory was procured by the broker.

In *Cook v. Blake*, 98 Mich. 380, the broker recovered commissions where he was to advertise the property free of charge, provided the same was not sold within one year, but in case of a sale within one year from the date, either by that means or otherwise, the principal was immediately to pay the broker a certain percentage for such advertising, with a certain amount of the purchase price, and the percentage besides, although the defendant testified that before he made the exchange he told the broker he would not exchange if he expected commissions, and the broker stated he would not expect commissions if it was an exchange and no sale, when the broker showed in rebuttal that the principal falsely represented the trade as

an even one, and that there was no money consideration in it.

And he also recovered where a contract of sale was subject to a contingency that a certain institution shall consent to release a mortgage note, but there was nothing to indicate that such company was unwilling to give such release, or that the principal's position in relation to the contract was affected by such provision, as such fact did not relieve the principal from liability for the agent's commissions. *Ward v. Cobb*, 148 Mass. 518.

Where the broker was to be paid in full monthly until his full commissions were paid in proportion to a certain percentage of the gross earnings of the property received by the principal upon the purchase price for a given number of years unless the same was paid in full before such time where the contract between the parties was abrogated and a new one entered into in which the payment of commission was refused, it was held to be error for the court to charge in effect that the broker could not recover unless the jury found that in the usual course of business the purchaser would have fully paid the purchase price, and that the broker would have received the full amount of his commission but for the subsequent contract, as the broker had a right to have the contract continued in force for the full period of time mentioned, and to receive his percentage upon his principal's share. *Bishop v. Averill*, 17 Wash. 209.

In *Washburn v. Bradley*, 169 Mass. 86, the broker recovered, as the principal availed himself of his services to relieve him of his tenancy, and found a firm willing to become lessee thereof for a certain number of years at a certain rent, and obtained from the firm a covenant which was verbally accepted by the principal who arranged for his own release by the owner upon payment of a certain sum to which the owner assented to the terms proposed, and prepared a lease accordingly, which was not executed, when owing to difficulties a subtenant took a lease from the owner and the principal was released from his own tenancy upon the payment of the amount arranged, as it was the principal's concern to procure the cancellation of his own lease, and that such evidence justified a finding that the principal agreed to pay a full commission for inducing a satisfactory customer to engage to take the new lease, and also a finding that the broker had performed that service, although there was no evidence that the broker's customer became the tenant or took the lease, or that the owner was ever bound to become a party to such lease.

XVI. Acts held not to constitute performances.

A memorandum made and signed by a real-estate broker to authenticate a contract for the sale of land was held to be insufficient where, though it stated the price "cash," it referred to additional terms agreed on between the contracting parties not evidenced by writing but left in parol. *Lester v. Heidt*, 86 Ga. 226, 10 L. R. A. 108.

An action on a special contract to pay the broker the usual commissions for services in procuring a purchaser with a count on an account for "commissions for services as broker in getting a customer to purchase," will not lie where there is no proof of the sale of the property, or of an agreement for the sale thereof binding upon the purchaser. *Drury v. Newman*, 99 Mass. 256.

So, evidence which shows that the sale is a mere pretense, with no legal obligation resting on anyone, and that there is at the most a vague and indefinite understanding, will not 44 L. R. A.

support the broker's claim for commissions. *Huggins v. Hearne*, 74 Mo. App. 86, 87.

And, under a contract to pay commissions out of the first money received, a broker is not entitled to compensation when he finds a purchaser ready, willing, and able to purchase on the prescribed terms, unless there is a sale and a first payment made. *Lindley v. Fay*, 119 Cal. 239.

Again, the broker's claim was refused where the contract for an exchange expressly provided that the agreement was to be good "only if counsel approved of the contract," and it was not shown that such approval was ever obtained, and therefore by the terms of the contract it was null and void. *Halprin v. Schachne*, 21 Misc. 519.

The broker's claim was also refused where his contract with his principal was to procure a purchaser able, ready, and willing to purchase at a given price, and he procured a contract which was not binding by reason of a condition that it was to be void if certain payments mentioned therein were not paid within a given time. *Ramsey v. West*, 31 Mo. App. 676.

And, where a broker is employed to make an absolute and unconditional sale at a fixed price, a conditional sale relieving the purchaser of the obligation to complete on payment of a portion of the purchase price, although approved by the owner, will not amount to an acceptance by the latter, as a performance by the broker of his undertaking to make an absolute and unconditional sale. *Belger v. Bigger*, 29 Mo. App. 421, 427.

So, a contract to procure a cash purchaser at not less than a stated price is not performed by the production of a person willing to pay a certain amount for the option to purchase within a given time, which option is never exercised or a binding contract made; and in such a case the broker is not entitled to retain in his hands money paid to him on behalf of his principal for such option as commissions. *Gilder v. Davis*, 45 N. Y. S. R. 690.

And the performance of a contract to find a purchaser at a given price where no terms are specified, and in which the principal wrote the broker that there was a lease upon the property with seven years to run: "all else can be satisfactorily arranged,"—which contract is subsequently countermanded by the principal, is not shown by an offer from a proposed purchaser to buy upon the terms named by the broker provided the principal "will accept a certain sum down and take a mortgage" for the balance payable in a number of years, as the minds of the parties never met. *Forrester v. Price*, 6 Misc. 308, 309.

Again, performance is not shown where the purchaser secured is not willing to enter into an unconditional or absolute contract to purchase, and only enters into a mere option contract to be relieved of the engagement by forfeiting a sum of money paid by him. *Zeldier v. Walker*, 41 Mo. App. 118, 121; *Dwyer v. Raborn*, 6 Wash. 213; *Tousey v. Etzel*, 9 Utah, 329.

The same result followed where there was no evidence to present to the jury except proof of the receipt of a contract mailed by the proposed purchaser which did not contain an unqualified agreement to purchase, but one which by its construction only gave him an option to purchase at the price and terms named, after the receipt of which the principal withdrew his offer, as the broker had not brought the parties together in a completed contract of sale and purchase, or produced to his principal a purchaser able and willing to buy at the price and on the terms fixed. *Runyon v. Wilkinson, G. & Co.* 57 N. J.

L. 420, 424. In this case the purchaser cabled the principal: "Accept 370; half cash, half debentures. Contract mailed,"—and the price and terms described substantially agreed with those named in the offer, but the cablegram was qualified by the connection of the acceptance of the contract therein said to be mailed.

And a contract to pay a certain sum in so many days, the balance to be secured by a deed of trust and note, is a performance of his authority to sell upon specific terms of some cash down, the balance on mortgage for a given term at a certain percentage. *Hoyt v. Shipherd*, 70 Ill. 309, 311.

A contract to produce a purchaser the next day who has "cash" is not performed by the production of a party who is not able to conclude the sale for thirty days, but who has property enough to raise the amount at any time. *Mullenhoff v. Gensler*, 39 N. Y. S. R. 441.

Under a contract giving the broker all above a certain price which is net to his principal, the broker is not entitled to commissions upon a sale made at the net price by his principal to a purchaser introduced by the broker, where such broker originally informed the purchaser that he could purchase at the net price. *Beatty v. Russell*, 41 Neb. 321.

Where the only evidence of performance was that the broker produced a party who offered to take the property on a lease with the privilege of purchasing from the broker's principals, who were executors with no power to lease, provided all the heirs would sign the lease, the broker is not entitled to his commissions for finding a purchaser. *Woolley v. Schmal*, 5 Ohio C. C. 76.

Commissions were also refused in a case in which a broker made negotiations for a lease which his principal refused on the ground that one of the lessees was an infant and that his guardian could not make the lease. *Folsom v. Hesse*, 24 Misc. 713.

So, in a case in which the contract showed that the broker was to receive by way of commissions stock in a company to be formed for the purpose of purchasing the land, the broker failed to recover, as his contract was not completed, and the company or association under which he claimed never purchased the land. *Bowles v. Allen* (Va.) 21 S. E. 665.

In *Powell v. Blinney*, 54 Neb. 690, the broker's claim was disallowed, as the fact that a real-estate broker gave a memorandum in writing to one who thereon claimed rights as a purchaser, which memorandum recited that the proposed sale was subject to the approval of the owner of the property, was not sufficient to entitle him to recover,—especially as the entire evidence adduced in the case showed that there was a prompt disapproval of said terms when submitted to the owner.

And the fact that after the sale made by his principal he rendered some services to him by introducing him to a party to supervise his papers will not entitle him to recover, as such services are not to be "within the encompassment and drift" of his employment as a broker to find a purchaser, as they are not rendered so as to assist in the sale. *Dolan v. Scanlan*, 57 Cal. 261, 267.

So, where the agreement as admitted by both parties calls for "a sale", and not an exchange, the principal is not liable for the commissions upon an exchange, as the contract has not been fully performed, as the special terms show that a sale, and not an exchange, is to be made. *Menifee v. Higgins*, 57 Ill. 50, 52.

And the court refused the broker's commissions in a case where, under an authority to sell at a given price upon payment of a specified

amount in cash, he found a purchaser who offered to take the property at a large sum, on the terms the broker was authorized to give, except that a smaller amount than that named was paid in cash, and a well was to be put down which furnished a good supply of water, which offer the principal refused, as it was a material departure from the terms authorized sufficient to make the attempted sale of no effect. *Smith v. Allen*, 101 Iowa, 608.

In this case the mere fact that the broker intended to advance the difference in the cash amount of the offer made by the purchaser if the principal wished him to do so was held not to affect his position,—especially as he made no tender of the amount, and the proposed sale contained provisions which the broker was unauthorized to make.

So, the court refused the broker his commissions where he merely gave the owner the name of a party who had previously made an indefinite statement of his possible willingness to take and failed otherwise to find and produce a purchaser under the terms of his employment, as he was under no obligation to wait longer or indefinitely, and the broker had failed to negotiate a sale or exchange with such party, or even to get an offer from him. *Babcock v. Merritt*, 1 Colo. App. 84. In this case the owner subsequently sold to such party.

And where the broker did not procure the purchaser, or effect a sale, but only acted as intermediary in carrying propositions from one party to the other, his right to his full commissions was denied. *McMurtry v. Madison*, 18 Neb. 291, 293. In this case, however, the court intimated that if he rendered some service he might be entitled to some compensation upon a *quantum meruit*, and an instruction to the jury to that effect might not be improper.

Performance of a contract to procure an agreement for an exchange upon the principal's terms, or others acceptable to him, is not shown where the party introduced refused the offer, and proposed to exchange if the principal would remove an encumbrance, and after several interviews and continued negotiations for months neither would make any concessions, and the principal notified the broker that the effort to effect a trade was abandoned, and withdrew his offer, after which the other party put his property in the hands of other brokers. *Uphoff v. Ulrich*, 2 Ill. App. 399, 401.

And, a contract which provides that when the principal secures a deed conveying to him a certain interest in real estate he will pay the broker a given sum as commission, under which the principal agrees to purchase, does not provide that the commissions are to be paid *pro tanto* in proportion to the amount of purchase money paid. *Witte v. Taylor*, 110 Cal. 224.

And the court reversed a judgment in the broker's favor where he was to negotiate the sale of lots at a stipulated commission on the sale of each lot, and the matter fell through after the broker had sold only two lots, as the principal's wife would not join in the purchase deeds. *Hill v. Jones*, 152 Pa. 433.

So, the broker does not establish a case for the jury when his evidence does not show that the purchaser procured was able to comply with the terms, or that the principal knew his name until it was disclosed by the witnesses upon the trial. *Hayden v. Grillo*, 26 Mo. App. 289, 293.

In *Alden v. Earle*, 121 N. Y. 688, the court affirmed the order of the court below granting a new trial, as the compensation of the broker was contingent upon his effecting the lease, even though it was shown that his negotiations might have contributed to render the agreement actually entered into by his principal easier to con-

summate, no bad faith existing on his principal's part in making such contract.

And evidence which only shows that he had a purchaser in view to whom he showed the lots which the defendant was willing to take, and that a conference was had with the supposed owner and a price was agreed upon and the amount paid in cash, the title to be clear except as to the result of a pending suit, but the value of the goods to be taken in exchange was not determined by invoice, and the deal was abandoned as the party could make no title to the property and the defendant sold his stock,—does not establish the broker's claim for compensation, as the value of his services is not shown, and there is nothing upon which any compensation can be collected. *Freedman v. Gordon*, 4 Colo. App. 343.

In *Bull v. Price*, 7 Bing. 238, the agent as surveyor was to negotiate the sale of a reversionary interest, and the premises were sold to commissioners under the English Improvement acts, and a jury awarded a sum therefor, but the premises were charged with an annuity of which the defendant had not apprised the plaintiff, and the defendant declined to induce the annuitant to be a party to the conveyance to the commissioners, who thereupon paid the money into the bank. It was held that the money being still in the bank the plaintiff could not recover the commissions on a sale.

The broker's claim was refused where the sale fell through owing to a dispute about the description of the land which the principal was willing to convey "as center of a certain part," which description the purchaser refused to take as it made a difference of 2 or 3 acres, as his only authority was to sell according to the description by which it was conveyed to his principals. *Ward v. Lawrence*, 79 Ill. 295.

So, no performance is shown where there was no written contract to which his principal's assent is shown, nor any agreement for the same accepted by the principal, either verbal or written, or partly verbal and partly written, which the parties carry into effect,—especially where it is shown that such party was not able to perform the contract the principal assented to, and never contracted in a valid and binding form even had the title been in him and the lots been free from encumbrances. *Barnes v. Roberts*, 5 Bosw. 78.

Again, in *Yeager v. Kelsey*, 46 Minn. 402, the broker's claim for commissions was disallowed, as the purchaser was not bound by the instrument and assumed no legal obligation to purchase, although he examined the title but refused to accept the deed. The facts showed a negotiation and a payment to the broker as part of the purchase price, and an acceptance by the brokers of an instrument signed by them only with the designation "agents" added to their signature, which embraced a receipt for the money paid by the purchaser as part payment, stated the full price, and when the balance or first payment was to be made.

Under a contract providing to pay the broker a certain sum per acre on the sale of a tract of land whenever a sale of said land should be effected, or the same should be taken by legal proceedings, or the exercise of the right of eminent domain, and if the same should be sold or taken in parcels a proportionate part should be paid to the broker at the time each parcel was taken or sold, a sale of an undivided quarter interest of the premises is not a sale of a parcel of land within the meaning of the contract, which contemplates a joint conveyance of a part or the whole of the land, and a joint payment of commissions, and, in the absence of an express provision, to pay the broker his commis-

sions on the transfer of an undivided quarter, the broker is not entitled to his commissions upon it, the contract plainly meaning that when a joint sale of any portion or of the whole of the premises was made the principals were to pay commissions. *Johnson v. Silret*, 153 N. Y. 51, 53, 54, Reversing 83 Hun, 317.

In *Bradford v. Menard*, 35 Minn. 197, commissions were denied, as, under a contract to sell at a certain price net, one half down and the remainder within one year, for which the broker was to have whatever he could obtain in excess of that amount for his compensation, he procured a purchaser to enter into a written agreement for purchase at a larger sum, a certain amount to be paid down and the balance "paid in cash and mortgage" when the deed should be delivered, under which the purchaser tendered an amount in cash, and his notes for the balance, which together made the sum net to the principal, which agreement was incomplete and unenforceable against the purchaser, and the broker was only entitled to whatever the property should be sold for in excess of the net sum mentioned.

"Under a contract which completes a sale, or such a contract as may be fully enforced against the purchaser, an averment that the purchaser produced was willing to take the property on acceptable terms; that the broker brought the parties together; that they entered into a written agreement by the terms of which the purchaser was to pay a certain amount of money and convey real estate, the title to which was to be shown to be clear and free from encumbrances, and to be conveyed by warranty deed, and accompanied by abstract of title showing a clear title, will not support a claim for commissions, under the contract, where the abstracts furnished show no title. *Greusel v. Dean*, 98 Iowa, 405, 407.

A contract to pay certain amounts on a first and second mortgage then due, and the balance to the principal in cash on a given date, the broker to have the exclusive sale for twenty days, is not performed by procuring a purchaser to pay a certain amount in cash on the signing of the contract, and other amounts by assuming the first and second mortgages, and the balance on the date fixed, which mortgages were accompanied by the defendant's bonds, as the offer is one to sell to a purchaser who will assume the mortgages by absolutely paying and discharging them, although if the mortgages were not due the authority might be construed as authorizing a sale subject to them. *Schultz v. Griffin*, 121 N. Y. 294, 299.

In *Diamond v. Hartley*, 38 App. Div. 87, commissions were not allowed, as the proposed contract, although pronounced satisfactory by the purchaser's attorney, was never consummated, as one of the vendors required a clause to be inserted giving the option of allowing a certain portion of the purchase money to remain on mortgage, to which the purchaser's consent was disputed, and the principal refused to make a deduction in the price on account of discrepancy in the quantity of the property.

In a case in which the sale was contingent upon an allowance of a certain pension to the purchaser and his ability to make payments, and to pay the purchase money out of the pension when allowed, the broker's claim was disallowed as the purchaser did not receive the full amount of pension money and only paid a small amount to the defendant, and as the payment of purchase money to the defendant was the ultimate object to be attained, and not so much the sale of the land. *Cobb v. Kenner* (Tenn. Ch. App.) 42 S. W. 277, 278.

In *Moffatt v. Laurie*, 15 C. B. 583, 24 L. J.

C. P. N. S. 56, 1 Jur. N. S. 283, the plaintiff was to make no charge for laying out land for building purposes and making all necessary surveys and plans, but in the event of any of the land being disposed of he was to be appointed architect on his principal's behalf to see that the construction of the works were substantial, and the parties building on the land were to pay him a certain percentage on the outlay if they did not employ him as their architect, and if the principal or his executors wished to dispose of his services at any time, he or they were to remunerate him for the time, trouble, and expense he had been put to in making the said preparations. It was averred that the necessary surveys, etc., were made, that he incurred expense, and that the land was not disposed of according to the agreement, although a reasonable time had elapsed, and that after the death of the principal the defendants, who were his executors, dispensed with and wholly released and discharged the plaintiff. The court held the plaintiff could not recover for his trouble in surveying and making the plans, etc., as there was no cause of action, inasmuch as the event, on the happening of which alone he was entitled to recover remuneration for his services, namely the disposing of the land for building purposes, had not happened.

An answer in an action to recover compensation for services by a broker, which avers that the broker was employed to sell at the best price

he could obtain, and agreed to make a diligent effort to obtain the best price that could be obtained in the county or in that neighborhood, and that without making such efforts he sold at \$60 an acre when the land was really worth \$80 an acre, and he could have sold the same for the latter price if he had made an effort to do so, and that he knew the value of the land in that county, whereas the principal who lived in a remote county did not, and was compelled to, and did, rely upon the representations, judgment, and statements of the broker as to its value, constitutes a sufficient defense to the action for commissions. *Stuart v. Stumph*, 126 Ind. 580.

In *Wilson v. Alexander* (Tex.) 18 S. W. 1057, the broker's claim was disallowed upon testimony showing, *inter alia*, that after defendant was introduced to a party he saw another who agreed upon a trade which fell through, when he determined to work up a trade himself, and told another broker to see a party with whom a trade could likely be made, and that after some negotiations he made a trade with such party, and that he refused to pay commissions as the purchaser had paid them, and never admitted owing commissions to anyone; that he made the trade with the purchaser himself and was acting for himself in the trade, and that none of the plaintiffs had anything to do with such purchaser. E. W.

CALIFORNIA SUPREME COURT.

GRAHAM PAPER COMPANY, *Appt.*,

v.

S. J. PEMBROKE *et al.*, *Respts.*

(.....Cal.....)

An assignment of accounts and other choses in action to a purchaser in good faith, who obtains actual possession of them and immediately notifies the debtors, gives him a perfect legal title thereto as against a prior assignee to whom they were assigned for security, but who, without obtaining possession of them or giving notice to the debtors, left them with the assignor for collection.

(March 25, 1899.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendants in an action brought to establish title to the book accounts of the defendant corporation under an alleged assignment thereof as security for a debt. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Gordon & Young, for appellant:

The assignment was executed by the defendant, the Pacific Roll Paper Company, and it was not necessary to show that the board of directors ever authorized Mr. Corwin, as president, to make such assignment.

Bank of Columbia v. Patterson, 7 Cranch. 299, 3 L. ed. 351; *Fleckner v. Bank of United*

States, 8 Wheat. 338, 5 L. ed. 631; *New Athens v. Thomas*, 82 Ill. 259; *Sheffield School Trp. v. Andrews*, 56 Ind. 157; *Crowley v. Genesee Min. Co.* 55 Cal. 273; *Gillett v. Campbell*, 1 Denio, 522.

Usage and custom and the necessities and conveniences of business attach to certain corporate officers certain functions, independent of any express authority from the board of directors.

The president, as the chief executive officer of the corporation, may bind it by all acts, the performance of which is incidental to his office.

Spelling, Priv. Corp. § 193; *Castle v. Belfast Foundry Co.* 72 Me. 167; *Beach, Priv. Corp.* pp. 202, 203; *Morawetz, Priv. Corp.* § 538.

A general managing agent of a corporation is the representative of the corporation, and may do in the transaction of its ordinary affairs what the corporation itself could do within the scope of its powers; and such general managing agent may assign a chose in action of the corporation.

Greig v. Riordan, 99 Cal. 316; *McKiernan v. Lenzen*, 56 Cal. 61; *Sherman Center Town Co. v. Stigart*, 43 Kan. 292; *Waterman Corp.* § 30; *Siebs v. Hendy Mach. Works*, 86 Cal. 390; *Tuller v. Arnold*, 98 Cal. 522; *Pixley v. Western P. R. Co.* 33 Cal. 183, 91 Am. Dec. 623.

The authority of Corwin to make the contract is established from his admitted relations to the corporation; his authority may be inferred from the general manner in which he has been permitted to conduct the business.

Crowley v. Genesee Min. Co. 55 Cal. 273;

NOTE.—As to assignment of future accounts or earnings, see *note* to *Sandwich Mfg. Co. v. Robinson* (Iowa) 14 L. R. A. 126.
44 L. R. A.

Martin v. Webb, 110 U. S. 7, 28 L. ed. 49; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327; *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621; *Scott v. Johnson*, 5 Bosw. 213; *Merchants' Bank v. McColl*, 6 Bosw. 473; *Marine Bank v. Butler Colliery Co.* 1 Silv. Sup. Ct. 155; *Martin v. Niagara Falls Paper Mfg. Co.* 44 Hun, 132.

The assignment was a valid and binding transfer of the accounts and bills receivable mentioned in the instrument.

Kirk v. Roberts (Cal.) 31 Pac. 620.

An assignment of a debt is perfect as against subsequent assignees and attaching creditors, though no notice of the assignment has been given to the debtor.

Muir v. Schenck, 3 Hill, 228, 38 Am. Dec. 633; *Robinson v. Weeks*, 6 How. Pr. 167; *Lyman v. Cartwright*, 3 E. D. Smith, 118; *Bush v. Lathrop*, 22 N. Y. 549; *Baker v. Kenworthy*, 41 N. Y. 216; *Richardson v. Ainsworth*, 20 How. Pr. 531; *Countryman v. Boyer*, 3 How. Pr. 390; *Greentree v. Rosensstock*, 61 N. Y. 593; *Freund v. Importers & T. Nat. Bank*, 76 N. Y. 356; *Fairbanks v. Sargent*, 104 N. Y. 108, 56 Am. Rep. 490.

No particular form of words is necessary to create an assignment, so long as the intention to transfer is clearly indicated.

Silvey v. Hodgdon, 52 Cal. 363.

Messrs. John H. Dickinson and Henry E. Monroe, for respondents:

A corporation can only act—can only speak—through the medium prescribed by law, and that is its board of trustees.

Gashweiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; *Titus v. Cairo & F. R. Co.* 37 N. J. L. 98; *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 240.

The president of a private corporation has no authority by virtue merely of his official position to make contracts binding on the corporation, except in relation to matters arising in the ordinary course of business of the corporation.

Blen v. Bear River & A. Water & Min. Co. 20 Cal. 602, 81 Am. Dec. 132; *Blood v. Marcuse*, 38 Cal. 590, 99 Am. Dec. 435; *Bank of Healdsburg v. Bailhache*, 65 Cal. 331; *Perkins v. Ophir Silver Min. Co.* 35 Cal. 11; *Mulligan v. Smith*, 59 Cal. 225; *Bliss v. Kaweah Canal & Irrig. Co.* 65 Cal. 502; *Asher v. Sutton*, 31 Kan. 288; *Hoyt v. Thompson*, 5 N. Y. 320.

This assignment was not valid although all of the stock of the corporation was owned either by Mrs. Corwin or by Corwin.

Button v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131; *Gashweiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Stokes v. New Jersey Pottery Co.* 46 N. J. L. 238.

Plaintiff took no steps to perfect its title; hence the assignment, if otherwise valid, would not avail against a subsequent assignee who had given notice.

As between different assignees the one who first gives notice to the debtor will have the prior right.

1 Am. & Eng. Enc. Law, p. 840; *Dearle v. Hall*, 3 Russ. Ch. 1; note to *Row v. Dawson*, 2 White & T. Lead. Cas. *731; 2 Story, Eq. Jur. 13th ed. p. 367; *Loomis v. Loomis*, 23 Vt. 203; *Vanbuskirk v. Hartford F. Ins. Co.* 44 L. R. A.

14 Conn. 141, 36 Am. Dec. 473; *Bishop v. Holcomb*, 10 Conn. 444; *Judah v. Judd*, 5 Day, 534; *Woodbridge v. Perkins*, 3 Day, 364; *Williams v. Thorp*, 2 Sim. 257; *Loveridge v. Cooper*, 3 Russ. Ch. 30; 2 Pom. Eq. Jur. §§ 698, 701, 702, 712-714; *Spain v. Hamilton*, 1 Wall. 604; *Spain v. Brent*, 17 L. ed. 619; *Judson v. Corcoran*, 17 How. 614, 15 L. ed. 232; *Farmers' & M. Bank v. Farwell*, 19 U. S. App. 256, 58 Fed. Rep. 633, 7 C. C. A. 391.

Haynes, C., filed the following opinion:

The plaintiff and the defendant the Pacific Roll-Paper Company are corporations. On December 23, 1893, the Pacific Roll-Paper Company was indebted to the plaintiff in the sum of about \$15,000, due on merchandise accounts, and on that day T. J. Corwin, the president of said Pacific Roll-Paper Company, in the name of the corporation, by himself as president, executed to the plaintiff a written assignment of "all its book accounts and bills receivable, including all debts of every kind now due to said Pacific Roll-Paper Company from any person or persons, and the said Pacific Roll-Paper Company hereby agrees and covenants with the said Graham Paper Company to represent it as its agent henceforth in the collection of said bills and book accounts and debts, and reduce the same into cash as speedily as possible." This assignment was to be in satisfaction of the plaintiff's demand only to the extent that collections should be made. No statement of the accounts, bills receivable, or other debts embraced in said assignment accompanied it, nor was any statement thereof afterwards furnished the plaintiff, though demand was made for such statement about January 1, 1894, and afterwards a partial pencil memorandum was shown the plaintiff, but was retained by the assignor to be completed. On January 19, 1894, said Pacific Roll-Paper Company sold its property, assets, and goodwill, including the accounts and other demands so assigned to the plaintiff, to defendant S. J. Pembroke, for the sum of \$23,500, part of which was paid in cash (\$6,853), and the remainder in notes; and the answer alleged that no part of the purchase price consisted of debts due or owing from or by the vendor, that the purchaser immediately gave notice to all persons whose names appeared upon the books of the vendor as owing said Pacific Roll-Paper Company of the assignment and transfer of said accounts, and that said defendant had no knowledge or notice of said assignment to the plaintiff. The relief demanded by the plaintiff is, in substance, that it be adjudged to be the owner of said accounts and demands, that a receiver be appointed, for an accounting, that plaintiff have access to the books, and that defendants be enjoined from collecting any of the accounts that were in existence and unpaid on December 23, 1893, and for other relief. At the conclusion of plaintiff's evidence in chief the defendants moved for a nonsuit upon the grounds: (1) That it was not shown that the assignment to plaintiff was executed by the corporation, or that the directors ever authorized the

president to make it; and (2) that no steps were taken by the plaintiff to perfect the assignment, or to act under it, and that no attempt was made to reduce the accounts to possession. Said motion was granted, and from the judgment entered thereon and an order denying plaintiff's motion for a new trial this appeal is taken.

The only questions made or discussed by counsel in their briefs are: First, whether Mr. Corwin, the president of the Pacific Roll-Paper Company, had authority to execute the assignment to plaintiff; and, second, if its execution was authorized by the corporation, was it valid as against S. J. Pembroke, the subsequent assignee, who was a purchaser of the same accounts and demands without notice of the prior assignment, and who immediately gave notice to the debtors of the assignment to her, and obtained possession of the books and accounts? If the second of these questions should be resolved against appellant, the first need not be considered. To complete the assignment of an account as against the debtor, it is universally conceded that the debtor must have notice, as otherwise his debt will be discharged by payment to the assignor; but whether the prior assignee must give notice to the debtor in order to protect himself against a subsequent assignee is a question upon which there is a conflict in the authorities. "It is a well-established rule in England that, as between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided that at the time of taking it he had no notice of the prior assignment." 2 Am. & Eng. Enc. Law, 2d ed. p. 1077. The reason of this rule is stated by Sir Thomas Plumer, M. R., in *Dearle v. Hall*, 3 Russ. Ch. 1, thus: "In *Ryall v. Rowles*, 1 Ves. Sr. 348, the judges held that in the case of a chose in action you must do everything towards having possession which the subject admits. You must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund. In the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person." The English rule has been followed by the Federal courts in this country. See *Judson v. Corcoran*, 17 How. 612, 15 L. ed. 231; *Spain v. Hamilton*, 1 Wall. 604, 624, *Spain v. Brent*, 17 L. ed. 619, 625; *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. ed. 704. In *Methfessel v. Atlantic Trust Co.* 35 U. S. App. 67, *Methven v. Staten Island Light, H. & Power Co.* 66 Fed. Rep. 113, 13 C. C. A. 362, it was held that, where two assignments of a chose in action, for valuable consideration, are made to different persons, the assignee who first gives notice of his claim to the debtor has

the prior right, though the assignment to him is later in date than that to the other assignee, if taken without notice. This proposition is also sustained in 2 Story, Eq. Jur. § 1035a; and in note 4, p. 339, *Foster v. Cockerell*, 9 Bligh, N. R. 332, 375, 376, is quoted at considerable length, stating what appears to us satisfactory reasons in its support. In 2 Pom. Eq. Jur. § 695, the same doctrine is stated, and at § 698 the learned author added: "Even where the rule concerning notice to the debtor or trustee has not been adopted, an assignee who had otherwise the priority may lose it through his laches, as against a subsequent purchaser in good faith and for value who has been injured by the negligence. . . . The questions as to priority of right may arise between the assignee and a judgment creditor of the assignor or a subsequent purchaser from the assignor. There is a clear distinction between these two claimants, since a judgment creditor only succeeds to the rights of his debtor, while a purchaser may acquire higher rights." See also Id. § 707. In 2 Am. & Eng. Enc. Law, p. 1077, notes 3, 4, Iowa, Missouri, Vermont, and Virginia are mentioned as supporting the English rule, and New Jersey, New York, and Texas as rejecting it. To the former list may be added Connecticut. See *Bishop v. Holcomb*, 10 Conn. 444, and *Foster v. Mix*, 20 Conn. 395.

Appellant cites a large number of New York cases in support of its contention, and it must be conceded that they sustain the general proposition that the prior assignee has the better right, though he has not notified the debtor. We think, however, that the doctrine announced by the English courts, and followed by our Federal courts and the state courts above mentioned, is based upon the better reason, and sustained by the weight of authority. Notice to the debtor not only protects the assignee against payment to the assignor, but against payment to the subsequent assignee; since the debtor, with notice of the prior assignment, would be no more protected by a payment to a subsequent assignee than he would by payment to the assignor; and besides, an intending purchaser of the accounts from the assignor would have it in his power to ascertain from the debtors, by inquiry, whether any prior assignment existed, and would thus be furnished with the only reasonable protection possible against fraud on the part of the assignor. There are, however, some special features which strengthen the case of defendant Pembroke, the second assignee. The plaintiff was a creditor of the assignor, endeavoring to obtain some security for its claim against the Pacific Roll-Paper Company. It left the accounts and choses in action in the hands and under the control of the assignor, as its agent, for collection. The defendant, Pembroke, is a purchaser, who not only took an assignment of the accounts and other choses in action, but obtained actual possession of them and immediately notified the debtors, and therefore obtained a perfect legal title, without notice of the prior assignment, and with no means of ob-

taining information of it otherwise than from the fraudulent assignor, who, by the sale and assignment, represented that it had good right to make the sale and assignment. The case of *Kirk v. Roberts* (Cal.) 31 Pac. 620, is not in point. There the defendant was the assignee in insolvency, and therefore stood in the shoes of the insolvent; while here the defendant is a purchaser in good faith and for value, without notice, and therefore stands in a better position than her assignor.

In the closing paragraph of appellant's brief it is said that plaintiff had a right of action for an accounting against the Pacific Roll-Paper Company as to what it had collected on the assigned accounts, and against defendant Pembroke for whatever she may have collected since the assignment to her and that it was, therefore, error to grant the motion upon the grounds stated. As to defendant Pembroke there was, as we have seen, no right to an accounting; and as to the Pacific Roll-Paper Company there was no evidence that it had made any collections. The court would certainly not make an order requiring it to account in the absence of some evidence that it had made collections. Plaintiff called and examined Mr. Corwin as a witness, but did not ask for disclosures as to whether collections had been made; and, having rested its case, the court below could not assume that collections had been made, nor can we. Under these circumstances it does not appear that appellant has been prejudiced.

Numerous exceptions were taken to rulings on the admission and rejection of evidence. None of them are discussed in the briefs. Most of them relate to the authority of the president of the defendant corporation to make the assignment to the plaintiff, which assignment, we have assumed for the purposes of the case, was the act of the corporation. None of the other rulings would have changed the result had they conformed to plaintiff's views. I advise that the judgment and order appealed from be affirmed.

We concur: **Gray, C.; Britt, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

John D. VAN VLECK, *Respt.*,

v.

BOARD OF DENTAL EXAMINERS OF CALIFORNIA *et al.*, *Appts.*

(.....Cal.....)

1. A writ of mandate cannot be issued to compel the board of dental examiners to indorse a diploma on the ground that it was issued by a reputable dental college, when the board has decided to the contrary, under Stat. 1885, p. 110, § 5, requiring

NOTE.—For power to review action of boards of dental examiners, etc., see *Iowa Electric Medical College Assn. v. Schrader* (Iowa) 20 L. R. A. 355, and note.
44 L. R. A.

ing the board to indorse such diploma "when satisfied of the character of such institution."

2. Allegations that a certain institution was a reputable college, and that sufficient evidence of that fact was at the command of a board of examiners to whom a diploma from that college was presented, and that the petitioner furnished evidence satisfactory to the board, are not sufficient to show that the board found those facts so as to make a petition for mandamus good on demurrer.

(March 29, 1897.)

APPEAL by defendants from a judgment of the Superior Court for Orange County granting a peremptory writ of mandamus to compel defendants to issue to petitioner a certificate entitling him to practise dentistry. *Reversed.*

The facts are stated in the opinion.

Messrs. W. F. Fitzgerald, Attorney General, W. H. Anderson, and J. W. Ballard for appellants.

Messrs. Knight & Harpham for respondent.

Van Fleet, J., delivered the opinion of the court:

This is a proceeding in mandate, commenced in the superior court, against the board of dental examiners of the state, and the individuals composing said board, to compel the issuance to petitioner of a certificate entitling him to practise dentistry, under the act of the legislature entitled "An Act to Insure the Better Education of Practitioners of Dental Surgery, and to Regulate the Practice of Dentistry in the State of California," approved March 12, 1885. Stat. 1885, p. 110. The court below gave judgment granting a peremptory writ, and defendants appeal therefrom, and from an order denying them a new trial.

Defendants demurred to the complaint or petition, upon the ground, among others, that it did not state facts entitling petitioner to the relief sought. The demurrer was overruled, and this ruling presents the only question which need be considered, since we are of opinion the demurrer should have been sustained. The petition, omitting the formal parts and much immaterial and redundant matter, is, in substance, that petitioner is the holder of a diploma of graduation regularly issued to him on April 2, 1894, by the American College of Dental Surgery of Chicago, Illinois, after a course of study therein and an examination for graduation as prescribed by the regulations thereof; that, desiring to practise his profession in this state, petitioner, on the 10th day of May, 1894, in pursuance of said act, presented to defendants his said diploma, and demanded that they indorse the same, and issue to him a certificate to that effect; that when said diploma was issued, and at the time of the application to defendants, said American College of Dental Surgery "was a reputable college, and there existed and was at the command of defendants sufficient evidence of such fact"; that with his application petitioner furnished "evidence satisfac-

tory to the defendants that he was the person named in said diploma, and that the same had been issued to him as stated in said diploma"; that defendants, "without any lawful right or excuse therefor, refused to indorse plaintiff's said diploma, or to issue to him the certificate provided for in said act." The act referred to, which underlies the proceeding, makes it unlawful for any person who is not at the time of the passage of the act engaged in the practice of dentistry to engage therein, unless he shall have obtained a certificate as thereafter provided. It authorizes the appointment of a board of examiners, to consist of seven practising dentists, "whose duty it shall be to carry out the purposes and enforce the provisions of this act." After providing for the Constitution and organization of the board and for the registration of all those practising dentistry in the state at the date of its passage, it provides: "Sec. 5. Any and all persons who shall so desire may appear before said board at any of its regular meetings, and be examined with reference to their knowledge and skill in dental surgery, and, if the examination of any such person or persons shall prove satisfactory to said board, the board of examiners shall issue to such persons as they shall find to possess the requisite qualifications a certificate to that effect, in accordance with the provisions of this act. Said board shall also indorse as satisfactory diplomas from any reputable dental college, when satisfied of the character of such institution, upon the holder furnishing evidence satisfactory to the board of his or her right to the same, and shall issue certificates to that effect within ten days thereafter. All certificates issued by said board shall be signed by its officers, and such certificates shall be prima facie evidence of the right of the holder to practise dentistry in the state of California." The further provisions of the act are not involved.

The contention of the attorney general, for appellants, is that the functions of the defendant board under the statute are judicial or quasi judicial, in that they involve the exercise of discretionary power,—the determination of facts from evidence; that the determination of such facts is exclusively and finally vested in said board; and that, therefore, while mandate will lie to require it to act, should it refuse, it will not require it to proceed to a particular conclusion; nor where it appears, as the complaint alleges, that it has acted and reached one result, can it be coerced by this writ to act differently. The correctness of these principles, if such be the proper interpretation of the powers vested in the board, is conceded by respondent, but respondent contends that the act will not bear such construction. His contention, in effect, is that the power vested in the board is largely ministerial, or clerical merely; that, while the board has certain discretionary power to pass upon the facts upon which its action is to be based, its determination of those facts is not final; that if the evidence presented to it is such that, in the judgment of the court, the board should have found in favor of the existence of the facts

authorizing it to indorse the certificate, it can be required to so find, and make such indorsement. We are unable to coincide with respondent's construction of the act. The whole theory upon which it proceeds, and the manifest purpose intended to be accomplished thereby, are against such construction. It is very evident, as indicated, not only by the title, but in the body, of the act, that the inducing consideration moving the legislature to its adoption was the protection of the public against the ills suffered at the hands of incompetent quacks, empirics, and other unqualified practitioners in this most important and essential branch of modern surgery and medical science. Until within a comparatively recent period, the practice of dentistry consisted of treatment largely, if not exclusively, of a mere mechanical nature, such as drawing, filling, and cleaning the teeth; and practitioners of the art were neither required nor expected to know anything of the pathological features or surgical necessities of those diseases which rendered their artisanship a necessity to man's relief and comfort. Indeed, the local dentist was frequently the village barber or leech, the watchmaker, or even the blacksmith,—any artisan possessed of a convenient, if not suitable, instrument, and the necessary strength to pull a tooth. In more recent years, however, the necessity for a higher and special education in the art and science of treating the teeth has become widely and generally recognized, and has given rise to a distinct, honorable, and numerous profession. Departments for the teaching of dental science and surgery have been added to the regularly established schools of medicine and surgery, while numerous special colleges of dentistry have sprung up. Many of the latter, unfortunately, as with similar institutions in other branches of learning, are more of a pretense than a fact; mere pseudo establishments, with an outward semblance of educational facilities and forms, but in reality but dishonest shams, gotten up to make money by dispensing, for coin and without requirements of learning, pretended certificates and diplomas of graduation, which give the holder an apparent standing and character in his profession, to which he is not of right entitled. The evil resulting from this abuse has become so pronounced as to have received very general recognition, and there are now to be found in most of the states statutes intended for its correction. The statute under consideration is one of these. As expressed in its title, its purpose is "to insure the better education of practitioners of dental surgery; and to regulate the practice of dentistry." It provides a board composed of expert practitioners, with power to examine and license those who have not graduated elsewhere, and to investigate and pass upon the reputability of schools and colleges issuing certificates or diplomas, and the right of the holders of such diplomas to their possession. The powers thus conferred are broad and comprehensive, and in some respects, at least, must in their nature be final. The judgment of the board, for instance, as to the qualification of an applicant for license

by examination, which is largely, if not wholly, discretionary, must of necessity be conclusive. *Keller v. Hewitt*, 109 Cal. 146. No one would question this. Is the power to pass upon the reputability of a college, or the right of a holder of a diploma, intended to be less discretionary or final? There is nothing in the language of the act in conferring the power to indicate it. The requirement is to "indorse, as satisfactory, diplomas from any reputable dental college, when satisfied of the character of such institution, upon the holder furnishing evidence satisfactory to the board of his or her right to the same." This implies quite as necessarily the exercise of judgment and discretion as in the examination of an applicant as to his fitness. It does not direct the board to act upon the presentation of certain specified evidence prescribed by the statute, but it requires the finding of the facts upon which their action is to be based from evidence which is to be "satisfactory to the board." If the statute required that the applicant make a prescribed showing in a particular manner, and that thereupon the board should indorse his certificate, it might with some reason be said that the act was more ministerial than judicial, and that, upon the prescribed showing being made, the board could not refuse to act. Such a case would be within the doctrine of *Wood v. Strother*, 76 Cal. 545, and *Stockton & V. R. Co. v. Stockton*, 51 Cal. 328, relied on by respondent, where the action of the tribunal depended upon a certain event, and, that event being shown to have in fact occurred, the adverse determination of the tribunal whose duty it was to act was held not so far discretionary as to conclude the question; the true test, as held in *Wood v. Strother*, being whether the determination of the tribunal "is intended by law to be final."

But here the question whether those facts which are to move the action of the board have been shown does not depend upon some specified piece of evidence fixed by the statute, but upon such facts as will satisfy the board. The whole question, in other words, as to the facts, is committed to its discretionary judgment; and that its determination in such a case is conclusive, and not subject to the mandatory control of the courts, there can be no doubt. In *People, Sheppard, v. Illinois State Bd. of Dental Examiners*, 110 Ill. 180, where the statute made it the duty of the board to issue a license to a "regular graduate of any reputable dental college," having a full course of lectures and instruction in dental surgery, mandamus was sought to compel the issuance of a certificate to one who alleged that he held a diploma from a "reputable dental college," and that there was annually delivered at said college "a full course of lectures." In sustaining a demurrer to the petition, it is said: "Whether a college be reputable or not is not a legal question, but a question of fact. So, also, are the requirements in regard to the annual delivery of a full course of lectures and instruction. These questions of fact are by the act submitted to the decision of the board, not in so many words, but by the plainest and most necessary implication."

Their action is to be predicated upon the existence of the requisite facts, and no other tribunal is authorized to investigate them, and of necessity, therefore, they must do so. The act of ascertaining and determining what are the facts is in its nature judicial. It involves investigation, judgment, and discretion." And it was held that mandamus would not lie to control the discretion thus vested, and that no ground of relief was stated. Under a statute of Missouri providing for the issuance by the state board of health of a certificate to practise medicine to "all who shall furnish satisfactory proof of having received diplomas or licenses from legally chartered medical institutions in good standing," if the diploma be found to be genuine, and the person named therein be the one presenting it, etc., it was held that the board was vested with discretionary powers involving matters of judgment which could not be controlled by mandate; and that a petition alleging a state of facts which under the act should apparently entitle him to a certificate, but which showed that the application had been acted on by the board and denied, did not state a case for relief. *State, Granville, v. Gregory*, 83 Mo. 123, 53 Am. Rep. 565. To the same effect are *Williams v. State Bd. of Dental Examiners*, 93 Tenn. 619, and *State, Powell, v. State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575. See also *Berryman v. Perkins*, 55 Cal. 483; *Jacobs v. San Francisco City and County Supers*, 100 Cal. 121; *Fairchild v. Wall*, 93 Cal. 401.

The facts alleged do not bring the case within the doctrine of *Keller v. Hewitt*, 109 Cal. 146, relied on by petitioner. In that case the board of education had examined Keller for a teacher's certificate, and, as alleged in the petition, had found that he was in all respects qualified, and in every way fit and competent, to receive a certificate; but the board had, nevertheless, determined not to issue it. We held that, upon these facts, the writ would lie to compel the issuance of the certificate; that notwithstanding the board's discretionary power in determining the question of fitness, "when under the law and their rules, the question of an applicant's fitness to receive a certificate has been determined in his favor, the limit of the board's discretionary functions in the premises has been reached, and a plain legal duty results." In the present case the tribunal has acted, and has determined against the petitioner. The allegations that the American College of Dental Surgery "was a reputable college, and there existed and was at the command of defendants sufficient evidence of such fact," and that petitioner furnished "evidence satisfactory to defendants that he was the person named in said diploma," are not the legal equivalent of an allegation that the defendant board have so found. In the language of the court in *People, Sheppard, v. Illinois State Bd. of Dental Examiners*, 110 Ill. 180, on this precise point: "The demurrer here does not admit that the board of dental examiners found that the college at which the relator was graduated was reputable, although it does admit that to be

the fact. But, since the board cannot be compelled to decide the question that way, although the evidence might clearly sustain it in doing so, there is no ground for mandamus."

It follows that the petition states no cause of action, and the judgment and order must be reversed, and the cause remanded, with directions to sustain the demurrer. It is so ordered.

I concur: **Harrison, J.**

Garoutte, J., concurring:

I entirely agree with Mr. Justice Van Fleet as to the true construction of the legislative act here involved, but am compelled to dissent from the conclusion arrived at, to the effect that the petition does not state sufficient facts to entitle petitioner to the relief sought. At one stage of the proceedings the board of dental examiners has a pure ministerial duty to perform, viz. to indorse the applicant's diploma as satisfactory; and that stage of the proceedings is reached when the board is satisfied that the character of the institution issuing the diploma is that of a reputable dental college, taken in connection with the further condition that the holder of the diploma has also furnished "evidence satisfactory to the board of his or her right to the same." If the holder of the diploma complies with these two demands of the statute, then I say there is nothing remaining for the board of examiners to do but to indorse the diploma as satisfactory,—an act in no sense judicial, and one to compel the performance of which a mandate will issue. Eliminating from the allegations of the petition all immaterial matters, it still fairly shows a compliance with the two foregoing demands of the statute. It is alleged "that, at the time of making such presentation and demand, he (petitioner) furnished to defendants evidence satisfactory to the defendants that he was the person named in said diploma, and that the same had been issued to him as stated in said diploma." We also find the further allegation: "Plaintiff, on his information and belief, alleges that at the time defendants refused to indorse his

said diploma and issue said certificate, that the defendants, as such board of dental examiners, were satisfied the said college was a reputable college." The latter allegation is strictly in accordance with the terms of the statute, and the former, by a fair and liberal construction, is also sufficient.

Although holding the petition satisfactory in law, still plaintiff's troubles are by no means over. Allegations of fact are not difficult to make. Proof of the facts alleged is the final test of a meritorious case. And here proof of facts to fill the measure furnished by the aforesaid allegations of the petition is wanting. In the answers to the petition, the board denied that it was satisfied that the college issuing the diploma was a reputable medical college, and also denied that satisfactory evidence was furnished to it that petitioner was entitled to said diploma. Upon these issues evidence was introduced and, although findings of fact thereon were made in favor of petitioner, still in view of the construction of the statute, as declared in the main opinion, and in which construction I heartily concur, those findings of fact, as to one of the allegations at least, are without support in the evidence; and a reversal of the judgment necessarily results. The law delegated to the board of examiners the power to hear and determine certain facts, and its determination as to those facts was beyond review by the superior court. The question for the superior court to decide was not as to the correctness of the board's decision, but, rather, What did the board decide? The vitality of petitioner's case is found in the two allegations I have quoted from his petition; and, under the evidence introduced at the hearing before the trial court, it is a certainty that the petitioner did not furnish the board evidence satisfactory to it of his right to the diploma presented. It therefore follows that, as to one of the imperative demands of the statute, petitioner failed in his proof, and the relief asked for must be denied. For these reasons, I concur in the judgment.

Appeal dismissed by counsel pending application for rehearing.

INDIANA SUPREME COURT.

**PITTSBURG, CINCINNATI, CHICAGO,
& ST LOUIS RAILWAY COMPANY,
App't.,**

v.

**Anna B. MOORE, Admr., of Henry E.
Moore, Deceased.**

(.....Ind.....)

1. **Overruling a demurrer to a bad paragraph of a complaint** is not available error if the judgment rests on a good paragraph.
2. **An insufficient complaint which was**

tested by demurrer cannot be aided on appeal by reading into it a fundamental fact from the findings of the jury.

3. **An averment that a railroad yard and telegraph office were maintained "at" a certain city, in which there was an ordinance in force regulating speed and signals of trains, and that a telegraph operator was killed while passing from his office to deliver an order to a train in consequence of negligence in running a train in violation of the ordinance, sufficiently shows that the place of injury was within the corporate limits of the city.**

NOTE.—As to contracts of railroad relief associations, see also *Owens v. Baltimore & O. R. Co.* (C. C. S. D. Ohio) 1 L. R. A. 75, and *note*; *Baltimore & O. Employees' Relief Assn. v. Post* (Pa.) 2 L. R. A. 44; *Donald v. Chicago, B. & 44 L. R. A.*

See also 44 L. R. A. 645.

Q. R. Co. (Iowa) 38 L. R. A. 493; *Pittsburg, C. C. & St. L. R. Co. v. Cox* (Ohio) 35 L. R. A. 507; *Kinney v. Baltimore & O. Employees' Relief Assn.* (W. Va.) 15 L. R. A. 144; and *Eckman v. Chicago, B. & Q. R. Co. (Ill.)* 38 L. R. A. 750.

4. The violation of an ordinance regulating speed and signals of trains is not a risk assumed by a railroad employee, but obedience to the ordinance is a duty owing by the railroad company to its employees.
5. A contract that a railroad company shall be relieved of liability for the injury or death of an employee by the acceptance of benefits from a relief fund which the railroad company helps to provide, but leaving the employee or those entitled to maintain an action for his death the option of choosing the benefits of the relief fund or bringing an action against the company, does not violate Acts 1893, chap. 180, p. 294, § 6, prohibiting contracts to relieve railroad companies from liability to employees.
6. A widow's release of a right of action for the death of her husband does not affect her right to maintain an action for her child in her representative capacity, under Burns's Rev. Stat. 1894, § 285 (Horner's Rev. Stat. 1897, § 284).

(March 30, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Miami County in favor of plaintiff in an action brought to recover damages for alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. N. O. Ross and G. E. Ross, for appellant:

The act of March 4, 1893, regulating the liability of railroad and other corporations other than municipal to their employees in certain cases (Acts 1893, p. 294; Horner's Rev. 1896, §§ 5205s-5206v; Burns's Rev. 1894, §§ 7063-7087), is unconstitutional and void for the following reasons: (a) It violates § 23, art. 1, of the Constitution of the state of Indiana; (b) it violates § 23, art. 4, of the Constitution of the state of Indiana; (c) it violates the 5th Amendment to the Constitution of the United States; (d) it violates § 1 of the 14th Amendment of the Constitution of the United States.

Cooley, Const. Law, 391, 434; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Re Grice*, 79 Fed. Rep. 627; *Vanzant v. Waddel*, 2 Yerg. 270; *State, McCue, v. Ramsey County Sheriff*, 48 Minn. 236; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249; *Nichols v. Walter*, 37 Minn. 264; *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Santa Clara County v. Southern P. R. Co.* 18 Fed. Rep. 385; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24; *State, Randolph, v. Wood*, 49 N. J. L. 85; *Edmonds v. Herbrandson*, 2 N. D. 270, 14 L. R. A. 925; *Lodi Twp. v. State*, 51 N. J. L. 402, 6 L. R. A. 56; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766; *State, Richards, v. Hammer*, 42 N. J. L. 436; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931; *Frorer v.* 44 L. R. A.

People, School Fund, 141 Ill. 171, 16 L. R. A. 492; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257; *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 109, 50 Am. Rep. 636; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *People v. Gillson*, 109 N. Y. 389; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *State v. Divine*, 98 N. C. 778; *People, Manhattan Sav. Inst., v. Otis*, 90 N. Y. 48; *State v. Fire Creek Coal & C. Co.* 33 W. Va. 188, 6 L. R. A. 359; *Smith v. Louisville & N. R. Co.* 75 Ala. 449; *Godcharles v. Wigeman*, 113 Pa. 431; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325; *Ramsey v. People*, 147 Ill. 380, 17 L. R. A. 853; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702; *Tiedeman, Pol. Power*, pp. 4, 233; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 836; *San Antonio & A. P. R. Co. v. Wilson* (Tex. App.) 19 S. W. 910; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445; *Coa v. Pittsburgh, C. C. & St. L. R. Co.* 1 Ohio N. P. 215; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 660; *Warren v. Charlestown*, 2 Gray, 84; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Poindester v. Greenhow*, 114 U. S. 270, 29 L. ed. 185; *Com., Fertig, v. Patton*, 88 Pa. 258; *State, Columbus, v. Mitchell*, 31 Ohio St. 592; *People, Lee, v. Chautauqua County Supers.* 43 N. Y. 10; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145; *State, Corwin, v. Indiana & O. Oil Gas & Min. Co.* 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758; *Logan v. Stogsedale*, 123 Ind. 372, 8 L. R. A. 58; *Griffin v. State, Griffiths*, 119 Ind. 520; *Mesheimer v. State*, 11 Ind. 482.

The agreement set up as a defense to the complaint in the second paragraph of answer was not void under § 5 of the above-named act, but was valid and constituted a good defense to the act for the following reasons: (a) It was not prohibited by said section for the reason that it was not a contract between appellant and the decedent, but a contract between the Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh and the decedent; and the act being in derogation of the common law should be strictly construed; (b) the contract was not an agreement to release appellant from liability for injuries that the decedent might sustain, but it provided a method of compensation otherwise than by suit, which, if accepted should be in full compensation for the damages sustained; (c) because the appellee, after the right of action accrued, had the right to elect which of the two methods of remuneration she would accept, and having accepted one was estopped from seeking further compensation by recourse to the other; (d) that § 5 of the above act contravenes the state and Federal Constitutions and is void.

Graft v. Baltimore & O. R. Co. (Pa.) 6 Cent. Rep. 633; *Fuller v. Baltimore & O. Employees' Relief Assn.* 67 Md. 433; *Com. v.*

Equitable Beneficial Asso. 137 Pa. 412; *Spitze v. Baltimore & O. R. Co.* 75 Md. 162; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127; *Owens v. Baltimore & O. R. Co.* 35 Fed. Rep. 715, 1 L. R. A. 75; *State, Black, v. Baltimore & O. R. Co.* 36 Fed. Rep. 655; *Martin v. Baltimore & O. R. Co.* 41 Fed. Rep. 152; *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492; *Vickers v. Chicago, B. & Q. R. Co.* 71 Fed. Rep. 139; *Otis v. Pennsylvania Co.* 71 Fed. Rep. 136; *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931; *Maine v. Chicago, B. & Q. R. Co.* (Iowa) 70 N. W. 630; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442; *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44; *Eckman v. Chicago, B. & Q. R. Co.* 169 Ill. 312, 38 L. R. A. 750; *Pittsburg, C. C. & St. L. R. Co. v. Coz*, 55 Ohio St. 499, 35 L. R. A. 507; *Ringle v. Pennsylvania R. Co.* 164 Pa. 529; *Lease v. Pennsylvania Co.* 10 Ind. App. 47; *Chicago, B. & Q. R. Co. v. Miller*, 40 U. S. App. 448, 76 Fed. Rep. 439, 22 C. C. A. 264.

If appellee was entitled to a judgment at all, she was entitled to recover but \$4,000 instead of \$8,000 and the judgment should be so modified.

The action was a survival action, and the right to remuneration was fixed on the death of the decedent. He having left a wife and one child at his death, each was entitled to one half of the amount recovered, and the child having died after its father, and before suit, the child's right did not survive but died with her.

Spitze v. Baltimore & O. R. Co. 75 Md. 162; *Vickers v. Chicago, B. & Q. R. Co.* 71 Fed. Rep. 139; *Seeley v. Citizens' Traction Co.* 179 Pa. 334; *Morris v. Great Northern R. Co.* 67 Minn. 74; *Vandervelden v. Chicago & N. W. R. Co.* 61 Fed. Rep. 54; *Barker v. Northern P. R. Co.* 65 Fed. Rep. 460; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442; *Kreuzen v. Forty-Second Street, M. & St. N. Ave. R. Co.* 38 N. Y. S. R. 461; *Schmidt v. Menasha Woodware Co.* 99 Wis. 300; *Gibson v. Western N. Y. & P. R. Co.* 164 Pa. 142; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645.

Messrs. Charles A. Cole, Nelson & Myers, Michael F. Mahoney, and McConnell & Jenkins, for appellee:

The contract or agreement alleged and set out in the second paragraph of answer is expressly prohibited by § 5 of the act of March 4, 1893.

A railroad company cannot contract in advance with its employees for the waiver and release of statutory liability imposed upon it; and a contract in contravention of such a statute is void.

7 Am. & Eng. Enc. Law, p. 863; *Kansas P. R. Co. v. Peavey*, 29 Kan. 172, 44 Am. Rep. 630; *Rose v. Des Moines Valley R. Co.* 39 Iowa. 246; *O'Neil v. Lake Superior Iron Co.* 63 Mich. 690; *Carlton v. Western & A. R. Co.* 81 Ga. 531; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471; *Roesner v. Hermann*, 8 Fed. Rep. 782.

The true measure of recovery is the pecuniary loss of those entitled to recover.
44 L. R. A.

The loss to his child of the father's care and training is one element of damages.

Howard County Comrs. v. Legg, 93 Ind. 523, 47 Am. Rep. 390.

The loss to the wife of a means of support in the service and assistance of her husband is one element of the measure of damages.

Howard County Comrs. v. Legg, 93 Ind. 523, 47 Am. Rep. 390; *Korraday v. Lake Shore & M. S. R. Co.* 131 Ind. 261.

In examining the verdict under a motion for a *venire de novo*, mere conclusions of law, mere evidence and findings, outside of the issues, will be disregarded; and if, when stripped of such improper matters, the verdict is sufficient to sustain a judgment for either party, a *venire de novo* will not be granted.

Evansville & T. H. R. Co. v. Taft, 2 Ind. App. 237.

Moore had the right to assume that appellant, in the operation of any and all trains that might have occasion to pass over its tracks, in front of the office at which he was employed, would observe all the rules of the company, as well as obey and respect the ordinances in force of the city of Logansport, upon the question of the operation of trains, within its corporate limits.

Madison & I. R. Co. v. Taffe, 37 Ind. 376.

A railroad company cannot escape liability for death of an employee killed while working on the track in the private grounds of the company by its train moving at a greater rate of speed within the city limits than allowed by an ordinance of the city, upon the ground that such ordinance was only for the protection of the general public.

East St. Louis Connecting R. Co. v. Eggmann, 170 Ill. 538; *Illinois C. R. Co. v. Gilbert*, 157 Ill. 354; *Bluedorn v. Missouri P. R. Co.* 108 Mo. 439; *Petty v. Hannibal & St. J. R. Co.* 88 Mo. 306; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 441.

The intestate's right of action against the appellant for bodily injuries died with him, and is forever extinct. It does not survive to his widow and child. There can be no recovery for their benefit, for the bodily injuries of the intestate. But the statute creates a new right of action founded upon a new grievance, namely, causing the death of the intestate, and it is for the injury sustained thereby, by the widow and child of the intestate.

Jeffersonville R. Co. v. Swayne, 26 Ind. 477; *Whitford v. Panama R. Co.* 23 N. Y. 465.

Inasmuch as the statute does not transfer the right of action to the party injured to his personal representatives, but gives a new right of action in which the damages are to be assessed only with reference to the injury resulting from the death to the beneficiaries, nothing can be allowed on account of the mental or physical suffering or other injury to the deceased.

Kansas P. R. Co. v. Cutter, 19 Kan. 83; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591; *Blake v. Midland R. Co.* 18 Q. B. 93; *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *McKee v. Market Street R. Co.*

59 Cal. 294; Booth, Street Railways, 555; Tiffany, Death by Wrongful Act, § 168; *Cherokee & P. Coal & Min. Co. v. Limb*, 47 Kan. 469.

Since a new right of action in favor of the widow and child of the intestate is created by the statute, and since his right of action perishes with him, and is forever extinct, he could not make any binding contract respecting such new right of action.

Jeffersonville R. Co. v. Swayne, 26 Ind. 484; *Doyle v. Fitchburg R. Co.* 162 Mass. 46, 25 L. R. A. 157; *International & G. N. R. Co. v. Hinzle*, 82 Tex. 623.

Hadley, J., delivered the opinion of the court:

Appellee brought this action to recover damages for the death of her husband, alleged to have been caused by the negligence of appellant. The complaint is in three paragraphs, to each of which a demurrer was overruled. The answer was in three paragraphs, a demurrer to the second of which was sustained. The reply to the third paragraph of answer was in three paragraphs, and a demurrer to the third paragraph thereof was overruled. The cause thus at issue was tried by the jury, which returned a special verdict assessing the plaintiff's damages at \$8,000. A judgment for \$8,000 was rendered in favor of the appellee. The action of the court upon the demurrers, and in overruling appellant's motion for a new trial, for a *venire de novo*, for judgment on special verdict, in arrest of judgment, and to modify the judgment, is separately assigned as error.

The principal facts covered by the complaint are as follows: On the 5th day of July, 1893, plaintiff's decedent, Henry E. Moore, entered the employ of appellant, as night operator, at its yard office in the city of Logansport, where and in which capacity he continued until February 16, 1894, when he received injuries resulting in his death; that on the fatal night, while engaged in discharging the duties imposed by his said employment, about 8:45 P. M., he had received by wire, and under directions of appellant had delivered, an order to the conductor and engineer of freight train No. 77, while the same was running west through the yards at a rate of 4 or 5 miles an hour; and when decedent turned from delivering said message, to return to his post of duty, and while in the line of duty, and without fault or negligence on his part, one of appellant's locomotive engineers, in the employ of appellant and in charge of appellant's locomotive drawing appellant's wreck train upon appellant's main track, so carelessly and negligently ran said locomotive and wreck train eastward through said yards, with the engine reversed, the tender in front, and so carelessly and negligently managed and operated said locomotive and train, without giving any warning, or displaying any light, or ringing a bell or sounding a whistle, and at a speed of 20 miles an hour, as to, and did, without warning and without notice to plaintiff's decedent, negligently run upon and over the body of plaintiff's decedent, 44 L. R. A.

causing his death. In the second paragraph it is further averred that Logansport is a city of 16,000 inhabitants, and at the time of the injury to plaintiff's decedent said city had ordinances in force requiring trains to be run through said city after sunset at a speed not exceeding 6 miles per hour, and that trains and locomotives being run backward, or with tender in front, should carry signal lights in front, and should be announced by ringing the bell and sounding the whistle, and that said engineer so in the employ of appellant, and so in charge of appellant's said locomotive and wreck train, negligently ran said locomotive and tender backward at a speed of 20 miles per hour, within the limits of said town, without ringing the bell or sounding the whistle, or displaying any signal light in front of said tender, in violation of said city ordinance. Appellee concedes that the complaint is grounded upon the first branch of the fourth clause of what is known as the "Coemployees' Liability Act" (Burns's Rev. Stat. 1894, § 7083), which reads as follows: "Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any . . . locomotive engine or train upon a railway."

Appellant's learned counsel first assail the complaint for failure to disclose in either paragraph some duty owing by appellant to the deceased that had not been performed, their contention being that all the perils pleaded were obvious and ordinary risks assumed by the deceased. When it clearly appears from the record that the judgment rests upon a good paragraph of complaint, the overruling of a demurrer to a bad paragraph is not available error on appeal. Therefore, without considering the sufficiency of the first paragraph of complaint, which is urged upon our attention, we pass to the second, which sets out the facts in greater detail, and to which the special verdict seems to have been especially directed.

Appellee insists that, if any fundamental fact is insufficiently alleged, we may read it into the complaint from the findings of the jury. This is not the law. When a pleading is tested by demurrer, it must stand or fall by its own averments. It can find neither weakness nor strength from other parts of the record. *American Ins. Co. v. Replogle*, 114 Ind. 1-7; *Cole v. Gray*, 139 Ind. 396-399; *Runner v. Scott*, 150 Ind. 441. There is no longer any ground for contention over the rule that an employee assumes all the obvious and ordinary perils incident to his employment, and we find nothing in the statute relied upon by appellee to lessen the degree of diligence and responsibility required of the servant for his own protection.

Looking, then, to the facts pleaded in the second paragraph of complaint, for unperformed duty of appellant to the deceased, it is first insisted that it does not sufficiently show that the accident occurred within the corporate limits of the city of Logansport. It is averred that appellant maintained yards, and a telegraph office therein, "at" the city of Logansport; that the deceased was employed as operator in said telegraph

office; that it was his duty to receive and deliver orders to train crews passing said office; and in passing from said office to deliver an order to train No. 77, westward bound on the main track, he was required to pass over a number of other tracks, etc., and was killed by the negligent act of the engineer, etc.; that the city of Logansport is an incorporated city of 18,000 inhabitants, and had in force on the fatal night an ordinance, etc. In criminal pleading, in laying the venue, an approved form is to charge that the crime was committed "at Cass county;" and the above averments, we think, sufficiently show that the place of injury was within the corporate limits of the city of Logansport.

While we apply the rule that a servant must look out for his own safety, and heed, at his peril, all open and ordinary dangers, we must also give force to the correlative rule, equally well established, that the servant himself, observing due care, has a right to believe, and to rely upon his belief, that the master has done his duty in the promotion of safety; and in this instance the deceased had a right to believe that appellant would obey the city ordinance which forbade the running of trains through the city at a greater rate of speed than 6 miles an hour, and that required all backing trains, or reversed engines with tenders in front, after night, to carry a light in front, and to sound the whistle and ring the bell. A disregard of the ordinance, under § 7083, *supra*, will extend to the engineer in the employ of appellant, and in charge and management of its locomotive and train; and if said ordinance was disobeyed by said engineer, as averred, the jury would have the right to impute such disobedience as negligence. *Swindell v. State*, *Mawey*, 143 Ind. 153-168, 35 L. R. A. 50; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305. It will not do to say, as appellant contends, that the deceased, being in the service of the company, and familiar with the needs of the service, in running trains backward and forward through the yards, and sometimes at a great rate of speed, was not entitled to the protection afforded by the ordinance. The power of a city to pass such an ordinance is conferred as a police power for the protection of the public, and all the public; and because the deceased happened to be in the service of the company, within the inhibited territory, presents no reason for depriving him of its protection. *East St. Louis Connecting R. Co. v. Eggmann*, 170 Ill. 538; *Illinois C. R. Co. v. Gilbert*, 157 Ill. 354; *Bluedorn v. Missouri P. R. Co.* 108 Mo. 439. It follows, therefore, that the jury had the right to find, if the evidence warranted, that obedience to the city ordinances was a duty owing by appellant to the deceased, and its violation was not an assumed risk, but negligence of appellant.

The second paragraph of the complaint is good. The special verdict finds that Logansport is an incorporated city of 18,000 inhabitants; that the deceased was injured within the corporate limits of the city; that at the time of the accident the city had in force or-

dinances forbidding the running of trains through the city at a greater rate of speed than 6 miles an hour; that all engines running backward, with tender in front, after sunset, should display a bright light in front, and ring the bell continuously, while passing through the city; that these ordinances were being violated at the time of the injury. And in other respects the record affirmatively shows that the judgment rests upon the second paragraph of the complaint. We will, therefore, not consider the sufficiency of the first and third paragraphs of complaint.

The next question arises upon the sustaining of the demurrer to the second paragraph of the answer. This answer is pleaded to the whole complaint. It counts upon a contract of membership held by the deceased in an organization known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh," of which appellant was one; "that said department and its funds were managed by said lines without expense to the fund, and that they guaranteed the payment of all its obligations, and made up all deficiencies in the fund to meet the payment of all benefits due its members; that said relief department had a set of rules and regulations by which it and its members were governed, and to which all persons assented, and agreed to be bound by, when they became members thereof, a copy of which was filed with, and made a part of, said answer; that the decedent on the 7th day of October, 1893, made application and became a member on the terms of the regulations by which said department was operated, and continued such member until his death; that his application, made over his own signature, contained this express stipulation and agreement, to wit: 'And I agree that the acceptance of benefits from the said relief fund, for injury or death, shall operate as a release of all claims for damages against said company, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance.'" The Book of Regulations (a part of the contract) contained the following further provision, to wit: "Should a member, or his legal representatives, bring suit against either of the companies now associated in administering the relief department, or that may hereafter be associated, for damages on account of injury or death of such member, payment of benefits from the relief fund on account of the same shall not be made until such suit is discontinued. If prosecuted to judgment or compromise, any payment of judgment or amount in compromise shall preclude any claim upon the relief fund for such injury or death." The answer further alleges that the appellee, Anna B. Moore, his then wife, was made his beneficiary in said fund, and, in event of his death, should receive the death benefit therein provided for, which was \$500, and that after his death she did receive from said fund, as such death benefit, said sum of \$500, and executed and delivered to the appellant her instrument in writing

releasing it from all further liability. The question arises, Did the acceptance by the plaintiff of the death benefit from said relief department release her claim against appellant for the wrongful death of her husband, or does her act come under the protecting provisions of § 5, Acts 1893 (Acts 1893, p. 294, chap. 130; Burns's Rev. Stat. 1894, § 7087)? The language of the statute is, "All contracts made by railroads . . . with their employees, or rules, or regulations adopted by any corporation, releasing or relieving it from liability to any employee having a right of action under the provisions of this act, are hereby declared null and void." Appellant insists that the contract set out in said second answer does not come within the provisions of the statute, while the contrary is maintained by the appellee. It will be noted that the inhibition of the statute is against the making of any contract exonerating a railroad company from a future liability to an employee. The statute attempts only to forbid such contracts as release the company from liability to an action under the provisions of the act, and the act provides, and seeks to regulate, no rights of action except such as spring from the negligence of the company or its employees. The only purpose of the statute, therefore, is to prohibit the making of contracts relieving a railroad from liability for future negligence of itself and certain of its employees. Is the contract pleaded such an one? It shows: That a number of railroads constitute the Relief Department of the Pennsylvania Lines West of Pittsburgh, of which appellant was one. That the associated roads assumed control and administration of the department without cost to the fund. That they contribute largely to the fund. That they guarantee that the benefits stipulated for with employees shall be paid in full. That membership therein is voluntary. That the employee is entitled to his benefits, if disabled from any cause,—from sickness, from accident, from his own fault as well as from the fault of the company. If disabled without fault of the company, the living or death benefit may be drawn from the fund without question. If by the fault of the company, he may, after injury, elect whether he will accept the benefits from the fund, or pursue his remedy at law against the company. And that, when he signs the contract the only obligation assumed is that, if injured by the fault of the company, he will not seek double compensation, by pursuing both the relief fund and the company. It further shows, in effect, that when disability comes, and all the facts and conditions are known to him, he is at perfect liberty to then choose between the relief fund and the treasury of the company,—whether he will accept the sure and immediate benefits from the fund, or take his chances in the courts against the company,—and that an adoption of one course shall be held to be an abandonment of the other. This is the essence of the contract pleaded. It bears no semblance to an absolute contract for the release of the company from liability, under the provisions of the statute.

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The question here involved is not a new one to the courts. It has long been the law that a railroad shall not contract against liability for its future negligence, as being against public policy, in that such a right would induce carelessness for the safety of employees; and similar contracts with relief associations have often been before the courts of the country for construction. In *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127, the court, having under review a contract in all material respects like the one here, says: "But, even in cases of injury through the company's negligence, there is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. The injured party, therefore, is not stipulating for the future, but settling for the past. He is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby." In the case of *Ringle v. Pennsylvania R. Co.* 164 Pa. 529, in construing a contract the same in terms as this one, the court says: "In the present case there is an additional agreement that the plaintiff shall 'execute such further instrument as may be necessary formally to evidence such acquittance,' and it is argued that no such release has been executed by plaintiff. But it is not necessary that it should be. The acceptance of benefits is the substance of the release, and the agreement for a further instrument is by its express terms a mere formality for convenience of evidence." In the case of *Otis v. Pennsylvania Co.* 71 Fed. Rep. 136, the contract considered was identical with the one pleaded in this answer; and, concerning it, Baker, J., says: "As a general proposition, it is unquestionably true that a railroad company cannot relieve itself from responsibility to an employee for an injury resulting from its own negligence, by any contract entered into for that purpose before the happening of the injury, and, if the contract under consideration is of that character, it must be held to be invalid. But, upon a careful examination, it will be seen that it contains no stipulation that the plaintiff should not be at liberty to bring an action for damages in case he sustained an injury through the negligence of the defendant. He still had as perfect a right to sue for his injury as though the contract had never been entered into. Before the contract was entered into, his right of action for an injury resulting from the defendant's negligence was limited to a suit against it for the recovery of damages therefor. By the contract he was given an election either to receive the benefits stipulated for, or to waive his rights to the benefits, and pursue his remedy at law. He voluntarily agreed that, when an injury happened to him, he would then determine whether he would accept the benefits secured by the contract, or waive them, and retain his right of action for damages." In *Sharer v. Pennsylvania Co.* 71 Fed. Rep. 931, Ricks, J., reached the same conclusion from the consideration of a simi-

lar contract. Again, in *Pittsburg, C. C. & St. L. R. Co. v. Coz*, 55 Ohio St. 497, 35 L. R. A. 507, the supreme court of Ohio expressed its view of a similar contract in the following words: "This claim arises, we think, from a misconception of the contract,—in assuming that by the contract the employee releases some future right of action against the company. On a previous page we have undertaken to show that such is not the case; that there is no waiver of any cause of action which the employee may become entitled to, and that it is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. When that occurs, he is not stipulating for the future; he is but settling for the past. He accepts compensation for injury already received." The same view is held by the supreme court of Iowa, announced in *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492; and by the supreme court of Maryland in *Fuller v. Baltimore & O. Employees' Relief Assn.* 67 Md. 433; and by the supreme court of Nebraska in *Chicago, B. & Q. R. Co. v. Curtis*, 61 Neb. 442; and to the same effect is the case of *Maine v. Chicago, B. & Q. R. Co.* (Iowa) 70 N. W. 630, and that of *Lease v. Pennsylvania Co.* 10 Ind. App. 47. The contract forbidden by the statute is one relieving the company from liability for the future negligence of itself and employees. The contract pleaded does not provide that the company shall be relieved from liability. It expressly recognizes that enforceable liability may arise, and only stipulates that, if the employee shall prosecute a suit against the company to final judgment, he shall thereby forfeit his right to the relief fund, and, if he accepts compensation from the relief fund, he shall thereby forfeit his right of action against the company. It is nothing more nor less than a contract for a choice between sources of compensation, where but a single one existed, and it is the final choice—the acceptance of one against the other—that gives validity to the transaction.

But appellee contends that some of the cases cited above arose in states having no similar statute, and that the question of the railroad's contractual relief from liability was propounded as being against public policy, and not as in violation of a statute, and hence should not be accepted as authority. The answer to this is that the statute also rests upon public impolicy, or it has nothing whatever to stand upon. The right to contract upon subjects of themselves lawful, by persons *sui juris*, is beyond legislative control, so long as the right is exercised without injury to the public. The right to contract is inherent, and is inseparably connected with the right to own and control property, and "is a primary prerogative of freedom." 2 Wharton, Contr. § 1061. Therefore, in construing the act in question, it must be assumed that the legislature intended to prohibit only such contracts as injuriously affected the public; and can it be said that a contract providing that in the future, when an injury may be suffered, the injured party shall then be free to choose

which of two remedies will be most useful to him and most to be preferred, is against public policy? We do not see why, and are constrained to hold that the contract pleaded in the second answer is not within the inhibition of § 7087, *supra*, and that the same may be pleaded as a defense. We are mindful that this court, in the case of *Pittsburg, C. C. & St. L. R. Co. v. Montgomery* (Ind.) 49 N. E. 582, held a view of this question at variance with the opinion herein expressed, and which, after a more thorough examination of the decided cases, we find to be in conflict with the very decided weight of authority. Indeed, the cases seem now to be in substantial accord. The case of *Miller v. Chicago, B. & Q. R. Co.* 65 Fed. Rep. 305 (the only case relied upon as authority upon this question), was subsequently appealed to the United States circuit court of appeals, eighth district, and the doctrine of the lower court inferentially disapproved, by the court announcing, in substance, that the authorities were all the other way, though the question here was not decided, as not being necessary to a disposition of the case. *Chicago, B. & Q. R. Co. v. Miller*, 40 U. S. App. 448, 76 Fed. Rep. 439, 22 C. C. A. 264. So far as the case of *Pittsburg, C. C. & St. L. R. Co. v. Montgomery* (Ind.) 49 N. E. 582, is in conflict with the opinion herein announced, the same is disapproved.

As before stated, the second answer goes to the whole complaint. The plaintiff, an administratrix, sues for the use of herself, as widow, and for the infant child of the decedent, under Burns's Rev. Stat. 1894, § 285 (Horner's Rev. Stat. 1897, § 284). Under this statute, if the intestate had a cause of action against appellant for his injuries, death ensuing therefrom, a right of action accrued to his personal representative for the use of his next of kin. Whether the right of the administratrix was but a continuation of the intestate's right to sue, as contended by appellant, or whether it was a newly-created right, as our cases hold, is unimportant here. However it may be, the right exists only by virtue of the statute, and exists, not for the benefit of the intestate's estate, but as a source of compensation to those who by the death become the parties injured by the wrongful act of the defendant. *Hilliker v. Citizens' Street R. Co.* (Ind.) 1 Repr. 529, 52 N. E. 607.

The deceased at the time of his death had not elected whether he would accept compensation from the relief fund, or seek his damages by action at law against the appellant. Subsequent to his death the plaintiff, as widow, and who was named in the contract as the sole beneficiary of the death benefit, accepted the stipulated amount, \$500, in full satisfaction, and executed to appellant a release from further liability. Appellant contends that, since the widow was the sole beneficiary named in the contract with the relief department, her acceptance of the full sum extinguished all further claim against the company. We cannot assent to this proposition. Before death came to Moore, he had a cause of action against appellant that he had not released. Upon his death

the law conferred a right of action upon his representative for the use of his next of kin, for the use of his child as well as for the use of his widow; and no act of the latter, without the lawful consent of the child, will deprive the child of its benefit. The widow could only release what she was entitled to. *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645. The answer avers that after the death of her husband, and after she had become a beneficiary in a right of action against the company, without fraud she agreed with appellant, and accepted the \$500 death benefit in full satisfaction of her claim growing out of the death of her husband; and there is perceived no sufficient reason why she should not be bound by it. But her release in no way affected the rights of the child, and for the use of the child's estate, in her representative capacity, the plaintiff has the right to maintain this action. It follows that as the second answer was pleaded to the whole complaint, and is good only as to a part, the demurrer thereto was properly sustained.

The third paragraph of answer was partial, and was addressed only to so much of the complaint as sought a recovery for the

use of the widow. It averred that after the death of her husband, in consideration of \$500, she fully released the appellant. The plaintiff replied to the third answer in three paragraphs. In the third paragraph she set up substantially the same facts and exhibits as were set out in the second paragraph of answer, and averred that the \$500 was received by her under and in pursuance of her deceased husband's contract with said relief department, and not otherwise, and that said contract was invalid and void. To this paragraph of reply a demurrer was overruled, which forms the basis for appellant's fifth assignment of error. The question presented by this reply is the same as that considered at length as arising upon the second paragraph of answer, and, for the reasons there given, we hold that the court erred in overruling the demurrer thereto. For this error the cause must be reversed.

Judgment reversed, and cause remanded, with instructions to sustain appellant's demurrer to the third paragraph of reply to third paragraph of answer, and for further proceedings in accordance with this opinion.

SOUTH CAROLINA SUPREME COURT.

Willis JOHNSON, *Appt.*,

v.

CHARLESTON & SAVANNAH RAILWAY
COMPANY, *Respt.*

(55 S. C. 152.)

1. The release of the liability of a railroad company by an employee's election to accept the benefit of a relief fund in lieu of his right of action for damages is not prohibited by Const. 1895, art. 9, § 15, giving such employees the same rights and remedies allowed to persons who are not employees in certain cases, and providing that any waiver of the benefit of that section shall be null and void.
2. A contract by which the acceptance of benefits from a relief organization by a railroad employee who has been injured will operate to release the railroad company from liability to damages, but which gives him the option to accept such benefits or to decline them and retain his right of action against the railroad company, is not against public policy.

On rehearing.

3. A constitutional question is not involved in a case so as to require the calling in of the judges of the circuit courts to assist in its decision upon failure of the judges of the supreme court to agree, under the provisions of Const. art. 5, § 12, where the record does not show that the question was presented to and considered by the trial judge.
4. Although a constitutional question is involved in a case, yet the circuit judges need not be called in to assist in its

NOTE.—See also *Pittsburg, C. C. & St. L. R. Co. v. Moore (Ind.) ante*, 638, and footnote thereto.
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See also 44 L. R. A. 638.

decision under Const. art. 5, § 12, in case of failure of the judges of the supreme court to agree, if there is another question involved not requiring a construction of the Constitution, which is decisive, and upon which the conclusions reached manifestly turned.

(*Pope and Gary, JJ., dissent from propositions 1 and 2.*)

(January 16, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for Charleston County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. W. St. Julien Jervay, for appellant:

The contract was null and void as against public policy.

1 Story, Eq. Jur. § 296; 1 Fonbl. Eq. Bk. 4, chap. 4, § 4.

If the "contract binds the maker to do something opposed to the public policy of the state, or nation, or conflicts with the wants, interest, or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, it is void, however solemnly the same may be made."

Greenhood, Public Policy, 1.

The general rule undoubtedly is that a contract to do an act which is prohibited by statute, or which is contrary to public policy, is void, and cannot be enforced in a court of justice.

McConnell v. Kitchens, 20 S. C. 438, 47

Am. Rep. 845; Bishop, Contracts, §§ 59-473; Beach, Contracts, §§ 1415, 1502.

A corporation cannot provide by contract against liability for negligence.

Hutchinson, Corporations, §§ 260-262, 584; Bailey, Master & Servant, 475; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Stinson v. New York C. R. Co. 32 N. Y. 337, 88 Am. Dec. 332; Swindler v. Hilliard, 2 Rich. L. 286, 45 Am. Dec. 732; Cooley, Torts, 687; Greenwood, Public Policy, 528; Roesner v. Hermann, 8 Fed. Rep. 782; Lake Shore & M. S. R. Co. v. Spangler, 44 Ohio St. 471, 58 Am. Rep. 833; Johnson v. Richmond & D. R. Co. 86 Va. 975; Hisong v. Richmond & D. R. Co. 91 Ala. 514.

A contract which violates the provisions of a public statute is contrary to public policy and void.

Beach, Contracts, § 1441; Bemis v. Becker, 1 Kan. 226.

Constitution 1895, art. 9, § 15, both declares and extends the common law on the subject.

Kansas P. R. Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630; Lake Shore & M. S. R. Co. v. Spangler, 44 Ohio St. 471, 58 Am. Rep. 833; Little Rock & Ft. S. R. Co. v. Eubanks, 48 Ark. 460.

Contracts to do acts that are illegal, criminal, or contrary to public policy, or to refrain from doing what the law requires, are absolutely void.

28 Am. & Eng. Enc. Law, 477.

This subsequent release cannot be viewed as a new and independent contract, because every part and parcel of it, including the release itself, is stipulated for in the original contract.

A void act is one which is entirely null, not binding on either party, and not susceptible of ratification.

28 Am. & Eng. Enc. Law, 478.

A person who has derived benefit from a contract which is void as against public policy is not estopped thereby to defend against such contract when it is sought to be enforced against him.

Brown v. First Nat. Bank, 137 Ind. 655, 24 L. R. A. 206; Armstrong v. Toler, 11 Wheat. 253, 6 L. ed. 468; Root v. Stevenson, 24 Ind. 115; Beach, Contracts, § 1499.

When a contract is declared void as against public policy, it is so declared, not in the interest of either of the parties, but in the interest of the public. The defense is allowed, not for the sake of the defendant, but for the sake of the law itself.

Bailey, Master's Liability, 478.

It cannot be rendered valid by invoking the doctrine of estoppel.

Brown v. First Nat. Bank, 137 Ind. 655, 24 L. R. A. 206; Miller v. Chicago, B. & Q. R. Co. 65 Fed. Rep. 307.

Messrs. Mordecai & Gadsden, for respondent:

The courts of this country have always encouraged the settlement of disputes and the compromise of actions, and this is all that membership in this association includes.

In a very large percentage of these cases the injury results from the undisputed carelessness of the employee himself, and no ac-
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tion against the company results therefrom; but if such an employee is a member of the Relief and Hospital Department he is paid the benefits by that association just the same as if he had an absolute and undisputed right of action against the company.

There is an inherent right of a man to compromise and settle any cause of action which may have accrued to him.

Price v. Richmond & D. R. Co. 33 S. C. 556.

The decisions have sustained the contract now under consideration.

Johnson v. Philadelphia & R. R. Co. 163 Pa. 127; Graft v. Baltimore & O. R. Co. (Pa.) 8 Atl. 206; Fuller v. Baltimore & O. Employees' Relief Asso. 67 Md. 433; Spitze v. Baltimore & O. R. Co. 75 Md. 162; Ringle v. Pennsylvania R. Co. 164 Pa. 529; Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645; Donald v. Chicago, B. & Q. R. Co. 93 Iowa, 284, 33 L. R. A. 492; Chicago, B. & Q. R. Co. v. Bell, 44 Neb. 44; Maine v. Chicago, B. & Q. R. Co. (Iowa) 70 N. W. 630; Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442; Lease v. Pennsylvania Co. 10 Ind. App. 47; Pittsburg, C. C. & St. L. R. Co. v. Cox, 55 Ohio St. 497, 35 L. R. A. 507; Eckman v. Chicago, B. & Q. R. Co. 169 Ill. 312, 38 L. R. A. 750; Owens v. Baltimore & O. R. Co. 35 Fed. Rep. 715, 1 L. R. A. 75; State, Black, v. Baltimore & O. R. Co. 36 Fed. Rep. 655; Martin v. Baltimore & O. R. Co. 41 Fed. Rep. 125; Vickers v. Chicago, B. & Q. R. Co. 71 Fed. Rep. 139; Otis v. Pennsylvania Co. 71 Fed. Rep. 136; Shaver v. Pennsylvania Co. 71 Fed. Rep. 931; Chicago, B. & Q. R. Co. v. Miller, 40 U. S. App. 448, 76 Fed. Rep. 441, 22 C. C. A. 264.

Pope, J., filed the following opinion:

This action for damages came on for trial before his honor Judge R. C. Watts. The hearing was confined to an oral demurrer to the second affirmative defense set up in the answer, which demurrer was overruled, and from the order of Judge Watts overruling the same an appeal is now presented to this court. It will be proper, therefore, to reproduce the pleadings, to the end that our ruling may be properly understood.

Complaint (caption omitted): "The complaint of Willis Johnson against the Charleston & Savannah Railway Company, defendant herein, respectfully sheweth: (1) That the defendant was, at the time hereinafter mentioned, and now is, a corporation duly created and existing under the laws of the state aforesaid. (2) That the plaintiff was, on or about the 16th day of November, in the year of our Lord one thousand eight hundred and ninety-six, in the employ of the defendant company as a fireman, and was there actively engaged at work on a train of said defendant company, running between Charleston and Savannah. (3) That while so engaged, at Ridgeland, in the county of Beaufort and state aforesaid, as fireman on train proceeding from Savannah to Charleston, under charge and control of Robert Smart, engineer, it became the plaintiff's duty to stand upon a certain platform, on which wood was piled, and from said

platform to load the tender with fuel, by throwing sticks of wood therein. That, after supplying the tender with wood, as aforesaid, on a signal that the engine was about to move, the plaintiff stepped to the edge of the said platform, and thence endeavored to step onto the engine. (4) That, by reason of the broken and unsound condition of the said platform which caused the fall of the plaintiff, and the sills on which it rested, the said platform gave way under the weight of the plaintiff, and forcibly precipitated him upon the iron structure of the engine. (5) That the broken and unsound condition of the said platform which caused the fall of the plaintiff, as aforesaid, was the result of the carelessness and negligence of the defendant in not keeping said platform in good, reasonable, and safe repair. (6) That, by reason of the fall aforesaid, the plaintiff sustained serious wounds and bruises in his arm, side, and leg, and also injuries of an internal nature, causing him severe bodily pain and suffering, so that he is not able to perform his accustomed labor. That he has already expended a considerable amount of money for medicines and medical attendance, and is advised by his physicians that his said injuries will probably disable him permanently from performing such labor as he was heretofore capable of performing, and will continue to cause him pain and require medical attention and medicine for the rest of his life. (7) That, by reason of the carelessness and negligence of the defendant, as hereinbefore set forth, the plaintiff has been damaged ten thousand dollars, wherefore the plaintiff demands judgment against the defendant for the sum of ten thousand dollars, and for the costs and disbursements of this action. Complaint verified. W. St. Julien Jervey, Plaintiff's Attorney."

Answer: "The defendant, the Charleston & Savannah Railway Company, answering the complaint herein, says: (1) This defendant admits the allegations contained in the first paragraph of said complaint. (2) This defendant denies the allegations contained in the second, third, fourth, fifth, sixth, and seventh paragraphs of said complaint. And, by way of affirmative defense to said action, this defendant says: That the injury alleged in said complaint to have been received by the plaintiff, Willis Johnson, was caused by the contributory negligence of the said plaintiff, in not exercising due care and caution in stepping on said engine from said platform, and that but for said want of care said injury would not have happened, such contributory negligence on the part of the plaintiff being the primary cause of said injury. And, by way of affirmative defense to said action, this defendant alleges: That the said plaintiff, at the time he claims to have received the alleged injury, was a member of the Plant System Relief and Hospital Department. The said Relief and Hospital Department is an organization formed by the Charleston & Savannah Railway, Savannah, Florida, & Western Railway, Alabama Midland, Brunswick, & Western, Florida Southern, and other railway companies (which said railway compa-

nies comprise the Plant System), for the purpose of establishing and managing a fund for the payment of definite amounts to employees contributing to the fund who, under the regulations, are entitled thereto, when they are disabled by accident or sickness, and to their families in the event of death. The said relief fund is formed from contributions from the employees and the Plant System income derived from investments, and appropriations by the Plant System when necessary to make up a deficit. The regulations governing said Relief and Hospital Department require that those who participate in the benefits of the relief fund must be employees in the service of one of the railroad companies comprising said Plant System. This defendant further says that participation in the benefits of said relief is based upon the application of the beneficiary, and subject to all the rules and regulations of said Relief and Hospital Department. Defendant further says that, on the second day of November, 1896, the plaintiff herein, being in the employ of the defendant company, and said company being a member of the Plant System, applied for membership in the said Plant System Relief and Hospital Department, and in said application agreed to be bound by all the regulations of the Relief and Hospital Department, and in said application further agreed that, in consideration of the contributions of the said companies comprising the Plant System to the Relief and Hospital Department, and of the guaranty by them of the payment of the benefits aforesaid, the acceptance of the benefits from the said Relief and Hospital Department for injury or death should operate as a release of all claims against said companies and each of them for damages by reason of such injury or death. Defendant further says that, when the plaintiff received the alleged injury, he thereupon became entitled to the benefits coming out of his membership in said Relief and Hospital Department, by reason of the injury alleged to have been received by him while in said service. That said plaintiff thereupon immediately applied to said department for such benefits, and received therefrom payments amounting in all to the sum of \$66.50, being the amount due for 133 days at the rate of 50 cents per day, which was the rate to which the plaintiff was entitled as a member of said Relief and Hospital Department. This defendant further says that, in accordance with the regulations of said Relief and Hospital Department, said plaintiff received free medical and surgical attendance from the surgeons of said company, and care and treatment in the said company's hospitals free of charge, and the said relief and hospital department did all on its part to be done for and in behalf of the said plaintiff, by virtue of his membership in said department. The said sum of money the said plaintiff duly accepted and received for, under the regulations of said Relief and Hospital Department, and in accordance therewith, and the said plaintiff, in consideration of the payment to him of the said sums of money, thereupon duly released and forever dis-

charged said defendant company, and each and every company comprising the Plant System, from all claims and demands for damages, indemnity, or other form of compensation he then had, or might or could thereafter have, against any one of the aforesaid companies, by reason of said injury, which said receipts and releases were severally signed and sealed, and delivered to the said Relief and Hospital Department, by the said plaintiff. Wherefore this defendant alleges that the acceptance of the said benefits from said Relief and Hospital Department for said alleged injury, and the execution of the release aforesaid, operate to release and discharge said defendant company from any and all claims for damages arising in any way out of the injury complained of by said plaintiff in his said complaint."

Oral demurrer (caption omitted): "The plaintiff demurs to the second affirmative defense set up in the answer, and moves that the same be dismissed, for the reason that it does not state facts sufficient to constitute a defense, in this: that in said defense it is alleged that the plaintiff had entered into a contract with the defendant whereby it was agreed, upon certain consideration, that the defendant should be released from all claims of the plaintiff for damages by reason of accidental injury or death; that such contract is contrary to law and against public policy, and a release thereunder cannot, therefore, be pleaded as a defense to an action for damages caused by the defendant's negligence. W. St. Julien Jervey, Plaintiff's Attorney."

This demurrer was overruled; and his honor said: "There is no question in my mind that a contract of that kind, whereby a railroad company attempts to relieve itself of any liability on account of negligence, is contrary to public policy; and, where the party enters into the contract beforehand, he would not be estopped from bringing his action for damages against the railroad company. It seems, in this case, that the plaintiff had entered into that agreement relieving the railroad company before he was injured. After he was injured, he was put to his election as to whether he would sue the railroad company or go ahead and carry out the contract and receive the benefits of that contract. It seems to me that the decision in the case of *Price v. Richmond & D. R. Co.* 33 S. C. 556, would control this case, and I think the plaintiff is now estopped from bringing his action against the railroad company, having elected to receive the benefits under that contract, and from suing the railroad company here for damages, and I overrule the demurrer." Counsel for the plaintiff excepted to the ruling, and gave notice of intention to appeal.

Exceptions: "(1) Because his honor erred in holding that the said second affirmative defense set up in the answer contained allegations of fact sufficient to constitute a defense. (2) Because his honor erred in not holding that a contract whereby a railroad corporation seeks immunity from damages caused by the negligence of itself or its servants is null and void, under the Consti-

tution of the state. (3) Because his honor erred in not holding that such a contract is null and void, because it is against public policy. (4) Because his honor erred in holding that such a contract may properly be pleaded as a defense in an action brought by an employee against a railroad company for damages caused by said company or its servants. (5) Because his honor erred in holding that, even if such contract were void, the receiving of money or other consideration thereunder, after the receipt of the injury, was such an act as would bar recovery of damages."

It is apparent from the text of Judge Watts's decision that he held that the contract entered into by and between the plaintiff and the defendant, as a member of the Plant System, was void, as against public policy; and from this decision of Judge Watts there is no appeal, and hence it is the law of this case. However, the circuit judge, as he thought, under the decision of this court in the case of *Price v. Richmond & D. R. Co.* 33 S. C. 556, held that the subsequent receipt of Johnson to the defendant company would estop Johnson from bringing this action. We fear the case of *Price v. Richmond & D. R. Co.* 33 S. C. 556, has been given a force that it was not intended to possess. In the case cited, Price, while an employee of the railroad company, was injured, in February, 1887, by the alleged negligence of the railroad company, and, on the 5th day of August of the same year (1887), executed a release to said company, for a valuable consideration, whereby he discharged such company from any claim, demand, or liability for payment of any other or further sum or sums of money, for or on account of his injury while in their service. Price died on the — day of November, 1887. His wife, as the administratrix of his estate, brought an action against the railway company for damages, under what is known as the "Lord Campbell Act." On trial, the defendant railway company offered to prove, under the plea in its answer, that Price, the intestate, had in his lifetime released any right of action, for a valuable consideration, for his injury by the railway company. The circuit judge denied the proof, whereupon the railroad company appealed to this court, and it was here decided that the circuit judge was in error, because the right of action under Lord Campbell's act (§§ 2183 to 2186 of General Statutes) was first in the party injured, which right of action survived his death to his administrator, and that, as Price was competent to deal with his right of action in his lifetime, and had settled with the railroad company, therefore such settlement would estop his administratrix, unless the receipt was executed under fraud or duress. There was no allegation there that the contract not to sue was against a sound public policy, or that the receipt Price executed was in accordance with and as a part of such illegal contract. So that we do not think the case of *Price v. Richmond & D. R. Co.* is decisive of this case. We have never had a case in our courts before, where this question was con-

aided. There have been such in other courts of this country, where the decisions have been different,—some upholding the receipt, and indeed the contract, as binding; as, for example, in the state of Pennsylvania, in the cases of *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127; *Graft v. Baltimore & O. R. Co.* (Pa.) 8 Atl. 206; also in the state of Maryland, see *Fuller v. Baltimore & O. Employees' Relief Asso.* 67 Md. 433; *Spitze v. Baltimore & O. R. Co.* 75 Md. 162; also in the state of Iowa, see *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492; also, state of Nebraska, see *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44; also in the state of Ohio, see *Pittsburg, C. C. & St. L. R. Co. v. Coz*, 55 Ohio St. 497, 35 L. R. A. 507; *Owens v. Baltimore & O. R. Co.* 35 Fed. Rep. 715, 1 L. R. A. 75; also in Illinois, *Eckman v. Chicago, B. & Q. R. Co.* 169 Ill. 312, 38 L. R. A. 750; also, the state of West Virginia. The only case where the court has refused to sustain the question is that of *Miller v. Chicago, B. & Q. R. Co.* 65 Fed. Rep. 304; *Chicago, B. & Q. R. Co. v. Miller*, 40 U. S. App. 448, 76 Fed. Rep. 441, 22 C. C. A. 264. It seems to us that, when analyzed, the proposition of the defendant railway company is, as to either or both of these matters: First, a party can contract to relieve a railway company from the negligence of such railway company; or, second, a party, not being able to contract with a railway company as against its negligence, yet, by the acceptance of a benefit under such contract, may be estopped thereby from suing the railway company for its negligence. As to the first position, we say unhesitatingly that our decisions uniformly hold that we cannot make a valid contract to free a railway company from negligence. *Swindler v. Hilliard*, 2 Rich. L. 286, 45 Am. Dec. 732; *Baker v. Brinson*, 9 Rich. L. 202, 67 Am. Dec. 548; *Wallingford v. Columbia & G. R. Co.* 26 S. C. 258. But, apart from our decisions, the new Constitution of this state, adopted in the year 1895, in article 9, § 15, provides: "Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars or even engaged about a different piece of work. . . . Any contract or agreement expressed or implied, made by any employee to waive the benefit of this section, shall be null and void; and this section shall not be construed to deprive any employee of a corporation or his legal or personal representative, of any remedy or right that he now has by the law of the land." (Italics ours.) One of the results of this provision of the Constitution is that the employees of a railway corporation are placed upon the same

plane with all other persons in any case of injury which results from negligence of such railway company. This being so, no contract by which an employee binds himself to forego an action by reason of negligence as against a railway company is valid. It is not only against public policy, but it is forbidden by the Constitution. Now, as to the second point: It seems to us that the language in the last part of § 15, art. 9, of our Constitution forbids any agreement by an employee to waive the benefits of this section. But, if this were not so, still, as the original contract to release the railway from the liability for its negligence was void, any attempt by this employee to ratify such void contract is a nullity. It is needless to prolong this discussion or to cite the numerous authorities bearing on this matter. 28 Am. & Eng. Enc. Law, 478, puts the doctrine thus: "A void act, as defined in the later cases, and by approved authorities, is one which is entirely null, not binding on either party, and not susceptible of ratification." (Italics ours.) We will not undertake to comment upon the plans of the Plant System as to the protective association. It has some admissible points, but is fatally defective in others.

My opinion is that the judgment of this court should be that the judgment of the circuit court be reversed; but, inasmuch as the justices are evenly divided in opinion, under our Constitution the judgment of the circuit court stands affirmed.

Gary, A. J., concurring:

I concur in the conclusion announced in the opinion of Mr. Justice Pope, as it seems to me the allegations of the second or affirmative defense show a scheme on the part of the defendant to avoid its liability for negligence, and that it is therefore against public policy, null, and void. The unlawful scheme even extended to the acceptance of the benefits thereunder, and such acceptance is also against public policy.

McIver, Ch. J., filed the following opinion:

Being unable to concur in the conclusion reached by Mr. Justice Pope, I purpose to state the grounds of my dissent. All the material facts are so fully set forth in the leading opinion that it will be unnecessary to repeat them here in detail. The sole question presented for the decision of the circuit judge was whether the demurrer to the second affirmative defense, based upon the ground that the facts stated therein were not sufficient to constitute a defense, should be sustained; and, he having held that the demurrer could not be sustained, the question presented for the decision of this court is whether such ruling was erroneous in one or more of the several particulars pointed out by the exceptions. The first exception is manifestly too general to require further notice, under the well-settled practice. The third and fourth exceptions are taken under a misconception of the ruling of the circuit judge; for, so far from not holding that a contract whereby a railroad

corporation "seeks immunity from damages caused by the negligence of itself or its servants" is null and void because against public policy, he expressly so held, and, so far from holding that "such a contract could be pleaded as a defense to an action brought by an employee against a railroad company for injuries caused by [the negligence of] the said company or its servants" (the words which I have inserted in brackets being obviously inadvertently omitted), he, in terms, so held. This is manifest from the language used in the first sentence of the remarks made by the circuit judge in overruling the demurrer. These two exceptions may therefore be dismissed from further consideration. So, also, the fifth exception does not exactly represent the ruling of the circuit judge; but, by a liberal construction (which I am disposed to give it), this exception may be regarded as sufficient to raise the question whether there was error in ruling that, after the injury was sustained, the plaintiff was put to his election whether he would sue the company for damages, or accept the benefit of the arrangement set forth in the second affirmative defense, and, these having been accepted by the plaintiff, he was estopped from suing the company, and I am quite willing so to consider that exception. So that, according to a strict practice, the only question necessary for this court to consider is whether the second and fifth exceptions can be sustained.

The second exception presents the question whether there is any provision in the present Constitution declaring that "a contract whereby a railroad corporation seeks immunity from damages caused by the negligence of itself or its servants is null and void." Waiving the objection, which might be raised, that there is nothing in the record showing that such question was presented to or considered by the circuit judge, as I prefer to consider the question on its merits, disembarassed by any technical objection or rule of practice, I propose to so consider it. The only provision which is relied upon is that contained in § 15 of article 9 of the present Constitution, which reads as follows: "Every employee of any railroad corporation shall have the same rights and remedies for any injuries suffered by him from the acts or omissions of said corporation, or its employees, as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines, voluntarily operated by them. When death ensues from any injury to employees,

the legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, expressed or implied, made by any employee to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employee of a corporation, or his legal or personal representative, of any remedy or right that he now has by the law of the land. The general assembly may extend the remedies herein provided for, to any other class of employees." It seems to me very obvious that the main purpose of this provision of the Constitution was to make material, and, as I think, wise and proper, changes in the long-established rule whereby an employer, when sued for damages for injuries sustained by one of his employees, could exempt himself from liability by showing that the injuries complained of by the employee resulted from the negligence of one of his fellow servants, and to settle finally the doctrine (as to which there had been some conflict of authority) that the fact that an employee (except a conductor or engineer in charge of dangerous or unsafe cars or engines voluntarily operated by him) knew that the machinery or other appliance by which he was injured was defective or unsafe would constitute no defense to an action for damages brought by such employee, and finally to declare that any contract or agreement, either express or implied, by which any employee undertakes to waive the benefits of this section, shall be null and void. Now, what are the benefits secured by this section to the employee of a railroad corporation? (1) Putting the employee on the same footing as other persons not employees, so far as his rights and remedies for injuries sustained under the circumstances mentioned in the section are concerned. (2) Declaring that the fact that the employee knew of the defective or unsafe condition of the machinery or other appliances which caused the injury should constitute no defense to an action for damages sustained by such injury. (3) Giving to the representatives of any employee killed on the railroad the same rights and remedies as the representatives of any other person, not an employee, who may be killed by the railroad company, would have. (4) Declaring any contract to waive the benefits of this section to be null and void. (5) Declaring that this section shall not be so construed as to deprive any employee of a corporation of any right that he now has by the law of the land. (6) Authorizing the general assembly to extend the remedies therein provided for to any other class of employees. From this analysis of the provisions of the section, it seems to me very clear that it has no application whatever to this case. The affirmative defense here set up is not based upon any contract or agreement to waive any of the benefits secured by the section of the Constitution above analyzed. The constitutional provision now under consideration does not even purport to declare that a railroad corporation cannot, by contract, ex-

empt itself from liabilities for damages sustained by reason of its own negligence or that of its servants or agents, for the very obvious reason that such a declaration would have been wholly unnecessary, as that was the law at the time of the adoption of the Constitution, well settled by authority, and fully sustained by sound reason, and undisputed by anyone. The sole object of the constitutional provision was to confer upon the employees of railroad corporations certain benefits therein specifically stated, which they either had not previously enjoyed, or their right to which was a matter of question; and, to secure to such employees the full enjoyments of such benefits, it was further provided that any contract to waive any of such benefits "shall be null and void." I am therefore unable to perceive that § 15 of article 9 of the present Constitution has any application to this case, and hence I think the second exception should be overruled.

Proceeding, then, to the consideration of the fifth exception: This exception, as it seems to me, is based upon the assumption that the contract or arrangement set out in the second affirmative defense is void because against public policy. Whether this assumption is well founded is an important and interesting inquiry, of novel impression in this state, at least. But, before proceeding to this inquiry, I desire to notice a mistake into which, I submit with deference, Mr. Justice Pope has fallen. He says (and in justice to him I quote his language): "It is apparent from the text of Judge Watts's decision that he held that the contract entered into by and between the plaintiff and the defendant, as a member of the Plant System, was void as against public policy; and from this decision of Judge Watts there is no appeal, and hence it is the law of this case." In the first place, it is at least doubtful whether the circuit judge so construed the contract set up in the affirmative defense. His language, following immediately after the statement of the grounds of the demurrer, should be construed in connection with that statement: "He says there is no question in my mind that a contract of that kind [meaning a contract of the kind mentioned in such statement], whereby a railroad company attempts to relieve itself of any liability on account of negligence, is contrary to public policy; and, where the party enters into the contract beforehand, he would not be estopped from bringing his action for damages against the railroad company." But he nowhere says that he regarded the contract set up in the affirmative defense as void. It is true that he does say, immediately after the language just quoted, that "it seems in this case that the plaintiff had entered into that agreement, relieving the railroad company, before he was injured;" and he then proceeds to hold that after the plaintiff was injured he was put to his election whether he would sue the company, or carry out the contract by receiving the benefits thereof, and that, having elected to receive the benefits of the contract, he was estopped from suing for dam-

ages. His idea seems to have been that even if the contract was void, the plaintiff, by receiving its benefits, had estopped himself from suing. This, judging from the language used in the exception, seems to have been the view taken by appellant's counsel, for the error imputed to the circuit judge by the fifth exception is "in holding that 'even if such a contract were void the receiving of money or other consideration thereunder, after the receipt of the injury, was such an act as would bar the recovery of damages.'"

But, in the second place, even if it be assumed that the circuit judge did consider the contract or arrangements set out in the affirmative defense void as against public policy, and gave as his reason for the judgment which he pronounced, that, notwithstanding such contract was void, yet the plaintiff, by accepting its benefits after the injury was sustained, had estopped himself from bringing this action, I do not think this court would be thereby precluded from considering and determining the two questions: (1) Whether the contract or arrangements set up as a bar to the action was in fact contrary to public policy, and therefore void; (2) if so, whether the acceptance of the benefits of such contract or arrangements after the injury was sustained estopped the plaintiff from bringing this action. As I understand it, the appeal is from the judgment rendered by the circuit court, and not from the reasons given by the circuit judge for such judgment. The question, therefore, is whether any error in the judgment has been pointed out by the exceptions, and not whether the reasons given for such judgment are well founded; for, as has been frequently said, a judgment may be affirmed, though the reasons given for it by the circuit judge may not be sound. If, therefore, the circuit judge can properly be regarded as having considered the contract set up in the affirmative defense as contrary to public policy, and therefore void, the defendant could not appeal from that, as the judgment was in its favor; and, the defendant company having obtained the judgment of the circuit court, it matters little to the company what may have been the grounds upon which such judgment was based. It seems to me, therefore, that this court not only may, but should, consider the important and interesting question whether such contract is contrary to public policy. This question, new in this state, has been considered and determined in at least eight of our sister states, and by Federal courts in at least four of the circuits. In every case which has been brought to my attention, except one, contracts similar to that now under consideration have been upheld, as not contrary to public policy and not void. Even in the case mentioned as an exception (*Miller v. Chicago, B. & Q. R. Co.* 65 Fed. Rep. 304), it seems that when the case was carried up by appeal the appellate tribunal, while affirming the judgment, did not do so upon the ground that the contract was contrary to public policy, and therefore void, but upon the ground of defect in the plea

setting up the contract as a defense. Indeed, the appellate tribunal seems to have recognized the authority of the numerous cases holding that such contract was not void as against public policy. Many of these cases, having been mentioned in the opinion of Mr. Justice Pope, need not be cited here. While it is quite true that these cases are not binding authority on this court, and are only useful as showing the trend of the judicial mind, and mainly valuable for the strength of the reasoning employed therein, yet, when such unusual and striking unanimity is found in the various courts and various jurisdictions in which this question has been considered, it is well calculated to incite this court, when called upon for the first time to determine this question, to the most careful consideration of the reasoning by which such a practically unanimous result has been reached. I propose, therefore, to consider with care this question, aided largely by the light which has been thrown upon it by the various judges who have been called upon to determine the question.

In the outset, I desire to say (what would seem to be needless, but for the fact that it appears to have been thought necessary to expend much time and labor upon the point) that I do not suppose anyone doubts that a contract whereby a railroad corporation, or any other common carrier, undertakes to secure immunity from liability for damages for injuries resulting from the negligence of the carrier, or any of his servants or agents, is contrary to public policy, and therefore void. But the question here is whether the contract or arrangement set up in the affirmative defense is a contract for immunity from damages. I do not think it can be so regarded; for, on the contrary, the very terms of the contract necessarily assume that the defendant is liable, and the whole scope and effect of the contract are to fix the measure of such liability, and the manner in which such liability shall be satisfied. As is well said in one of the cases cited (*Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127), "He [referring to the plaintiff] is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby." How such a contract can be construed to be a contract whereby the carrier seeks to obtain immunity from liability for damages sustained by reason of its own negligence or that of its servants or agents, it is impossible for me to conceive. Let us examine in detail the terms of the contract or arrangements as set out in the affirmative defense, and see whether such terms do not fully justify what I have said as to its scope and effects. It seems that the defendant company is one of several railroad companies constituting what is called the "Plant System," in which there is an organization called the "Relief and Hospital Department," established for the purpose of raising a fund for the payment of specified amounts to any employee contributing to the fund, when he is disabled by accident or sickness, and to his family in the event of his death. This fund is raised by stated contributions from the

employees, from the Plant System, from income that may be derived from investments of the fund, and from appropriations made by the Plant System when necessary to make up a deficit in the fund. It is alleged in the affirmative defense that the plaintiff applied for membership in the said Relief and Hospital Department, and in his application agreed to be bound by all of the regulations of said department, and further agreed that, in consideration of the contributions from the companies composing the Plant System to said funds, and of the guaranty by them of the payments of the benefits aforesaid, the acceptance of such benefits should release the said companies, and each of them, from all claims for damages sustained by reason of any injury that such employee might sustain. It is further alleged that, as soon as the plaintiff sustained the injury complained of in this case, he immediately applied for and obtained from the said Relief and Hospital Department all the benefits to which he was entitled under the regulations of such department, as well in money as in surgical and medical services, care, and treatment in the hospital free of any charge therefor, and that the plaintiff, in consideration therefor, duly executed, under his hand and seal, receipts therefor, and release of all claims for damages or other form of compensation which he might have against the defendant company. From this statement of the nature and terms of the contract or arrangement in question, which substantially covers the allegations made in the second affirmative defense to which alone the demurrer was directed, which allegations must, in considering the demurrer, be accepted as true, I do not see how it is possible to regard such contract as a contract exempting the defendant company from liability for damages, sustained by reason of the negligence of the defendant company, or that of its servants or agents. By entering into this contract evidenced by his becoming a member of the Relief and Hospital Department, the plaintiff did not waive or release any right of action which he might thereafter have against the defendant company, but his contract was that if, after receiving any injury at the hands of the company, he accepted the benefits which he would be entitled to claim by virtue of his membership of such department, such acceptance should operate as a release of any right of action which he might otherwise have against the company. So that by the terms of the arrangement the plaintiff, after he sustained the injury, had his election either to accept the benefits which, as a member of the Relief and Hospital Department, he would be entitled to claim, or to decline to receive such benefits. If he accepted, he was then bound to release the company; but, if he declined, he was not bound to release the company, but retained his right of action, just as if he had never become a member of the Relief and Hospital Department. It may be said that this seems to be a one-sided arrangement, as the plaintiff, if he declined to accept the benefits, would lose the amount which he had contributed to the Relief and

Hospital Department fund. But when it is considered that by the terms of the arrangements the plaintiff would be entitled to the benefits of the fund, and to medical or surgical services, and to care and treatment in the hospital, free of any charges therefor, even if his disability arose from sickness from natural causes, or from injuries for which the railroad company could not be held responsible, this seeming one-sidedness disappears. Furthermore, inasmuch as the plaintiff had the right of election, after the injury was sustained, either to sue for damages, or to claim the benefits of the Relief and Hospital Department, he could, if the injury was slight, accept the benefits of the Relief and Hospital Department as satisfactory compensation for the injury, but if the injury was serious, calling for greater compensation than would be afforded by the benefits which he might claim, he could exercise his right to sue for damages; so that it seems to me that the arrangement, properly understood, would be favorable, rather than detrimental, to the interests of the employee. But, however this may be, such an arrangement certainly cannot be regarded as a contract whereby the carrier undertook to secure immunity from liability for injuries sustained by his employee, resulting from his own negligence, or that of his servants or agents. As was well said in the case above cited, and referred to with approval in another subsequent case in Pennsylvania (*Ringle v. Pennsylvania R. Co.* 164 Pa. 529): "It is not the signing of the contract [or becoming a member of the Relief and Hospital Department], but the acceptance of benefits after the accident, that constitutes the release [of the injured party]. The injured party, therefore, is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby. . . . The substantial feature of the contract, which distinguished it from those held void as against public policy, is that the party retains whatever right of action he may have until after knowledge of all the facts and an opportunity to make his choice between the sure benefit of the association [department] or the chances of litigation. Having accepted the former, he cannot justly ask the latter in addition."

It was claimed by counsel for appellant, in his argument, that under the rules and regulations of the defendant company the plaintiff was required, when he entered the service of such company, to become a member of the said Relief and Hospital Department; but, as that fact does not appear in the "case" as prepared for argument here, it cannot, under the well-settled rule, be considered. But I may say that, under my view of the case, such fact, even if it did appear, would make no difference. As I understand it, every person who enters the employment of another agrees, either expressly or impliedly, to conform to the regulations of the employer for the control and management of his employees; and, if he is not willing to conform to such regulations, he is at perfect

liberty to decline entering the service of such employer. So, here, when the plaintiff entered the service of the defendant company he did so voluntarily, as he was under no compulsion to do so, and might have entered the service of some other company which had no such rules and regulations, or might have engaged in some other employment, but, when he entered the service of the defendant company, he, like all other employees, signified his willingness to conform to its regulations; and he, therefore, cannot properly be said to have been compelled to enter into the contract or arrangements in question.

But even if the contract in question could be regarded as contrary to public policy, and therefore void, then, in the eye of the law, the case stands as if no such contract had ever been executed. If the contract was an absolute nullity, then it is as though no such contract was ever made. If so, then the allegation distinctly made in the second affirmative defense, that the plaintiff, after sustaining the injury complained of, for valuable consideration, under his hand and seal, released the defendant company from all liability for such injury, was certainly sufficient to constitute a defense to the action; and for that reason, if no other, the demurrer was properly overruled. For that would be precisely in accordance with the principle established in the case of *Price v. Richmond & D. R. Co.* 33 S. C. 556. It seems to be supposed that the case just cited has been misunderstood, and that it has no application to this case. Let us see. That was a case in which Price, a conductor of a freight train, was seriously injured on the 18th of February, 1887, while in the performance of his duties as such, from the effects of which he died in the month of November following. On the 8th of August, 1887, after the injury was sustained, but before his death, he executed a release, for valuable consideration, of his right of action against the railroad company. Subsequently, to wit, in August, 1888, an action was commenced against the railroad company by the administratrix of Price to recover damages under the statute (Lord Campbell's act). On the trial the defendant company offered to put the release in evidence, as a bar to the action, which was ruled inadmissible. Upon appeal it was held that the release was competent, and that its effect was to bar the plaintiff's right of action, unless it was made to appear that such release was obtained by fraud or duress. It is very clear that the court in that case considered and determined the very question presented here, for in the opinion of the court we find this language: "We think the leading and controlling question in the case is as to the admissibility and effect of the release above mentioned." (Italics mine.) And, after showing that the capacity of the deceased to maintain the action is made the test of the right of the administratrix to maintain the action provided for by statute, the court proceeds to use this language: "It cannot be doubted that if the deceased had not died, and such release had been pleaded and proved in an action instituted by him to recover damages for the injury alleged to

have been done him by the wrongful act of the defendant, it would have been a bar to such action, unless it had been made to appear that such release was obtained by fraud or duress." That case therefore certainly does decide that such a release, in the absence of fraud or duress,—of which there is not, and cannot be, any pretense in this case, as now presented,—would bar the plaintiff's right of action. It may be that, as in *Price's Case*, 38 S. C. 199, when this case comes to trial upon its merits the plaintiff will be able to show that the release was obtained by fraud or imposition; but that is a matter which we cannot consider now, when the question is simply as to the sufficiency of the pleading.

It is contended, however, that the release relied on as a bar to the action is but a part of the contract claimed to be void because contrary to public policy, and hence must fall with it. In the first place, as I have endeavored to show, I do not think any part of the contract is contrary to public policy; but conceding, for the sake of argument, that it is, in the second place I do not think the act of giving the release entered into, or formed any part of, the contract. The terms of the contract, as set out in the second affirmative defense, are that the plaintiff "agreed that, in consideration of the contributions of the said companies comprising the Plant System to the Relief and Hospital Department, and of the guaranty by them of the payment of the benefits aforesaid, *the acceptance of the benefits from the said Relief and Hospital Department for injury or death shall operate as a release of all claims against said companies* and each of them, for damages by reason of such injury or death" (*italics mine*); and I am unable to discover anything in the contract which contemplates or requires any formal release, such as is alleged to have been executed by the plaintiff. On the contrary, if, as we have seen, by the terms of the contract, the acceptance were to "operate as a release," there would and could be no necessity for the execution of a formal release. Hence, when the plaintiff did, as alleged, execute a formal release, he was not acting in pursuance of the contract, or carrying out any of its terms, but it was his own voluntary act, independent of the alleged void contract, which must operate as a bar to the action, as declared in *Price's Case*. Besides, I am not now prepared to assent to the proposition that because one of the terms of a contract is contrary to public policy, and therefore void, it necessarily follows that all the other terms must likewise be declared void. But as it would extend this opinion to an unreasonable length to enter into any discussion of that proposition and as I do not deem it necessary to do so in this case, under the views which I have taken, I do not propose to discuss that proposition, or to express any definite opinion with reference to it. It seems to me, therefore, that under any view that may properly be taken of this case, there was no error in the judgment over-

ruling the demurrer, and hence such judgment should be affirmed.

Jones, J., concurs.

The judges of the supreme court having been equally divided in opinion, a petition was filed for a hearing before the constitutional court composed of the judges of the supreme and circuit courts, in response to which the following opinion was handed down on May 9, 1899:

Per Curiam:

This case was heard at the April term, 1898, of this court; and, the members of the court being equally divided, as appears by the opinions filed on the 16th of January, 1899 (32 S. E. 2), the judgment of the circuit court stood affirmed, by virtue of the provisions of the Constitution to that effect. On the 1st day of February, 1899, the appellant filed his petition for a rehearing, which is now before us for consideration. The petition is based upon the sole ground that there was a constitutional question involved in the case, and, as the entire court was not agreed as to the proper determination of that question, this court was bound, under the provisions of § 12 of article 5 of the Constitution, to call to its assistance all of the judges of the circuit court, except the judge who presided at the circuit court when the judgment appealed from was rendered; and the rehearing is asked for for the purpose of having the circuit judges called to the assistance of this court, to hear and determine said constitutional question.

In the first place, the "case," as prepared for argument here, does not show that any constitutional question was either presented to or considered by the circuit judge who rendered the judgment appealed from. On the contrary, it does show that the question below arose upon a demurrer to the second affirmative defense set up in the answer, and was based solely upon the ground "that in said defense it is alleged that the plaintiff had entered into a contract with the defendant whereby it was agreed, upon certain consideration, that the defendant should be released from all claims of the plaintiff for damages by reason of accidental injury or death: that such contract is contrary to law and against public policy, and a release thereunder cannot, therefore, be pleaded as a defense to an action for damages caused by the defendant's negligence." And in the order overruling the demurrer the circuit judge held that a contract whereby a railroad company attempts to relieve itself of any liability on account of negligence is contrary to public policy, and where a party enters into such a contract before the injury was sustained he would not be estopped from bringing his action for damages: but where, as in this case, the party injured, after the injury was sustained, elected to receive compensation for such injury as provided for by such contract, he is estopped from bringing his action for damages. He therefore rendered judgment overruling the demurrer. From this judgment plaintiff ap-

pealed, and for the first time, so far as the record before us shows, by his second exception, distinctly raised the constitutional question, in these words: "Because his honor erred in not holding that a contract whereby a railroad corporation seeks immunity for damages caused by the negligence of itself or its servants is null and void, under the Constitution of the state." Inasmuch as the supreme court is a tribunal whose duty it is to review the action of the circuit court, and, in a law case, correct any errors of law therein which are pointed out by the exceptions, this court has uniformly held that the appellant has no right to have any question, except a question of jurisdiction, considered by this court, unless it appears by the record, as prepared for argument here, that such question has been presented to or considered by the circuit judge. It is true, as set forth in the petition for a rehearing, that counsel for respondent, in his argument before this court, does say, "Counsel for the plaintiff, in the argument of this case on circuit, cited § 15 of article 9 of the Constitution of 1895, as setting forth the public policy of the state in reference to contracts by employees." But counsel for respondent also says: "A careful consideration of this section will disclose the fact that its sole purpose and effect is to limit the defense of the negligence of a fellow servant"; and he adds, "Counsel for the plaintiff, in his argument, also seemed to admit this to be the proper construction of the section." We also observe that in the printed argument of counsel for appellant, on file in this case, he seems to refer to the constitutional provision above cited only for the purpose of showing that the general and well-settled doctrine that a railroad company cannot, by contract, exempt itself from liability for damages resulting from injuries sustained by reason of its negligence, because such a contract is against public policy, and therefore void, has received the sanction of the organic law of this state. It is easy, therefore, to understand why the circuit judge should not have considered the constitution-

al question in rendering his judgment in this case. But, aside from this, it has been invariably held that this court will consider no fact appearing only in the argument of counsel, but will confine itself to what appears in the record as prepared for argument here, unless the same is amended, either by consent or other proper mode. We must hold, therefore, that no constitutional question is properly involved in this case. It is true that, in the opinion of Mr. Justice Pope, he does refer to the constitutional provision above cited as an additional reason for the conclusion which he reaches, but he manifestly bases his conclusion mainly upon the ground that the contract set up in the second affirmative defense, to which the demurrer was directed, was void as contrary to public policy; and Mr. Justice Gary, in his special concurrence, unquestionably bases his concurrence solely upon the ground of public policy; while the other two justices hold that the constitutional provision has no application to this case. This being the case, it is manifest that the question upon which the court was equally divided was, not the constitutional question, but the question as to public policy. Now, the rule in the Supreme Court of the United States is well settled, that, where the case presents two questions, one of which is a Federal question, and the other is not, if the view taken by the court below of the latter question is decisive of the case the Supreme Court of the United States will not take jurisdiction of the case, although there is also a Federal question in the case. By analogy, this rule may well be applied to the present case, as the conclusions reached by the several justices manifestly turned upon the question as to public policy, which is not a constitutional question. We are of opinion, therefore, that no constitutional question can properly be said to be involved in this case, and that there is no ground for a rehearing.

It is therefore ordered that the petition for a rehearing be dismissed, and that the stay of the remittitur heretofore granted be revoked.

KANSAS SUPREME COURT.

W. P. BIGGS, Admr., etc., of Leigh Walter Howell, Deceased, *Pff. in Err.*,

v.

CONSOLIDATED BARB-WIRE COMPANY.

(.....Kan.....)

*1. The maintenance of dangerous machinery on private grounds, unpro-

*Headnotes by SMITH, J.

NOTE.—As to liability for maintaining premises dangerous to children, see turntable cases in note to Fort Worth & D. C. R. Co. v. Robertson (Tex.) 14 L. R. A. 781; also Walsh v. Fitchburg R. Co. (N. Y.) 27 L. R. A. 724; and Delaware, L. & W. R. Co. v. Reich (N. J.) 41 L. R. A. 831.

As to dangerous ponds, see, upholding liability, Pekin v. McMahon (Ill.) 27 L. R. A. 206; denying liability, Moran v. Pullman Palace Car Co. (Mo.) 33 L. R. A. 755; Dobbins v. Missouri, K. & T. R. Co. (Tex.) 38 L. R. A. 573; Omaha 44 L. R. A.

ected from the visits of trespassing children, renders the owner thereof, who has knowledge that children and others are accustomed to frequent said grounds and climb upon the structures supporting said dangerous appliances, liable in damages to the next of kin of a boy fourteen years of age, who was caught in said exposed machinery, and killed.

2. In this case the question whether the boy was of sufficient intelligence,

v. Bowman (Neb.) 40 L. R. A. 531; Stendal v. Boyd (Minn.) 42 L. R. A. 288; and Ritz v. Wheeling (W. Va.) 43 L. R. A. 148.

For other cases respecting dangerous attractions to children, see Missouri, K. & T. R. Co. v. Edwards (Tex.) 32 L. R. A. 825, and cases cited in footnote thereto; also Jefferson v. Birmingham R. & Electric Co. (Ala.) 38 L. R. A. 453; Kaumeler v. City Electric R. Co. (Mich.) 40 L. R. A. 385, and footnote thereto; also O'Leary v. Brooks Elevator Co. (N. D.) 41 L. R. A. 677.

natural capacity, foresight, and judgment as to be guilty of contributory negligence is for the jury.

2. The case of *Price v. Atchison Water Co.* 58 Kan. 551, followed.

(February 11, 1899.)

ERROR to the District Court for Douglas County to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Mr. R. E. Melvin, for plaintiff in error:

The case comes clearly within the decisions of this court.

Missouri, K. & T. R. Co. v. Shockman, 59 Kan. 774; *Consolidated City & C. P. R. Co. v. Carlson*, 58 Kan. 62; *Kansas P. R. Co. v. Whipple*, 39 Kan. 531; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Price v. Atchison Water Co.* 58 Kan. 551.

See also, to the same effect, *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206; *Brinkley Car Co. v. Cooper*, 60 Ark. 545; *Lynch v. Nurdin*, 1 Q. B. 29; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 410, 98 Am. Dec. 175; *Atchison, T. & S. F. R. Co. v. Cross*, 58 Kan. 424; *Kinchlow v. Midland Elevator Co.* 57 Kan. 374; *Union P. R. Co. v. Dunden*, 37 Kan. 1; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Evanich v. Gulf, O. & S. F. R. Co.* 57 Tex. 126, 44 Am. Rep. 586; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; 1 Thomp. Neg. 304, 305; 1 Shearm. & Redf. Neg. §§ 97, 98; *Mackey v. Vicksburg*, 64 Miss. 777.

Mr. W. W. Nevison, for defendant in error:

The shaft was lying upon beams 15 or 18 feet above the water, and was used for the purpose of conveying power to the barb-wire mill; it was not built for a place for people to fish, or as a place of resort for persons and children, nor was it built for the purpose of furnishing an attractive place for children to play.

Turess v. New York S. & W. R. Co. 61 N. J. L. 314.

Howell was a boy fourteen years of age, intelligent, healthy, and promising at the time of his death. He was of more capacity than those who recovered in—

Kansas C. R. Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203; *Kansas P. R. Co. v. Whipple*, 39 Kan. 533; *Washington & G. R. Co. v. Gladmon*, 15 Wall. 410, 21 L. ed. 116; *Union P. R. Co. v. Dunden*, 37 Kan. 1; *Kinchlow v. Midland Elevator Co.* 57 Kan. 375; *Atchison, T. & S. F. R. Co. v. Cross*, 58 Kan. 425; *Consolidated City & C. P. R. Co. v. Carlson*, 58 Kan. 63; *Price v. Atchison Water Co.* 58 Kan. 557; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175.

44 L. R. A.

Can it be said that Howell, a boy fourteen years of age, intelligent, healthy, and promising at the time he was killed, was an infant of tender years, or can be placed in that class?

At common law, a male person, fourteen years of age, and a female twelve years of age, were capable of binding themselves in marriage; they had arrived at the age of consent.

2 Kent, Com. p. 78; *Parton v. Hervey*, 1 Gray, 119; Bishop, Contr. § 946, p. 371.

There can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained.

Beach, Contrib. Neg. §§ 14, 15; *Hargreaves v. Deacon*, 25 Mich. 1; *Bush v. Brainard*, 1 Cow. 78, 13 Am. Dec. 513; 1 Shearm. & Redf. Neg. § 99; *McGrath v. New York C. & H. R. R. Co.* 59 N. Y. 468, 17 Am. Rep. 359.

The accident could not have happened but for the fault of Howell.

Rathbun v. Payne, 19 Wend. 399; *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273; *Brown v. Maxwell*, 6 Hill, 595, 41 Am. Dec. 771.

The plaintiff, before he can recover or have any standing in court as an accuser for negligence to Howell, must show that Howell himself was free of fault.

Munger v. Tonawanda R. Co. 4 N. Y. 359. 53 Am. Dec. 384; *Butterfield v. Forrester*, 11 East, 60; *Smith v. Smith*, 2 Pick. 621, 13 Am. Dec. 464.

When it appears that the plaintiff's negligence or wrongful act had a material effect in producing the injury, or substantially contributed toward it, he is not entitled to recover.

Overholt v. Vieths, 93 Mo. 422; *Klitz v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Buts v. Cavanaugh*, 137 Mo. 503; *Witte v. Stifel*, 126 Mo. 303.

Defendant in error was not bound to fence or encase, or protect the shaft which caused the death of Leigh Walter Howell, as the machinery was open and on the premises of the defendant, a place where the deceased, Howell, had no right to go.

Nagle v. Allegheny Valley R. Co. 88 Pa. 35, 32 Am. Rep. 413; *Moore v. Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *McMahon v. New York*, 33 N. Y. 642; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645; *Sickles v. New Jersey Ice Co.* 153 N. Y. 83; Beach, Contrib. Neg. §§ 20, 40, 123; Bishop, Non-Contr. Law. § 845; *Conroy v. Chicago, St. P. M. & O. R. Co.* 98 Wis. 243, 38 L. R. A. 419; *Daley v. New Haven, Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Bagley v. Cleveland Rolling Mill Co.* 21 Fed. Rep. 159; *Sutton v. New York C. & H. R. R. Co.* 66 N. Y. 243; *Cooley v. Torts*, 2d ed. p. 804; *Pleasants v. Fant*, 22 Wall

116, 22 L. ed. 780; *Beisiegel v. New York O. E. Co.* 40 N. Y. 9.

Smith, J., delivered the opinion of the court:

This was an action commenced in the court below for the recovery of damages by reason of the death of Leigh Walter Howell, which was caused, as is alleged, by the wrongful act, neglect, and default of the defendant in error, the Consolidated Barb-Wire Company. On December 2, 1897, an amended petition was filed in the cause, to which a general demurrer was interposed by the defendant wire company. This demurrer was sustained by the court, and, the plaintiff below electing to stand thereon, judgment was rendered in favor of the defendant.

The question for our consideration is whether the amended petition states facts sufficient to constitute a cause of action. It is alleged in said amended petition that the plaintiff, W. P. Biggs, on July 26, 1897, was duly appointed administrator of the estate of Leigh Walter Howell, deceased; that the defendant is a corporation, and had for a long time operated a wire-nail and barb-wire plant on the south bank of the Kansas river, at Lawrence; that said plant was run by water power, and that the power is transmitted to said wire mill and plant about 125 feet, by a certain shaft owned and controlled by the defendant; that said shaft is about 6 inches in diameter, and is located about 15 or 18 feet above the water; and that said shafting is supported on timbers which are about 18 inches apart, said timbers being supported by a stone buttress or pier; and that about 12 or 13 feet west of said buttress or pier is a collar or coupling, about 8 inches in diameter, around said shaft, and in the outer rim of said collar or coupling is a bolt or set screw which projects out some 4 or 5 inches from the outer rim of the collar or coupling; that the shafting and connections and attachments are open and exposed, and in no manner covered or inclosed; that the shaft revolves at the rate of about 100 to 150 revolutions per minute; that on the 21st day of April, 1897, said Leigh Walter Howell was fishing and playing near to and under said shaft, and that in attempting to climb up from below, on a ladder for that purpose built by the defendant, onto the timbers on either side of said shaft, the aforesaid bolt or set screw which projected from the collar or coupling on said shaft caught in the back of his coat, and he was whirled around said shaft, and against said timbers, with irresistible force, and killed, dying as the result of being so caught by said set screw; that the barb-wire company was guilty of gross carelessness towards the deceased, in that, through its officers, it had actual notice of the faulty construction of said machinery, and that at the place of the accident it was unsafe and dangerous; that the barb-wire company was guilty of gross carelessness towards the deceased, in not inclosing or boxing the collar, coupling, and

screw, and in leaving same exposed and open, and, further, in allowing the set screw or bolt to project 4 or 5 inches from the rim of the collar or coupling, and in not boxing same, and was careless in leaving the machinery and timbers supporting the same, and the immediate surroundings (which were attractive to children), open and exposed, wholly unguarded and unfenced; that the deceased could not see the bolt or set screw, by reason of the shaft revolving so fast as to render it invisible; that the place where plaintiff's intestate was killed, and the machinery and timbers supporting the same, and the surroundings, were attractive to children; and that children, and particularly boys, were in the habit of resorting there for the purpose of amusement, and men and boys were in the habit of climbing about on the timbers which supported the shaft, for the purpose of fishing and playing, and they did fish from the timbers, and that the barb-wire company had notice of such facts; that the defendant company knew that the said machinery was unsafe and dangerous, for the reason that other persons had been caught by said screw; that said shaft is built across what would be New Hampshire street if projected 10 feet into the water; that said dangerous machinery was left in an open and exposed place, unfenced and unprotected, and in a place attractive to children; that at the time of the accident, April 21st, there were no signboards on or about the said premises, but previous to that time there had been and same had been put up and erected by defendant company, but that since April 21st the defendant had placed and erected danger boards on and around said premises; that Leigh Walter Howell, the deceased, was a boy fourteen years of age, intelligent, healthy, and promising, at the time of his death; that he left a father, brother, and sister surviving him.

All the allegations of the petition being admitted, together with such facts as are properly inferable from the language used, we are unable to perceive that they demand the application of any different rule than that heretofore adopted and adhered to by this court in cases substantially similar. The structure erected and maintained by the wire company was of such a nature as to be attractive to children, especially to boys. It was situated in a place about which boys and men congregated for the purpose of amusement, and boys were in the habit of climbing about on the timbers that supported the shaft for the purpose of fishing and playing, of which fact the wire company had actual notice. At the top of the structure was a collar or coupling, in which was a set screw projecting 4 or 5 inches from the outer rim of the coupling. When in motion, this collar or coupling and the set screw revolved at the rate of from 100 to 150 revolutions per minute, by reason of the velocity of the shaft, so that the screw was invisible. There was a ladder extending to the top of the structure, upon which the boy climbed un-

til, when near the top, he was caught in the back of the coat by this revolving set screw, which projected from the collar and, being whirled around the shaft and against the timbers, he was killed.

The case of *Price v. Atchison Water Co.* 58 Kan. 551, is an authority directly in point. In that case the boy drowned in the reservoir of the water company was bright and intelligent. He was a trespasser on the grounds of the water company. The grounds about the reservoirs were inclosed with a barb-wire fence ten to twelve wires high. The deceased entered the inclosure by climbing over a stile. The watchman of the water company was aware of the habit of boys to climb over the stile, and permitted them to do so without objection. The boy went with some companions to the reservoir to fish and play, and, venturing upon an "apron" which extended from the bank out into one of the reservoirs, was drowned. His parents had frequently warned him of the danger of going to the reservoir, and he had trespassed there once before, without their knowledge. In the *Price Case*, as in the case at bar, two grounds of error were urged: First, that the defendant was not negligent in maintaining the premises; second, that the deceased was guilty of contributory negligence. The two grounds were disposed of by this court in an opinion reviewing the authorities. Among other things, the court said: "It is, however, contended by the defendant in error that, inasmuch as the deceased was a trespasser upon its grounds, it owed to him no duty to guard against the accident which occurred. Without doubt, the common law exempts the owner of private grounds from obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who go upon them, not by invitation, express or implied, but for pleasure or through curiosity. *Coolley, Torts*, 2d ed. 718; 1 *Thomp. Neg.* 303; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573. The common law, however, does not permit the owner of private grounds to keep thereon allurements to the natural instincts of human or animal kind, without taking reasonable precautions to insure the safety of such as may be thereby attracted to his premises. To maintain upon one's property enticements to the ignorant or unwary is tantamount to an invitation to visit, and to inspect and enjoy; and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express." The court quotes approvingly from the case of *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 691, 31 Am. Rep. 203, when passing on the question of contributory negligence of the deceased: "Boys can seldom be said to be negligent when they merely follow the irre-

sistible impulses of their own natures,—instincts common to all boys. In many cases where men, or boys approaching manhood, would be held to be negligent, younger boys and boys with less intelligence would not be. And the question of negligence is in nearly all cases one of fact for the jury, whether the person charged with negligence is of full age or not." See also *Kinchlow v. Midland Elevator Co.* 57 Kan. 374; *Consolidated City & C. P. R. Co. v. Carlson*, 58 Kan. 62.

From the peculiar character of the structure upon which the plaintiff's intestate was killed, and its proximity to the water of the Kansas river, it certainly presented to the average boy a desirable place from which to fish; and considering the inbred disposition and ever-present impulse in children, especially boys, to explore and investigate, this structure over the water appealed strongly to such natural inclination. The barb-wire company had notice that this structure was used by men and boys as a fishing platform; and, having this notice, it was a question for the jury to say whether it was negligent in maintaining it in its condition at the time of the accident. The death of the plaintiff's intestate was directly caused by the revolving set screw attached to the coupling on the shafting which was supported by the upright timbers. Its velocity was so great that neither a boy of fourteen nor a man of mature years could have seen it. Except for the projecting pin on said coupling, the appliance would probably have been safe, and no harm would have resulted to the boy. It was not boxed or covered.

It is contended by the defendant in error that the prior decisions of this court above cited are not precedents in the case at bar, for the reason that in none of them has a boy of the age of fourteen years been held incapable of knowing the consequences of his acts. We cannot say, as a matter of law, at what age a boy would be possessed of such intelligence, foresight, and judgment as to charge him with contributory negligence in a case like the present. It is peculiarly within the province of the jury to determine such questions. In the *Carlson Case*, above cited, it is said: "As a matter of fact, we know that there is great difference in the capacity of different children at the same age, owing as well to differences in education and surroundings as to natural capacity. The question as to the capacity of a particular child, at a particular time, to exercise care in avoiding a particular danger is one of fact, falling within the province of the jury to determine."

The judgment of the court below will be reversed, with instructions to overrule the demurrer to the petition.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

J. K. SUMRALL *et al.*, *Appts.*,

v.

COLUMBIA FINANCE & TRUST COMPANY, Assignee of Commercial Building Trust.

(.....Ky.....)

1. The issuance of preferred stock by a building and loan association which is based on principles of co-operation, equality, and mutuality is void as against public policy.
2. A guaranty that preferred stock in a building and loan association shall mature at a certain time, and that the common stock shall constitute a guaranty therefor, constitutes a guaranty for the accumulation of sufficient profits or dividends to mature the preferred stock, and does not control a distribution of the capital and assets of the concern on the winding up of the association, when there are no profits on hand.

(March 18, 1899.)

APPEAL by defendants from a judgment of the Common Pleas Division of the Circuit Court for Jefferson County refusing to allow preferences to defendants out of the assets of an insolvent building and loan association. *Affirmed.*

The stock of the Commercial Building Trust was divided into classes. One class was known as common stock, the owners of which constituted the working corporation, and which under the by-laws of the corporation constituted a guaranty for the maturity of the preferred stock. The other class was preferred stock which appeared to be in the nature of an investment, and this in turn was divided into two classes. One class was paid in full by a single payment and the other class was to be paid for by monthly payments. The plan appeared to be that the preferred stock should draw interest on the amounts paid in. Upon the insolvency of the corporation the preferred stock claimed repayment in full in preference to the holders of the common stock. This suit was brought to test the validity of such claims. The court appointed J. R. Williamson to defend for the class of preferred instalment stockholders, J. K. Sumrall to defend for the class of preferred paid-up stockholders, and J. C. Caldwell to defend for the class of common stockholders. The court denied any preference, and the representatives of the preferred stockholders took this appeal.

Further facts appear in the opinion.

NOTE.—For prepaid stock in building and loan associations, see *People, Fairchild, v. Preston* (N. Y.) 24 L. R. A. 57; also *Gibson v. Safety Homestead & L. Asso.* (Ill.) 39 L. R. A. 202; and *Rhodes v. Missouri Sav. & L. Co.* (Ill.) 42 L. R. A. 93.

For preferred stock in corporations generally, see note to *Field v. Lamson & G. Mfg. Co.* (Mass.) 27 L. R. A. 136.
44 L. R. A.

Messrs. William W. Watts, Joseph S. Botts, and J. R. Watts, for appellant Williamson:

The common stockholders knew of the provisions of the contract and induced Williamson and his class to purchase. The defense of *ultra vires* will not avail them, for the court will not hear them say they did not know of their contract.

To be *ultra vires*, the act must be outside of the power of the corporation.

The articles of incorporation, the instrument creating the corporation, provide that the common stock shall stand as a guaranty to the preferred stock.

An act authorized by the statutes, and by the charter of the corporation organized thereunder, then by the by-laws subsequently adopted, cannot be said to be an act *ultra vires* the corporation.

The charter of articles of incorporation, by-laws, and certificates of stock make up the contract between the corporation and the stockholders.

Kent v. Quicksilver Min. Co. 78 N. Y. 159; *Holyoke Bldg. & L. Asso. v. Lewis*, 1 Colo. App. 127; *Bergman v. St. Paul Mut. Bldg. Asso. No. 1*, 29 Minn. 275; *McKenney v. Diamond State Loan Asso.* 8 Houst. (Del.) 557; *Pioneer Sav. & L. Co. v. Brockett*, 58 Ill. App. 204; *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso.* 148 N. Y. 281, 35 L. R. A. 289; *Thompson, Bldg. Asso.* 31; 1 *Thomp. Corp.* § 940; *Endlich, Bldg. Asso.* 2d ed. 269; *White v. Boreing*, 20 Ky. L. Rep. 210.

Preferred stock in a building association has been recognized by the Kentucky court of appeals.

Tate v. Louisville Bldg. & L. Asso. 19 Ky. L. Rep. 1962.

The contract was not against public policy, and was not contrary to law, and the act of 1882 and the act of 1893 expressly provide for priority in the distribution of the assets upon the dissolution of a corporation voluntarily or otherwise.

Frankfort Bridge Co. v. Frankfort, 18 B. Mon. 46; *Ang. & A. Corp.* § 256; *McGregor v. Home Ins. Co.* 33 N. J. Eq. 181; *Cook, Stock & Stockholders*, 4th ed. § 278.

A person dealing with a corporation must, at his peril, take notice of its charter or articles of incorporation.

First Nat. Bank v. D. Kiefer Milling Co. 95 Ky. 97; *Oil City Land & Improv. Co. v. Porter*, Ky. 261; *Wright v. Shelby R. Co.* 16 B. Mon. 499, 63 Am. Dec. 522; *Bell & C. Co. v. Kentucky Glass Works*, 20 Ky. L. Rep. 1092; *Parks v. Evansville, I. & C. Straight Line R. Co.* 23 Ind. 572; *Jenkins v. Prewitt*, 7 Blackf. 329; *Walker v. Mobile & O. R. Co.* 34 Miss. 255; *Ellison v. Mobile & O. R. Co.* 36 Miss. 572; 1 *Thomp. Corp.* § 941; *Cook, Stock & Stockholders*, § 54; *Endlich, Bldg. Asso.* 2d ed. § 269; *Bertche v. Equitable Loan & Invest. Asso.* (Mo.) 48 S. W. 954.

Williamson and the others in his class in buying their stock were innocent purchasers making their purchases under the belief that the provisions of the articles, by-laws, and their certificates of stock, both on the face and back thereof, would be carried out.

American Wire-Nail Co. v. Bayless, 91 Ky. 94; *Kent v. Quicksilver Min. Co.* 78 N. Y. 159.

Upon the purchase of stock by Williamson and the others in his class their rights vested, and nothing which the corporation and the common stockholders might thereafter do, unless done immediately for the purpose of annulling the contract, could take away from them the rights acquired, except by their (Williamson's) laches, acquiescence, or assent.

Kent v. Quicksilver Min. Co. 78 N. Y. 159; *Holyoke Bldg. & L. Asso. v. Lewis*, 1 Colo. App. 127; *Bergman v. St. Paul Mut. Bldg. Asso. No. 1*, 29 Minn. 275; *McKenney v. Diamond State Loan Asso.* 8 Houst. (Del.) 557; *Niblack, Ben. Soc.* 2d ed. 113; *Thompson, Bldg. Asso.* 31; 1 *Thomp. Corp.* § 946; *Cook, Stock & Stockholders*, § 700a; *Endlich, Bldg. Asso.* 2d ed. § 269; *Cook, Corporations*, 4th ed. § 4a.

It is the duty of stockholders to be prompt in their application for relief against the acts of the corporation before innocent third persons suffer; otherwise assent, acquiescence, or ratification will be presumed, and the doctrine of estoppel will apply.

American Wire-Nail Co. v. Bayless, 91 Ky. 94; *Oil City Land & Improv. Co. v. Porter*, 99 Ky. 254; *Maxville, W. & L. Turnp. Road Co. v. Barnes*, 14 Ky. L. Rep. 431; *Pocantico Waterworks Co. v. Low*, 20 Misc. 484.

Williamson and the other preferred instalment stockholders have paid into the association about \$141,000. From that sum and from the sums paid in by the other preferred stockholders more than \$145,000 have been taken by the corporation for the common stockholders, and used in payment of the expenses of the corporation and the salaries of the officers and directors.

A stockholder who is an officer of the company, who is active in having preferred stock issued, subscribes for it, pays for it, takes his certificate therefor, votes upon it and induces others to take it, cannot after two years, when the corporation is insolvent, say that the statutes of the state authorize the issue of common stock only.

Banigan v. Bard, 134 U. S. 291, 33 L. ed. 932; *Cook, Corporations*, 4th ed. §§ 41, 732; *Kent v. Quicksilver Min. Co.* 78 N. Y. 159.

The question of *ultra vires* can be raised only while the contract is executory and before performance by innocent third persons.

American Wire-Nail Co. v. Bayless, 91 Ky. 94; *Pocantico Waterworks Co. v. Low*, 20 Misc. 484; *Maxville, W. & L. Turnp. Road Co. v. Barnes*, 14 Ky. L. Rep. 431; *American & Foreign Christian Union v. Yount*, 1 Ky. L. Rep. 8; *German Nat. Bank v. Butchers' Hide & Tallow Co.* 97 Ky. 34; *Springfield, M. & H. Turnp. Road Co. v. Harrodsburg*, 11 Ky. L. Rep. 309; *Morton v. Hamilton* 44 L. R. A.

College, 100 Ky. 281, 35 L. R. A. 275; *Cook, Corporations*, 4th ed. §§ 30, 268, 671-673, 681; *Ten Eyck v. Pontiac, O. & P. A. R. Co.* 114 Mich. 494; *Nicrost v. Calera Land Co.* 115 Ala. 429; *Woolfolk v. January*, 131 Mo. 620; *Washburn v. National Wall Paper Co.* 51 U. S. App. 380, 81 Fed. Rep. 17, 26 C. C. A. 312.

There are no general creditors as such, and none defending in the case; therefore the distribution must be made according to the contract expressly made and ratified, assented to, acquiesced in, and promulgated by the common stockholders, and the doctrine of *ultra vires* will not apply.

Cook, Corporations, 4th ed. §§ 268, 775; *Hohenshell v. Home Sav. & L. Asso.* 140 Mo. 566; *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263; *Thompson v. Lambert*, 44 Iowa, 239; *Martin v. Niagara Falls Paper Mfg. Co.* 122 N. Y. 165.

Messrs. Sumrall & Sumrall, with *Messrs. Caruth, Chatterson, & Blitz*, for appellant Sumrall:

The fully paid-up preferred stock was issued under the authority of the charter and by-laws, and, in accordance with § 564, Ky. Stat., was paid for in cash and at par, and represented by the officers, agents, and common stockholders of the corporation, to be preferred above the common stock, and the common-stock fund was held sacred for the maturity and repayment of the preferred.

It is an inherent power in a corporation to issue preferred stock subject to such restrictions as are imposed by statute, and these restrictions have been complied with in this fully paid-up preferred stock issue.

Kent v. Quicksilver Min. Co. 78 N. Y. 159; *McGregor v. Home Ins. Co.* 33 N. J. Eq. 181.

The statute prefers this stock as to the capital or assets as well as to dividends or interest.

Ky. Stat. § 564; 1 *Cook, Corporations*, § 278; *McGregor v. Home Ins. Co.* 33 N. J. Eq. 181; *Hamlin v. Continental Trust Co.* 47 U. S. App. 422; *Hamlin v. Toledo, St. L. & K. C. R. Co.* 78 Fed. Rep. 664, 24 C. C. A. 271, 36 L. R. A. 826.

This court has recognized the right of a building and loan association to issue preferred stock, and enforce contracts in relation thereto.

Tate v. Louisville Bldg. & L. Asso. 19 Ky. L. Rep. 1962.

The law as to estoppel and acquiescence also applies under the pleadings.

2 *Herman, Estoppel*, pp. 1396-1399; 1 *Herman, Estoppel*, pp. 709, 711; *Maxville, W. & L. Turnp. Co. v. Barnes*, 7 Ky. L. Rep. 431.

Messrs. M. B. Bowden, James C. Poston, and Clarence Dallam, for appellees:

The right of holders of preferred stock depends on the contract, and is solely a question of the interpretation of the contract.

Beach, Priv. Corp. § 499; *Cook, Stock & Stockholders & Corp. Law*, 3d ed. § 267; 2 *Thomp. Corp.* §§ 2262, 2263.

Preferred stock of a corporation when not explicitly preferred in the distribution of the assets, is preferred only as to dividends.

Beach, Priv. Corp. § 507; 2 *Waterman*,

Corp. p. 155; Cook, Stock & Stockholders & Corp. Law, 3d ed. §§ 267, 278; 2 Thomp. Corp. § 2280; *Re London India Rubber Co.* L. R. 5 Eq. 519.

A contract of guaranty cannot be extended beyond its strict terms; and must be interpreted according to the intention of the parties.

Cambria Iron Co. v. Keynes, 56 Ohio St. 501; *Pease Piano Co. v. Matthews*, 5 Kan. App. 370; *Lininger & M. Co. v. Webb*, 51 Neb. 10.

If this is a guaranty by the common stockholders of the contract of the corporation, it is within the statute of frauds and unenforceable.

Ky. Stat. § 470.

Where neither the charter, by-laws, nor contract under which preferred stock is issued contemplates insolvency or the winding-up of the company, the preference is in dividends only; in the distribution of assets all become common stockholders, regardless of the preference.

Re London India Rubber Co. L. R. 5 Eq. 519.

The so-called guaranty, if not confined to a guaranty of dividends, was merely an estimate as to when the stock would be matured, and was only applicable as to a going company.

Re London India Rubber Co. L. R. 5 Eq. 518; *Bertche v. Equitable Loan & Invest. Assn.* (Mo.) 43 S. W. 954.

All contracts of building and loan associations to the effect that after the payment of a certain sum, less than the face value, stock shall be considered full paid, are *ultra vires* and void.

Wiernan v. International Bldg. Loan & Invest. Union, 67 Ill. App. 550; *Latimer v. Equitable Loan & Invest. Co.* 81 Fed. Rep. 776; *Bertche v. Equitable Loan & Invest. Assn.* (Mo.) 48 S. W. 954; *International Bldg. Loan & Invest. Union v. King*, 68 Ill. App. 640; *Gibson v. Safety Homestead & L. Assn.* 69 Ill. App. 485; *State, Walker, v. Equitable Loan & Invest. Assn.* 142 Mo. 325; *Baltimore Bldg. & L. Assn. v. Potomac Improv. Co.* 87 Md. 59; *Fisher v. Patton*, 33 S. W. 451, and 134 Mo. 32.

The pledge by a corporation of part of its capital for the benefit of a class of its shareholders is *ultra vires*, null and void.

Miller v. Ratterman, 47 Ohio St. 158; *Wiernan v. International Bldg. Loan & Invest. Union*, 67 Ill. App. 550; *Latimer v. Equitable Loan & Invest. Co.* 81 Fed. Rep. 776; *Bertche v. Equitable Loan & Invest. Assn.* (Mo.) 48 S. W. 954.

Paid-up stock in a building and loan association cannot be regarded as indebtedness of the association, especially where, as in this case, the charter provides for the creation of other forms of indebtedness.

Towle v. American Bldg. & L. Assn. 75 Fed. Rep. 935.

There can be no unpaid subscription to the stock of a building and loan association.

Ibid.

Mr. Charles Fox, for appellees Smith et al.:

The provision in the charter and by-laws 44 L. R. A.

of said association guaranteeing the maturity of the stock denominated preferred stock, when rightly construed, was never intended to give, and did not give, to the preferred stockholder any priority in the distribution of the assets of the association.

The corporation meant when it undertook to guarantee the maturity of the preferred stock to say that after you have paid the monthly dues on your stock for seven years or ten years, according as your contract provides, that you shall have a right on proper notice to withdraw from the association \$100 for each share held by you.

There is no provision nor even intimation in the charter or any by-law that the holder of preferred stock shall be entitled to any priority in the redemption of his stock or in the distribution of the assets of the association.

The corporation did not guarantee that the shareholder would have a right to withdraw the par value of his stock until seven years or ten years, as the case might be, from the date of its issuance.

The Commercial Building Trust had no authority in law to give to one class of its capital stock a preference in the distribution of its assets over another class of its capital stock, and such attempt is clearly *ultra vires*.

First Nat. Bank v. D. Kiefer Milling Co. 95 Ky. 97.

Messrs. Fairleigh & Straus for the assignee.

Messrs. William Furlong and John Roberts for the common stockholders.

Hazelrigg, Ch. J., delivered the opinion of the court:

The Commercial Building Trust is a corporation organized in February, 1892, under chapter 56 of the General Statutes. The general nature of its business was to "lend its money to its stockholders, especially with the view of aiding them to procure homes, and, in case of a surplus not needed by the stockholders, to other persons." Articles of Incorporation, p. 8. The object of the corporation was "to afford its members a safe and profitable investment for their earnings, and an opportunity to obtain loans upon easy terms to purchase homes, and establish themselves in business." By-laws, p. 9. The capital stock was to consist of \$10,000,000—100,000 shares, of the par value of \$100 each—of preferred stock; and \$1,000,000—1,000 shares, of the par value of \$1,000 each—of common stock. The former, or preferred stock, was to be subscribed for and paid in upon such terms, and at such times, as the by-laws might prescribe; being in instalments of small amounts, payable periodically or in larger payments, at the election of the subscriber. The common stock was to be subscribed for and paid in upon such terms, and at such times, as the board of directors might, from time to time, determine, and it might be issued in monthly or other periodical series. We conclude, therefore, that the business of the concern, to all practical intents, was that of an ordinary building and loan association; so extended

and amplified, however, as to embrace objects and purposes wholly foreign to such associations proper, and which have been condemned by this court in numerous cases. The articles of incorporation provide that "the preferred stock is guaranteed by this corporation to mature, and be payable, in seven years from the date of the payment of the first instalment paid on said stock." And a by-law provides that the funds of the common stock "shall constitute the guaranty for the maturity of the preferred stock." This preferred stock was to be issued in various classes, in some of which the dividend to be paid was at the rate of 8 per centum per annum, and in others at the rate of 10 per centum per annum, all payable semi-annually. As soon as organized, the corporation began business, and issued, from time to time, both common and preferred stock. Becoming insolvent, however, it made, in June, 1897, for the benefit of its creditors, an assignment of all its assets to the Columbia Finance & Trust Company. In the administration of the trust, the question was presented to the chancellor, in a suit brought for a settlement of the estate, whether there not being enough money to pay the alleged preferred stockholders in full, the entire funds of the corporation should be distributed to them, to the exclusion of the common stockholders. The chancellor answered this question by holding "that none of the stock of the defendant corporation is entitled to a preference over other stock in said corporation, and that all stockholders, indiscriminately, shall share equally in the distribution of the assets of the corporation in the hands of the assignee, in proportion to the amounts paid into the corporation by them, respectively, on their stock, after the payment of its debts, and the proper costs, expenses, and charges of the assignee in the execution of the trust." The correctness of this judgment is the sole question presented on this appeal.

Without reference, for the present, to certain interesting questions ably discussed by counsel, involving the validity of the issue of preferred stock by this corporation, we turn at once to a consideration of the terms of the contract by which the corporation guaranteed that its preferred stock should "mature and be payable in seven years from the date of the payment of the first instalment paid on said stock." This is the only provision on the subject of guaranty to be found in the articles of incorporation, and it seems to apply only to instalment stock. So construing it, the provision means simply that, upon the subscriber for this stock making his monthly payments of 60 cents per share for the period of seven years, or \$50.40 in the aggregate, the corporation guaranteed that the dividends thereon would so accumulate as that the stock would be worth \$1.00 per share. Putting the guaranty in another form, the corporation guaranteed that it would declare at the end of seven years a dividend of \$49.60 on each share of preferred instalment stock, but this stock is to be paid for in monthly instalments of 60 cents per month. In the by-laws, however, there is a

further provision, by which the corporation "guaranteed the maturity of class D instalment stock in seven years from the date of the first month's dues paid thereon, and class E instalment stock in ten years from the date of the first month's dues paid thereon, and class F paid-up stock in seven years from the date of its issuance." Here, again, is merely a guaranty that dividends sufficient to mature certain classes of instalment stock and a class of paid-up stock would be declared at the end of seven years. The subscribers to this stock were members of the association, and participants in the scheme of so loaning out its funds as that the usurious rates were to be realized. It was by reason of the unlawful and usurious character of this scheme, which was adopted by the association with the approval and by the votes of these members or their representatives, that the enterprise failed of execution; and, when it failed, the so-called "guaranty" was at an end. Moreover, the guaranty on the part of the company that it would declare, in a given time, certain dividends, or dividends sufficient to mature certain stock, or an agreement that it would set apart certain other stock as a guaranty of such dividends, cannot be enforced, unless there are net profits—dividends proper—out of which the guaranty can be made good and the dividends paid. The reason is because the contract does not, and cannot, in the nature of things, create the relation of debtor and creditor. The member is a shareholder in the association,—a preferred one, it is true,—when there are profits out of which he may be paid; otherwise not. Mr. Cook, in his work on Corporations, says (§ 271): "The law is now clearly settled that a preferred stockholder is not a corporate creditor."

A contract that dividends shall be paid on the preferred stock, whether any profits are made or not, would be contrary to public policy, and void. An agreement to pay dividends absolutely and at all events,—from the profits when there are any, and from the capital when there are not,—is an undertaking which is contrary to law and is void. Public policy condemns, with emphasis, any such undertaking on the part of a corporation as to its preferred or guaranteed shares." See also *Taft v. Hartford, P. & F. R. Co.* 8 R. I. 310, 5 Am. Rep. 575; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156. The contract there is a guaranty of dividends sufficient to mature the stock, and is enforceable only if there are profits sufficient for that purpose. In this insolvent association there are no profits, and there can be no dividends, a guaranty to the contrary notwithstanding. This may not be very material to appellant, as he is reaching after the capital and all assets on hand not profits. But it follows, from what we have said, that the guaranty has reference solely to a preference in the distribution of dividends. It has no reference to a distribution of assets apart from dividends, and especially no reference to such distribution on the winding-up or insolvency of the concern. The agreement to make enough profits to mature the preferred stock in seven years,

and a pledge of the common stock for that purpose, looked to a going concern; at least, it was expected to be a live and running association for seven years. It is not contended the guaranty was that the corporation was to last for that time. We think it clear that the period of winding up having arrived, with no profits on hand, the distribution of the capital and assets of the concern is not to be controlled by a provision or guaranty looking solely to the maturity of stock, or, what is the same thing, the distribution of dividends, in due course, in a running or going association.

In *Re London India Rubber Co.* L. R. 5 Eq. 519, there was a provision in the company's charter securing to preferred stock a bonus or dividend out of money produced by the sale of certain property, not required by the company in the conduct of its business. This property was, in effect, pledged to the preferred stockholders, to secure this bonus or dividend, just as it is argued here we have a charge on the common stock to secure the maturity of the preferred stock by dividends large enough to mature it. It was argued in that case that the bonus or dividend should be paid out of the proceeds of the property when sold. The court herein, however, said: "But I think it is plain that the 161st clause is directed to a going or continuing concern. It does not, in the slightest degree, contemplate a breaking up of the company, and is not intended to define the rights of the parties on the happening of that unfortunate event. This clause, therefore, has no application to the event which has happened. The fund is not dividend. It represents the capital of the company, and, not being otherwise provided for, it must, in my opinion, as I originally decided, be divided among the shareholders . . . *pro rata*, according to the amount of capital which each shareholder has in the concern; in other words, among the two classes of shareholders equally. I wish it to be considered that I decide the case upon this principle: That where there is a provision for preferential dividends, but no provision for the division of capital, upon the breaking up of the concern any surplus must be distributed among the shareholders according to their capital, without reference to their right in respect to dividends."

So, we think here, the by-laws providing that the funds of the common stock shall constitute the guaranty for the maturity of the preferred stock means that the common-stock fund was a guaranty for the accumulation—the earning—of sufficient profits or dividend to mature the preferred stock, in a continuing association, and continuing, too, on a plan or scheme well known to all its members. There is no provision in the corporation's charter or its by-laws, or in any of the certificates of stock or indorsements or specifications accompanying the stock, declaring that there was to be any preference given one class of stock over another in the capital or body of the concern. In the absence of such a provision, the stock is preferred only in the sense that it has priority in the distribution of dividends. The 44 L. R. A.

contract we are considering, then, by fair construction, refers only to preferential dividends, and this is the ordinary effect to be given the use of the words "preferred stock." In *1 Cook, Stock & Stockholders & Corp. Law*, 3d ed. § 267, it is said: "By preferred stock is to be understood stock which entitles the holder to receive dividends from the earnings of the company before the common stock can receive a dividend from such earnings. In other words, it is stock entitled to dividends from the income or earnings of the corporation before any other dividend can be paid." And the same author (§ 278) says: "Upon the dissolution of a corporation, and the distribution of its assets among the shareholders after the payment of the corporate indebtedness, it is the settled rule of law that, in the absence of any provision in the statutes, by-laws, or certificate to the contrary, preferred stockholders have no priority over common stockholders." See also *Beach, Priv. Corp.* § 507; *2 Waterman, Corp.* § 155; *2 Thomp. Corp.* §§ 2278-2280.

When we bear in mind that the corporation we are dealing with is a building and loan association, with certain underlying principles of co-operation, equality, and mutuality in its make-up not common to ordinary corporations, and which may be termed the "common law of its existence," the objections to upholding preferential contracts among members become apparent. All such attempts are absolutely void, as contrary to the natural law of such associations. If their managers may attract investors by selling them preferred stock,—preferred either as respects dividends or capital,—the burdens of maintaining the organization, and in all probability all the losses of the concern, in case of embarrassment or insolvency, will fall on the very class of members who were primarily intended to be benefited by such associations. In *King v. International Bldg. Loan, & Invest. Union*, 170 Ill. 135, it was said: "The plan of issuing stock containing such agreements is entirely foreign to the purposes of the corporation contemplated by the statute under which the one at bar was organized, and we cannot but regard them as of no force and effect." To the same effect are the cases of *Trowbridge v. Hamilton*, 18 Wash. 686, and of *Wierman v. International Bldg. Loan, & Invest. Union*, 67 Ill. App. 550, although in these cases a by-law undertook to authorize the contract of preference. In the case of *Latimer v. Equitable Loan & Invest. Co.* 81 Fed. Rep. 776, the question arose as to whether or not a building association, established under the statutes of Missouri, substantially similar to those of Kentucky, could provide for the issuance of paid-up stock, and secure its redemption by a trust deed upon its assets. The court held that, independent of statutory provision, a building and loan company had an implied power to receive a prepayment of its stock, and to issue paid-up stock, but that any attempt to give a preference to such stock was against the policy of the common law governing such institutions, and was against the policy of the statute, and was absolutely void. In passing upon the question in that case, the

court said: "The next and last question to be considered is whether the complainant, as the holder of the certificates in question, is entitled to any preferential right in and to the property undertaken to be pledged to secure their payment. This must be answered by determining whether the defendant association had power to make the contract so pledging such property. 'The elementary working principle of the building association scheme,' according to Endlich (Bldg. Asso. § 122), is 'a system of perfect mutual-ity and reciprocity and equality of all members.' No provision is found in the organic law authorizing an association like the defendant to pledge any of its assets for the retirement or payment of any of its stock, nor is there any general power conferred by statute upon loan and building associations to issue preferred preferential stock, from which authority for pledging its assets to secure the payment of any of its stock may be inferred. Under such state of facts, it must, in my opinion, be held that the pledge of corporate assets for the retirement or payment of a certain class of its stock, in preference to others, is so violative of the elementary requirement of equality and mutuality as to be absolutely void."

We fully concur, therefore, in the chancellor's judgment denying any preference to the so-called preferred over the common stockholders in the distribution of the assets of this association. The suggestion that the appellees have not in fact paid anything into the concern on their stock is guarded against in the orders below by requiring proof of all claims, in the usual way, before the master.

The judgment is affirmed.

CITIZENS' BANK OF DYERSBURG, Tennessee, Appt.,

v.

J. B. MILLETT, Impleaded, etc.

(.....Ky.....)

1. A petition in an action against an indorser of a bill of exchange, which is annexed thereto, need not aver protest of the bill or waiver of protest, where the bill has the words "No protest" indorsed on its face.
2. The existence of a debt due by the drawee of a bill of exchange to the payee is a sufficient consideration to bind the drawer upon his promise to pay the bill, and render him liable for the amount although he was a stranger to the debt.
3. That a draft is to the knowledge of the payee drawn by the agent of the drawee to pay the latter's debt will not relieve the drawer from personal liability thereon if he directs the amount to be charged to his account.

NOTE.—The above case is an unusually important one on the question of a draft by an agent to pay a debt of the principal on whom the draft is drawn.

As to agent's responsibility on bills of exchange generally, see also some cases in note to 44 L. R. A.

4. Parol evidence is not admissible to show that a draft drawn by one as an individual was drawn in accordance with a parol agreement between him and the payee that he should not be bound thereon.

(January 20, 1898.)

APPEAL by plaintiff from a judgment of the Circuit Court for Henderson County releasing the drawer of a bill of exchange from liability thereon to the payee because of an alleged understanding that he was not to be liable. *Reversed.*

The facts are stated in the opinion.

Messrs. S. B. Vance and R. D. Vance for appellant.

Messrs. Yeaman & Lockett, for appellee:

The petition does not set forth a cause of action as against Millett. There is no allegation that either of the bills was protested, nor that Millett, the drawer, had any notice of their dishonor.

Daniel, Negotiable Instruments, § 970.

It is no answer to say that the words "No protest" were written across the end of the bill, as in this case. Had it been alleged in the petition that the protest was waived by Millett, and that allegation had been controverted, the memorandum might have been used as evidence to support the allegation. But upon the trial of such an issue the drawer might show that the memorandum was put upon the bill after his signature.

Whatever might constitute the evidence of waiver, it is as necessary to aver it as it would be, in a suit on a note, to aver that the defendant promised to pay.

Randolph, Commercial Paper, § 1367.

The question arises between the original parties to the paper, all of whom understood the circumstances under which it was drawn.

It is a good defense or bar to an action between these parties, that the bill is a mere accommodation bill, that the drawer is a mere accommodation drawer, the payee an accommodation indorser, and the acceptor an accommodation acceptor.

Daniel, Negotiable Instruments, § 1; 3 Kent, Com. 4th ed. pp. 80, 81.

Presumptively the agent drawing on his principal is bound to the creditor; but if there were an express understanding that he was not to be bound, or circumstances from which it might be inferred that such was the understanding, he would be regarded as having drawn for the creditor's accommodation, not, indeed, to enable him to raise money, necessarily, but to enable him, in the most succinct form, to vouch to his debtor the amount and authenticity of the debt, and call for payment at the same time.

Daniel, Negotiable Instruments, § 311, *Liability of Agent*; 1 Parsons, Notes & Bills, 2d ed. 93, 94; 2 Am. & Eng. Enc. Law, *Bills and Notes*, 369.

Farmers' Co-Operative Trust Co. v. Floyd (Ohio) 12 L. R. A. 346.

For note by agent, see also Keldan v. Winegar (Mich.) 20 L. R. A. 705, and note; also Shuey v. Adair (Wash.) 30 L. R. A. 473.

Gaffy, J., delivered the opinion of the court:

On the 18th of December, 1894, the appellant filed in the clerk's office of the Henderson circuit court its petition against W. W. Shelby and William Soaper, a firm doing business under the firm name of the Henderson Hominy Mills, and against the appellee, J. B. Millett. The petition reads as follows:

The plaintiff, the Citizens' Bank, a corporation organized under the laws of the state of Tennessee, and doing business in the town of Dyersburg, Tennessee, says that, for several months past, the defendants W. W. Shelby and Wm. Soaper were partners, doing business in the city of Henderson and state of Kentucky, under the firm name of Henderson Hominy Mills; and while they were copartners, to wit, on November 30, 1894, the defendant J. B. Millett drew his certain draft, a bill of exchange, of that date, payable at sight, on the said Henderson Hominy Mills, and in favor of plaintiff, for the sum of \$2,750.72, which said draft was presented to and accepted by the said Shelby and Soaper, under the style of the Henderson Hominy Mills, on the 5th day of November, 1894; and on the 8th day of November, 1894, said draft was duly presented to said defendants for payment, and payment thereof demanded, but no part thereof was paid. The said draft is herewith filed as part hereof, no part of which has been paid. The plaintiff further says that the defendant J. B. Millett drew his certain other draft or bill of exchange, dated December 1, 1894, on the said defendants Shelby and Soaper, under the firm name of the Henderson Hominy Mills, payable at sight, in favor of plaintiff, for \$2,475.53, which said bill of exchange was duly presented to defendants for payment, and the payment thereof demanded of them, but no part thereof was paid. The said bill is herewith filed as part hereof. The consideration of the said bill of exchange was the sum of \$2,475.53, paid by this plaintiff on the checks of the defendants Shelby and Soaper, and used in payment for corn purchased by them by the defendant J. B. Millett, as their agent. The said checks were paid upon the express agreement of the said defendants that they would accept the draft of the defendant J. B. Millett, drawn upon them for the amount thereof, when requested by this plaintiff; and he says, by reason thereof, the said defendants became and are indebted to him in the said sum of \$2,475.53, and are liable therefor on the said bill of exchange. The defendant the Ohio Valley Banking & Trust Company and Jas. S. Alres have received from the said Shelby and Soaper a conveyance of their property in trust for the payment of their debts, and have accepted said trust, and have qualified as such trustees. No part of the said debt has been paid. The premises considered, the plaintiff prays judgment against the defendants for the sum of \$2,750.72, with interest from November 30, 1894, and for the further sum of \$2,475.53, with interest from December 1, 1894, for their costs, and for all proper relief

S. B. & R. D. Vance.

Atty. for Plaintiff.

The drafts referred to in the foregoing petition are as follows:

\$2,750.72.

Dyersburg, Tenn., Nov. 30th, 1894.

Buying Department of Henderson Hominy Mills.

At sight ——— pay to the order of Citizens' Bank twenty-seven hundred and fifty & 72/100 dollars. Collect through Farmers' Bank, Henderson, Ky. Value received, and charge the same to account of J. B. Millett.

For corn.

To Henderson Hominy Mills, Henderson, Ky.

No. 414.

\$2,475.53.

Dyersburg, Tenn., Dec. 1, 1894.

Buying Department Henderson Hominy Mills.

At sight ——— pay to the order of Citizens' Bank two thousand and four hundred and seventy-five & 53/100 dollars. Collect through Farmers' Bank, Henderson, Kentucky. Value received, and charge the same to account of J. B. Millett.

For corn.

To Henderson Hominy Mills, Henderson, Ky.

No. 415.

Shelby and Soaper made no defense, and judgment was rendered by default against them for the amounts claimed. The appellee, Millett, filed his separate answer, which reads as follows:

The defendant J. B. Millett, for his separate answer to plaintiff's petition, states that, at the time the two drafts sued on were drawn and delivered to the plaintiff, the defendants Shelby and Soaper were, as stated in the petition, partners in the name of the Henderson Hominy Mills, and were manufacturing great quantities of corn into hominy. This defendant was the agent of said hominy mills for the purchase of corn to be shipped to them, to be used in their said business. Prior to the making of either of said drafts, said hominy mills made an arrangement with the plaintiff bank, by which it was agreed between said hominy mills and the plaintiff that the defendant as the agent of said mills should purchase corn in the neighborhood of Dyersburg, and give the checks of the said mills therefor on the plaintiff, and that at convenient periods the amounts paid by plaintiff on such checks should be balanced by drafts drawn on said hominy mills. After said arrangement had been entered into, this defendant, as such agent, purchased large quantities of corn for said hominy mills, and gave checks therefor on plaintiff, signed Henderson Hominy Mills, by J. B. Millett, and afterwards, at convenient periods, gave to plaintiff drafts on said mills for the aggregate amount of such checks, all of which drafts, prior to the one dated November 30, 1894, were paid by said hominy mills. After the last draft that was paid, and prior to said November 30,

this defendant, as such agent, purchased other corn, and gave checks therefor on plaintiff, signed as aforesaid, amounting to \$2,750.72, when, on said November 30, he gave plaintiff a draft for that amount, being the one first set forth in the petition. Afterwards, and prior to December 1, 1894, he, as such agent, purchased other corn, and gave checks therefor on plaintiff, signed as aforesaid, amounting in the aggregate to \$2,475.53, when, on December 1, he gave plaintiff a draft for that amount, being the one secondly set forth in the petition. Defendant alleges that, in the giving of said drafts, and in all of said transactions, he acted solely as the agent of said Henderson Hominy Mills, which fact was well known to and perfectly understood by the plaintiff; and the plaintiff accepted said drafts as the drafts of said hominy mills, and solely upon their credit, and not as the drafts or acts of this defendant in his own right; and, in accepting said drafts, the plaintiff gave credit solely to, and looked for payment thereof solely to, said hominy mills, and not at all to this defendant; and, so far as this defendant is concerned, there was no consideration whatever for either one of said drafts. Par. 2. This defendant has no knowledge or information sufficient to form a belief that either of said drafts was ever presented for payment, or payment thereof demanded. He prays to be dismissed, with his costs, and for all proper relief.

Yeaman & Lockett, for Deft. Millett.

Plaintiff demurred to the first paragraph of the answer, but afterwards withdrew same, and filed its reply, which is as follows:

The plaintiff, for reply to the first paragraph of the answer of J. B. Millett, herein, says it denies that, in giving the drafts mentioned in the petition, the defendant acted solely as the agent of the Henderson Hominy Mills, or that plaintiff accepted said drafts, or either of them, as the drafts of the said hominy mills, or solely upon their credit, or that, in accepting said drafts, it gave credit solely to said hominy mills; but plaintiff says that said drafts were drawn as the drafts of the defendant Millett, and were accepted by the plaintiff as his drafts, and in reliance upon his credit, as well as that of the said Henderson Hominy Mills. Plaintiff says that the arrangement for the payment of the checks of the said hominy mills was made by the defendant Millett, who, in consideration that plaintiff would pay said checks, agreed and promised that, when thereunto requested by plaintiff, he would draw his personal bill of exchange on the said hominy mills for the amount of the checks so paid, and in payment thereof; and plaintiff says that the bills sued on were drawn in pursuance of said agreement, and as the personal bills of the defendant Millett, and were accepted by plaintiff as such, and in reliance upon the credit of the said Millett, as the drawer thereof. Plaintiff prays as in its petition, and for all proper relief.

S. B. & R. D. Vance,

Attys. for Plaintiff.

Afterwards appellee filed the following rejoinder:

The defendant Millett denies that the drafts sued on were drawn as his drafts, or were accepted by plaintiff as his drafts, or in reliance upon his credit. Defendant denies that he, in consideration that plaintiff would pay the checks of the Henderson Hominy Mills, agreed or promised to draw his personal bill of exchange on said hominy mills for the amount thereof or in payment of said checks. It is not true that, in pursuance of such agreement, the said drafts were drawn as the personal bills of the defendant, or were accepted by plaintiff as such, or in reliance upon the credit of this defendant as the drawer thereof. Wherefore he prays as in his answer, and for all proper relief.

Yeaman & Lockett, for Deft. Millett.

A trial resulted in a verdict and judgment for the appellee. Appellant's grounds for a new trial are as follows: "(1) For error of law occurring at the trial and excepted to by the plaintiff as follows: In permitting evidence on behalf of said defendant that he signed the bills of exchange only as agent of the Henderson Hominy Mills; in giving to the jury instructions numbered 1 and 2, and in refusing to give instructions A, B, and C, asked for the plaintiff. (2) Because the verdict is not sustained by sufficient evidence, and is contrary to law. Wherefore plaintiff moves the court to grant it a new trial as against said Millett."

Plaintiff's motion for new trial having been overruled, it prosecutes this appeal.

The plaintiff read as evidence the bills sued on, heretofore copied, together with indorsements thereon, showing that they had been assigned to some other parties for collection, but the assignments being regarded and treated as of no consequence. One of the bills appears to have been accepted by the Henderson Hominy Mills, and the other not accepted. The plaintiff also introduced C. T. Starling, who testified as follows: "I am cashier of the Farmers' Bank of Kentucky, at Henderson." Being shown the said bills of exchange the witness said that "the one of date November 30, 1894, being for \$2,750.72, came to our bank for collection. He did not know whether the other one did or not, nor did he know whether they were ever presented to the Henderson Hominy Mills or to Shelby & Soaper, for payment. The collection clerk takes out the bills for collection, and I do not know to whom he presented them. Hugh Atkinson was our collection clerk at the date of these bills." Sam Heilbronner was then introduced for plaintiff, who testified as follows: "In December, 1894, I was bookkeeper for the Henderson Hominy Mills. The bill dated November 30, 1894, was presented to the Henderson Hominy Mills on December 5, 1894, for payment, and was accepted by me in writing on the face of it. The other bill was never presented to me. The word 'refused,' written on the back of it, was written by Mr. David Banks." On cross-exam-

ination he said that after he accepted the bill, it was never afterwards presented for payment as far as he recollected, and that, when he accepted it, it was presented only for acceptance. The plaintiff then introduced Hugh Atkinson, who testified as follows: That in December, 1894, he was discount and collection clerk in the Farmers' Bank of Kentucky, at Henderson, Kentucky; that the bill in suit, of date November 30, 1894, came to the Farmers' Bank for collection. "Our custom was, when we received paper on the Henderson Hominy Mills, to telephone to Mr. Heilbronner, and he would come up and accept them; and in this case I suppose he came to the bank, as the bill has his acceptance on it." On cross-examination witness said he did not know whether anything further was said to the hominy mills about paying the bill after it was accepted. "The course is, when a draft is accepted, I enter it up, and file it to the date it is due. My father places it in open file, and they are not presented for payment any more. I have no recollection of this particular draft, but I identify it as one that passed through my hands by my writing on the back of it. A great many such drafts come to the bank, and I think we received four or five drawn in favor of the Citizens' Bank of Dyersburg on the Henderson Hominy Mills, and signed like this one is signed. I do not know what became of the draft dated November 30, 1894." David Banks was next introduced for plaintiff, who testified as follows: That he was cashier of the Planters' State Bank of Henderson, Kentucky. "The bill in suit, dated December 1, 1894, passed through my bank, having been sent to it for collection, and was presented by me to the firm of Shelby & Soaper for payment. I telephoned them at the hominy mills that I had the bill for collection, and its payment was refused by them. The word 'refused,' indorsed on the back of the bill, was written by me." On cross-examination witness said he did not remember whether it was Shelby or Soaper to whom he talked through the telephone, but recognized the voice at the time, and knew it was one of them, and then knew which one it was. "The distance from the bank where I was to the hominy mills is about eight or ten blocks. That was the only presentation of the bill I ever made." On re-examination witness said he presented the draft immediately after it reached the bank through the mail, as he was aware of the assignment made by Shelby and Soaper the day before. "My impression is that the assignment was made on the 5th day of December."

The defendant testified for himself as follows: "I reside in Henderson, Kentucky, and am acquainted with the Citizens' Bank of Dyersburg, Tennessee. The Henderson Hominy Mills is located at Henderson, and that bank is located in Dyersburg, Tennessee. My connection with the Henderson

Hominy Mills began on the 8th day of September, 1894, as agent to buy corn on a salary. I operated in the neighborhood of Dyersburg, Newburn, and Yates, and was buying in all the different points along the road. As such agent, I had dealings with the plaintiff bank. I do not remember exactly when that dealing commenced, but it was after I had made contracts for purchasing corn that the Henderson Hominy Mills, through me, made arrangements with the bank to furnish the money to pay for the corn. These contracts were made with the parties who shelled the corn in the shuck, and the Henderson Hominy Mills was to pay them four cents per bushel for shelling the corn; and for every car they loaded I gave them a check on the Dyersburg Bank, and, when I made my rounds, I gave the bank a draft for the whole amount on the Henderson Hominy Mills. The person who did the shelling loaded the corn into the cars, and I paid them by giving a check on the Dyersburg Bank, signed Henderson Hominy Mills, by J. B. Millett. The bank had no money on deposit to the credit of the Henderson Hominy Mills with which to pay these checks. The checks were balanced by a draft for the full amount of the checks up to its date drawn by me on the Henderson Hominy Mills. [Witness produced the stubs of his check book, which were read to the jury, showing the checks given on the Dyersburg Bank for corn purchased for the Henderson Hominy Mills.] The amounts \$486.07, dated November 7, 1894; \$530.72, dated November 9, 1894; \$2,383.17, dated November 17, 1894; \$6,845.80, dated November 23, 1894; \$2,743.87, dated November 30, 1894; and \$2,469.36, dated December 1, 1894,—are amounts for which bills were drawn by me on the Henderson Hominy Mills to take up the checks which had been drawn on the bank, and paid by it, the last two being those for which the bills sued on were drawn. In the bill dated November 9, 1894, is included \$2.50 exchange charged by the bank on the bill; in that of date November 17, 1894, is included \$5.94 exchange; in that of date November 23, 1894, \$17.11 exchange; in that dated November 30, 1894, \$6.85 exchange; and in that dated December 1, 1894, \$6.17 exchange. The bank knew that I was buying corn as agent for the Henderson Hominy Mills and it was the understanding and agreement between the bank and myself that the amounts paid by the bank of the checks drawn by me were to be covered by drafts on the Henderson Hominy Mills. My salary was in no way dependent on the payment of these drafts." W. W. Shelby was next introduced by defendant, who testified as follows: "I was one of the members of the firm of Henderson Hominy Mills. Am acquainted with the defendant Millett. He was our agent for purchasing corn in Dyersburg. Millett was authorized to give drafts on us in payment for corn bought by him. He gave a number of drafts on us, several of which

were paid. I had no communication with the plaintiff bank, except that I received a letter from them, the same which is here now shown me." The said letter was read in evidence to the jury, and is in words and figures as follows:

Dyersburg, Tenn., Nov. 16, 1894.
Henderson Hominy Mills, Henderson, Ky.:—

Gentlemen: Your Mr. Millett is buying quite a lot of corn in this vicinity, and has made arrangements with us to handle his drafts on you. We have reason to believe that he is your representative, but, as the drafts are drawn without B. of L. attached, we prefer to have you authorize us to pay all his drafts.

Yours truly,
A. R. Woollen, Asst. Cashier.

"In answer to that letter, I wrote and placed in the mail the letter a copy of which is here now shown me." The defendant then offered to read to the jury the said copy, to which plaintiff objected; but its objection was overruled, and plaintiff excepted, and the defendant then read the said copy in evidence to the jury, which is in words and figures as follows:

Henderson, Ky., 11/17/94.
A. R. Woollen, Assistant Cashier, Dyersburg, Tenn.:—

Mr. J. B. Millett is our duly-authorized agent, and all his drafts will be promptly paid. He is a man in whom we have the greatest confidence, and will, without doubt, deal fairly with your people.

Yours truly,
Henderson Hominy Mills.
W. W. Shelby, Manager.

The appellee was recalled, and testified as follows: "I stated to the bank that I was the authorized agent of the Henderson Hominy Mills; and they gave me a blank book to give them checks, and when I came back I would give them a draft for the whole amount. The bank knew that I was the authorized agent of the Henderson Hominy Mills, and furnished a book containing the blank checks which I was to use in drawing on it for the money paid for the corn." Witness produced one of the checks taken from the said book, filled out in pencil, which was read to the jury, and is as follows:

Dyersburg, Tenn., Dec. 4, 1894.
No. ——. Citizens' Bank: Pay to the order of Hall & Co. (\$313. ⁷⁵/₁₀₀) three hundred & thirteen ⁷⁵/₁₀₀ dollars. Buying Department Henderson Hominy Mills, for 1 car load of corn.
Henderson Hominy Mills,
By J. B. Millett.

"That was the form of the check which I drew on the bank in payment for corn bought by me."

Plaintiff then introduced A. R. Woollen, who testified as follows: "I was assistant cashier of the plaintiff Citizens' Bank at the 44 L. R. A.

time the bills in suit were drawn, and had been since March 1, 1889. The bills in suit were made by Mr. Millett, to take up checks on the bank given by him for corn bought for the Henderson Hominy Mills. Mr. Millett was introduced to us by Mr. Sugg as representing the Henderson Hominy Mills. He had come over to buy corn for them, and he made with the bank an arrangement to have it pay the checks of the Henderson Hominy Mills drawn by him for the corn as he bought it; and at convenient periods he was to give the bank his draft on the Henderson Hominy Mills, to take up the checks for the amount that had been paid by the bank at that time. The bank never requested him to draw any draft, but that was done at his own motion, and there was no understanding or agreement between him and the bank that they were not his individual drafts or that he was not to be responsible on them. Nothing was said about that." On cross-examination witness said the bank did not request Millett to draw these two drafts. They were drawn in pursuance of the arrangement previously made, and to cover the amounts that had been taken out for the Henderson Hominy Mills for the payment for corn. Witness said he had written a letter to Shelby which had been previously read. Witness made no inquiries about Millett except to find out whether he was the authorized representative of the hominy mills; made no inquiries as to his solvency. He received the letter written by Mr. Shelby, a copy of which had been read to the jury. On re-examination, witness said the arrangement before stated was made with Millett before the receipt of the letter from the Henderson Hominy Mills, and that the bills in suit were accepted as the bills of Millett.

The court then instructed the jury as follows: "(1) The court instructs the jury to find for the plaintiff the two bills filed, and read them, with interest from the date at which they were presented to the hominy mills for payment. (2) But if the jury find from the evidence that Millett was the agent of the Henderson Hominy Mills, and the plaintiff knew that fact, and gave credit solely to said hominy mills, and these bills were drawn by Millett merely as evidence of the amount due said bank by said hominy mills, not intending to bind himself, and the plaintiff knew such to have been his purpose or intention when they accepted said bills, they will find for the defendant." To the giving of which instructions appellant objected and excepted. The plaintiff offered instructions A, B. and C, which were refused by the court, with exceptions. The instructions are as follows: "(A) If the jury believe from the evidence that the bills of exchange in the petition mentioned were drawn by the defendant J. B. Millett in pursuance of an agreement by him with the plaintiff that his drafts on the Henderson Hominy Mills were to be given for the money plaintiff might advance on their checks made by said Millett, then they will find for the plain-

tiff. (B) If the bills sued on were made by Millett in payment of moneys advanced by plaintiff on the checks of the Henderson Hominy Mills made by him, and signed them in his own name, without notification to plaintiff that they were not to be binding on him, then they must find for plaintiff as to said bills. (C) If the jury believe from the evidence that the defendant Millett made an arrangement with the plaintiff by which they were to handle his drafts on the Henderson Hominy Mills for money that he might need in buying corn for said mills, and the bill sued on were drawn in pursuance of such arrangement, then Millett is bound by said bills, and the jury will find for plaintiff thereon." Appellee asked instructions X and Y, which were refused by the court, with exceptions. Said instructions are as follows: "(X) On motion of defendant Millett the court instructs the jury that, upon the pleadings, the defendant is entitled to a verdict, and they are directed to find for the defendant. (Y) If the jury believe from the evidence that Millett is the agent of the Henderson Hominy Mills, engaged in the purchase of corn for said mills, made an arrangement with the plaintiff bank to pay for the corn purchased by drawing the checks of said hominy mills on said bank, and at intervals to draw bills upon the mills in favor of the bank for the amount of said checks, and the bills in suit were so drawn and accepted by the bank, with the knowledge that the defendant Millett was drawing said bills simply to settle the amount advanced by the bank on the purchase of corn, they will find for the defendant Millett."

The first contention of appellee is that the petition is insufficient, for the reason it does not aver protest of the bills, or that protest was waived, and therefore the judgment should be affirmed, without regard to any other question involved. But it will be seen that each bill has indorsed on the face thereof "No protest," which, being a part of the bill in suit, the petition and bill together show a right to recover, and it was not necessary to specifically aver a waiver of protest. If there had been any interlineation or change in the bill after it was signed, the defendant should have taken advantage of that by answer. We think the evidence establishes due presentation of the bills for payment; hence the only questions for decision are whether the bills were executed without any consideration and whether the appellee was entitled to plead and prove that the agreement between him and appellant was, in substance, that he was not to be bound upon the bills, but that they were accepted and treated alone as the obligation of the hominy mills. So far as the plea of no consideration is involved, it is sufficient to say that the existence of the debt against the hominy mills was a sufficient consideration to bind the appellee, and render him liable for the debt, if he in fact agreed to pay the same or to be bound therefor. The bills in suit clearly import an obligation upon the part of the appellee to pay the same;

and unless he escape liability on account of some arrangement between him and appellant, judgment should have been rendered against him for the amount of the bills.

It is insisted for appellee that he was entitled to allege and prove the alleged agreement between him and appellant to the effect that he was not to be bound upon the bills; while it is earnestly contended for appellant that appellee could not be heard to plead and prove any such agreement, the same being in contradiction of the written agreement, and contrary to the law in such cases. We deem it unnecessary to discuss or review all the authorities cited by counsel, but will first notice some of those relied on by appellee. The appellee cites Story, Bills, § 187, which seems only to go to the extent of holding that the plea of no consideration is good as between the drawer and the payee. Appellee also cites 1 Daniel, Neg. Inst. 3d ed. § 311. We quote as follows: "It will be seen from preceding sections that if an agent should in his own name draw a bill of exchange on his principal for a debt of the latter, he will be personally responsible to the drawer in the case of the default of the principal, although upon its face the bill was drawn on account of his principal. And it is stated in the American Leading Cases to be the general rule that whenever an agent puts his name to a negotiable instrument, as a party to it, he is legally liable to the promisee and to indorsees upon it." Section 311 says: "The English cases clearly bear out these views. But the weight of authority in the United States is otherwise, though the cases are not uniform. If the drawer signs himself 'A. B., Agent,' and the payee takes the bill so drawn on his principal debtor, to whom he has given credit, and to whom he looks for payment, it has been said that there is really no valuable consideration for his liability. But the debt of another is a valuable consideration, and, if the agent intended to be bound upon the draft, no other consideration will be necessary. Bills are constantly drawn for accommodation, and the transaction might be construed as intended to be of this character. We think, however, that a bill drawn by 'A. B., Agent,' might well be distinguished from a note so signed, for the language is not inconsistent with the idea that the drawer signs as agent of the drawee whose name is disclosed upon the face of the instrument; while in a note none but the maker's name is disclosed. Therefore parol evidence might well be admitted to show the real circumstances of the case from which might be inferred the understanding of the parties. When there is no intimation of agency accompanying the drawer's name, the case presented is more difficult. This view, however, may be presented when the buyer has parted with his goods upon faith of the principal's credit; but, dealing with his agent, he then has funds in the principal's hands, and it is his draft that the principal would honor, provided he knew the fact that he was indebted

to the drawer." Without quoting the entire section, it is sufficient to say that the doctrine contended for by appellee is not well sustained by the authorities *supra*. It will also be seen that the draft in question was simply signed "J. B. Millett," with direction to charge to his account.

In 3 Kent, Com. 4th ed. pp. 80, 81, it is said that, as between the original parties to negotiable paper, the consideration may be inquired into. In *Parsons on Notes & Bills*, 2d ed. p. 93, cited by appellee, it is said, commencing on page 92: "If an agent signs a note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable on the note, and the principal will not be liable. And although it can be proved that the agency was disclosed to the payee when the note was made, and it was the understanding of all parties that the principal, and not the agent, should be held liable, this will not generally be sufficient to authorize the discharge of the agent, or to render the principal liable on the note. But the principal will be liable under such circumstances on the original consideration for which the note was given. And there may be cases in which the agent would not be personally liable on the bill or note, though there should be nothing on the face of the instrument to indicate the agency. Thus, if an agent, in the execution of his agency, incurs a debt on behalf of his principal, and draws on his principal a bill for the amount thereof in favor of the creditor, it has been held that the agent will not be held liable on the bill, if it was the understanding of the parties that he acted as agent merely, and did not intend to make the debt his own. The principal object in drawing the bill in such cases is to certify to the principal the amount due the creditor, and the agent may, it seems, defend on the ground of want of consideration. Of course, this will not apply to a subsequent bona fide holder without notice. And if an agent draws a bill on a third person in his own name, but there is sufficient evidence on the face of the instrument to inform the drawee that he is to pay the amount on account of the principal, and not on account of the drawer, the drawee, having paid the bill, will not be entitled to maintain an action for money paid against the agent. Thus, where an agent of the owners of a steamboat drew a bill in his real name, and directed the drawee to charge the amount to account of steamer *Walter Scott*, it was held that the agency of the drawer was apparent on the face of the bill, in consequence of this direction, which negated the idea that he was to be personally bound." The most that can be sustained from the foregoing is that in some instances the agent has been allowed to escape liability by proving a parol agreement between him and the payee that the agent was not to be personally liable on the bill.

We will now proceed to notice some of the authorities relied on by appellant. In *Story* 44 L. R. A.

on *Agency*, 9th ed. § 155, it is said: "If, from the nature and terms of the instrument, it clearly appears, not only that the party is an agent, but that he means to bind his principal, and to act for him, and not to draw, accept, or indorse the bill on his own account, that construction will be adopted, however inartificial may be the language in furtherance of the actual intention of the instrument. But, if the terms of the instrument are not thus explicit, although it may appear that the party is an agent, he will be deemed to have contracted in his personal capacity; and there is no difference on this point whether the instrument be a deed or an unsealed contract. Thus, if an agent should execute a deed in his own name, and should thereby, 'for and on behalf' of his principal, covenant, etc., he would be personally bound thereby, and not his principal. So, if an unsealed instrument should purport to be a memorandum of agreement between A B, on behalf of C D, of the one part, and E F, of the other part, to execute a lease of certain premises of the principal, it would be held to be the contract of the agent, and binding on him personally. *A fortiori*, an agent will be held to be personally bound if the name or character of the principal should not appear on the instrument, or if it should appear that no other person than himself could be legally bound by it, although he should sign his name thereto as agent, or as acting in an official capacity." In § 156, after some preliminary remarks, the author gives the further illustrations: "Thus, if a broker should sell goods, and draw upon the buyer for the amount in his own name, in favor of his principal, if the bill should be dishonored he would be personally liable, unless some special words were used in the bill to prevent it. And this liability would not only extend to third persons, but even to his principal, although he was known to be a mere agent; for in such a case the bill imports upon its face a personal liability as drawer in favor of all persons who are or become parties to the bill, and there is nothing in the character of an agent which excludes such personal liability, if he chooses voluntarily to incur it in favor of his principal, as well as in favor of third persons. So, if a known agent should draw a bill on a third person in favor of the payee, and direct the drawee to place the amount to the debit of his principal, he would be personally liable on the bill to the payee, unless he use other words to exclude it." It is said in § 157: "Precisely the same personal liability will attach to an agent, who in his own name signs a note as maker, or a bill as drawer, or accepts a bill, or indorses a bill or note generally; for in such a case, although he is a known agent, the making or accepting or indorsing of the instrument is treated as an admission that it is his personal act, not only in respect to third persons, but also in respect to his principal."

In *Pentz v. Stanton*, 10 Wend. 275, 25 Am. Dec. 558, the court, in discussing the liabil-

ities of parties to bills, and testimony admissible to show the real contract, quotes with approval from other decisions cited: "The parol testimony explaining and showing the real nature of the transaction was decided to be inadmissible, on the ground that it contradicted or varied the written contract. Judge Parker, in delivering the opinion of the court, says that 'no person in making a contract is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs.' This principle has been long settled, and has been frequently recognized. 'Nor do I know,' he continues, 'an instance in the books, of an attempt to charge a person as the maker of a written contract appearing to be signed by another, unless the signer professes to act as by procuration or authority, and stated the name of the principal on whose behalf he gave his signature.' He also discusses at length . . . the admissibility of parol evidence in such cases to show the real character of the transaction, and holds it to be utterly incompetent on the ground which has already been stated. [Quoting *Mayhew v. Prince*, 11 Mass. 54; *Meyer v. Barker*, 6 Binn. 228.] It is well settled that if a private agent draw a bill or enter into any other contract in his own name, without stating that he acts as agent, so as to bind his principal, he will be personally liable. [Quoting *Chitty, Bills*, 36, and cases cited; 5 Taunt. 749; 2 Marsh. 454; 5 East, 148; 1 Bos. & P. 368; 1 T. R. 181.] It is not sufficient to charge the principal or protect the agent from personal responsibility merely to subscribe himself as agent, if the language of the instruments imports a personal contract on his part. [Quoting *Thacher v. Dinsmore*, 5 Mass. 299, 4 Am. Dec. 61; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Buffum v. Chadwick*, 5 Mass. 103; *Van Reimsdyk v. Kane*, 1 Gall. 630; Chit. 52; *Clark v. Van Reimsdyk*, 9 Cranch, 156, 3 L. ed. —.] But where the name of the principal appears on the face of the instrument or contract, and it is evident that the agent did not intend to bind himself personally, but acted merely on behalf of the principal, if he acted by competent authority, the principal, and not the agent, will be bound." In [*Thomas v. Bishop*] 2 Strange, p. 955, it is said: "A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing."

In [*Thomson v. Davenport*] 2 Smith, Lead. Cas. Hare & W. Notes, *368, 369, 7th Am. ed. it is said: "It has been said that if a contract in writing, without naming his principal, so that he appears upon the writing to be himself the principal, does not a creditor who seeks to show that, while thus professedly contracting for himself, he really contracted for a principal, endeavor to infringe this rule of evidence by adding to the written contract a new term at variance with the written terms? This question, it is, however, apprehended, must receive dif-

ferent answers upon different occasions, answers varying according to the object with which it is sought to introduce the parol testimony, which, it is submitted, can never be heard for the purpose of discharging the agent, but may always be so for that of charging the principal. That parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he mentioned his principal, at the time of entering into it, seems to be now well established." Numerous decisions are quoted by the author. It is further said in *Leadbitter v. Farrow*, 5 Maule & S. 345, by Lord Ellenborough: "Is it not an universal rule that a man who puts his name to a bill of exchange makes himself personally liable, unless he states on the face of the bill that he subscribes it for another, or by procuration of another? . . . Unless he says plainly, 'I am the mere scribe,' he becomes liable." In the case of *Nash v. Towne*, 5 Wall. 703, 18 L. ed. 530, which was an action upon a bill of exchange, the court said: "Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency, and mentioned the name of his principal, at the time the contract was executed. Where a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name, and parol evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence, says Baron Park, does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another; and that principle has been fully adopted by this court. Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal, and in that state of the case he might have his remedy against either, at his election. Evidence to that effect will be admitted to charge the principal, or to enable him to sue in his own name; but the agent who binds himself is never allowed to contradict the writing by proving that he contracted only as agent, and not as principal."

In 1 Randolph on Commercial Paper, § 382, it is said: "The liability of the agent to the principal is next to be considered. Where the agent draws a bill of exchange on his principal by his authority, the principal is not, in general, liable as drawer. Nor is it necessary in such case that the agency of the drawer should be expressed on the face of the bill, if it is drawn in fact for a debt of the principal. Where the drawer of a bill is the agent of the drawee, it is held in England that he is liable both to the payee and to subsequent parties, although known

by them to be acting as agent merely. In the United States a different rule seems to have been laid down, and it has been held that the agent who draws a bill on his principal for goods sold him, disclosing the principal, is not liable to a payee who has knowledge of the agency. But, if the agent draws the bill on his principal in his individual name, he will be liable as drawer to the payee and subsequent parties, even though the bill is drawn expressly chargeable to the principal's account, and though the payee knows of the agency." In 1 Parsons on Bills & Notes, p. 102, it is said: "It is the general rule in regard to simple contracts that parol evidence may be received to make unnamed principals liable, or to give them the benefit of the contract, for this leaves the actual party liable as before, and therefore cannot be considered as varying the contract. But such evidence cannot be received to discharge the actual signer on the ground of his agency, for this would be to vary the contract. In reference to negotiable paper, however, the rule, as we have seen, is more strict. For parol evidence is not admissible either to discharge an actual signer, or to charge one whose name does not appear on the instrument. The reason for this is that, from the nature and purpose of negotiable paper, no person should be held as a party to it whose name is not written upon it, as such paper ought to contain in itself all its own evidence, and thus be independent of extrinsic proof. One who puts his name on negotiable paper will be liable, personally, as we have seen, although he acts as agent, unless he says so, and says also who his principal is,—that is, unless he uses some expression equivalent, to use Lord Ellenborough's language, to 'I am the mere scribe.' For if the construction may fairly be that while he acts officially, or at the request of others, or for the benefit of others, yet, what he does is still his own act, it will be so interpreted." In 1 Daniel, Neg. Inst. § 305, it is said: "The party so signing must have intended to bind somebody upon the instrument; and, no promisor but himself thereon appearing, it must be construed as his note, or as a nullity. And, though he term himself 'agent,' such suffix to his name will be regarded as a mere *descriptio personæ*, or as an earmark of the transaction, and may be rejected as surplusage. And this principle applies although it could be proved that the payee knew of the agency when the note was made, and it was understood that the principal, and not the agent, should be bound, for such evidence would vary the terms of the written note. But, under such circumstances, if the note were not paid, the principal might be sued upon the original consideration. However, if the payee, with full knowledge of the agency and of the principal's liability, and relying solely on the agent's credit, took his individual note, the principal cannot be resorted to at all." In a late case in New York the note was signed simply "J. S. M., Agent." It was alleged to have been given for goods sold by the de-

fendant, a lady, probably the agent's wife, and recovery against the alleged principal was sustained. This decision is in conflict with the general current of authority. The true principle has been thus stated by the United States Supreme Court: "Parol evidence can never be admitted to exonerate an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency, and mentioned the name of his principal at the time the contract was executed."

We have been referred to no decisions of this court applicable to the case at bar. It seems manifest that the decided weight of authority is—if, indeed, there be any authority to the contrary—that the first paragraph of the answer constituted no defense, except so far as the plea of no consideration was relied on; and, that being true, the testimony as to the agreement or understanding between appellant and appellee that appellee should not be bound on the bills was incompetent, and could not authorize a verdict in defendant's favor. We have already seen that there was no proof to sustain the plea of no consideration. It further appears in this case that the appellant lived in the state of Tennessee, distant from the home of the hominy mills, as well as from appellee's residence; and it seems clear that the agreement at the commencement of the business transaction was that appellee should give the checks of the hominy mills on appellant to the persons from whom he purchased corn, and that from time to time he would give his draft to appellant upon the hominy mills for the sums so paid out by the bank on the checks as aforesaid; and it seems certain that appellant, for some time, relied entirely upon that agreement or contract, and cashed the checks of the hominy mills, signed by appellee as agent, without knowing in fact, except from appellee, that he was the authorized agent of the hominy mills. It may seem hard for appellee to pay the debts sued for, but would it not be still harder upon appellant to lose the money which it had advanced relying upon the promise of appellee to do that which in fact he did do,—that is, give his own bill in consideration of the money furnished by the bank at his instance and request, although he was merely the agent of the hominy mills?

From the foregoing, it will be seen that the court erred in giving the second instruction complained of. Instruction A, asked for by plaintiff, should have been given. Instruction B was more favorable to appellee than he was entitled to. Instruction C should have been given. Instructions X and Y, asked for by appellee, were properly refused.

For the reasons indicated, the judgment of the court below is reversed, and the cause remanded, with directions to award appellant a new trial, and for proceedings consistent with this opinion.

Rehearing denied.

MAINE SUPREME JUDICIAL COURT.

Jonathan P. PALMER

v.

MAINE CENTRAL RAILROAD
COMPANY.

(92 Me. 399.)

1. A private individual who has procured the arrest of an innocent person by an officer without a warrant cannot justify by showing that he acted in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds.
2. The unreasonable refusal of a passenger to state his name when asked by a conductor to whom he tenders a mileage ticket if the name thereon was his own does not justify the conductor in procuring his arrest without a warrant, on the charge of fraudulently evading payment of fare.
3. The settlement of an unwarranted prosecution of a passenger for alleged fraudulent evasion of the payment of fare, made by payment of the fare due and all costs of prosecution, and by an acknowledgment by the conductor of complete satisfaction "for evading his railroad fare," is not a bar or waiver of a cause of action by the passenger for false imprisonment.
4. Ten dollars is a sufficient compensation for a passenger's injured pride, wounded sensibility, and mortification caused by public arrest, where it was procured by a conductor in the belief that the passenger was fraudulently evading payment of fare, when he in fact tendered a valid mileage ticket, but unreasonably refused to state whether the name on the ticket was his own.

(January 12, 1899.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Cumberland County made during the trial of an action for false imprisonment which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

Messrs. Drummond & Drummond, for defendant:

The right to issue a ticket which is not transferable necessarily carries with it the right to require the identification, in a reasonable manner, of the party producing it with the party to whom it was issued. When a particular method of identification is made a condition precedent to the validity of the ticket, the courts have invariably held that that method must be observed by the holder of the ticket, and in case it is not that the conductor can rightfully refuse to accept the ticket.

Wood, Railroads, § 347, p. 1395; *Cody v. Central P. R. Co.* 4 Sawy. 114; *Chicago & N. W. R. Co. v. Bannerman*, 15 Ill. App. 100; *Boylan v. Hot Springs R. Co.* 132 U. S. 149, 33 L. ed. 292; *Mosher v. St. Louis, I. M. &*

S. R. Co. 127 U. S. 390, 32 L. ed. 249; *Cloud v. St. Louis, I. M. & S. R. Co.* 14 Mo. App. 136; *Edwards v. Lake Shore & M. S. R. Co.* 81 Mich. 364; *Abram v. Gulf, C. & S. F. R. Co.* 83 Tex. 61; *Bowers v. Pittsburgh, Ft. W. & C. R. Co.* 158 Pa. 302; *Bethea v. Northeastern R. Co.* 26 S. C. 91; *Rawitzky v. Louisville & N. R. Co.* 40 La. Ann. 47; *Norfolk & W. R. Co. v. Anderson*, 90 Va. 1.

When the holder has neglected to identify himself he has not complied with the terms of his contract, and the conductor is not obliged to accept the ticket, and upon refusal to pay fare can rightfully eject him from the train.

Cloud v. St. Louis, I. M. & S. R. Co. 14 Mo. App. 136; *Edwards v. Lake Shore & M. S. R. Co.* 81 Mich. 364; *Abram v. Gulf, C. & S. F. R. Co.* 83 Tex. 61; *Bethea v. Northeastern R. Co.* 26 S. C. 91; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249; *Boylan v. Hot Springs R. Co.* 132 U. S. 149, 33 L. ed. 292.

Whether the particular manner of identification adopted by the conductor was reasonable or not is entirely immaterial, because the plaintiff absolutely refused to identify himself at all.

Abram v. Gulf, C. & S. F. R. Co. 83 Tex. 61.

The provisions that the ticket is "good only for the person in whose name it is issued," and that "conductors are authorized to obtain the signature of holder of the ticket for identification," necessarily imply that the plaintiff, when he offers his ticket, should show, if requested, that he is the "person in whose name the ticket was issued," and if he refuses to do so he is not entitled to ride upon it.

Ripley v. New Jersey R. & Transp. Co. 31 N. J. L. 388; *Bethea v. Northeastern R. Co.* 26 S. C. 91; *Norfolk v. W. R. Co. v. Wysox*, 82 Va. 250; *Downs v. New York & N. H. R. Co.* 36 Conn. 287, 4 Am. Rep. 77; *Abram v. Gulf, C. & S. F. R. Co.* 83 Tex. 61; *Chicago & N. W. R. Co. v. Bannerman*, 15 Ill. App. 100; *Edwards v. Lake Shore & M. S. R. Co.* 81 Mich. 364; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249; *Boylan v. Hot Springs R. Co.* 132 U. S. 146, 33 L. ed. 290; *Burnham v. Grand Trunk R. Co.* 63 Me. 298, 18 Am. Rep. 220; *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 12 Am. Dec. 138.

The reasonableness of a particular practice adopted by railroad companies in fulfilling their obligations to passengers is a question of law.

South Florida R. Co. v. Rhodes, 25 Fla. 40, 3 L. R. A. 733; *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea. 128; *Norfolk & W. R. Co. v. Wysox*, 82 Va. 250; *Chilton v. St. Louis & I. M. R. Co.* 114 Mo. 88, 19 L. R. A. 269; *Avery v. New York Co. & H. R. R. Co.* 121 N.

NOTE.—For liability of carrier on account of false arrest of passenger, see note to *Mulligan v. New York & R. B. R. Co.* (N. Y.) 14 L. R. A. 791; also *Gillingham v. Ohio River R. Co.* (W. Va.) 14 L. R. A. 798; *Palmer v. Manhattan* 44 L. R. A.

R. Co. (N. Y.) 16 L. R. A. 136; *Central R. Co. v. Brewer* (Md.) 27 L. R. A. 63; *Atchison, T. & S. F. R. Co. v. Henry* (Kan.) 29 L. R. A. 465; and *Little Rock Traction & Electric Co. v. Walker* (Ark.) 40 L. R. A. 473.

Y. 31; *Vedder v. Fellows*, 20 N. Y. 126; *St. Louis, I. M. & S. R. Co. v. Adcock*, 52 Ark. 406; *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 12 Am. Dec. 138; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342, 35 Am. Rep. 278; *Pittsburgh, C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 2 L. R. A. 489; *State v. Gould*, 53 Me. 279; *Keeley v. Boston & M. R. Co.* 67 Me. 163, 24 Am. Rep. 19; *Eaton v. McIntire*, 88 Me. 578.

Having, by his action in settling the controversy in the way that he did, led the conductor and the judge to believe that he acknowledged his guilt, it is too late now to deny it.

His action was tantamount to a plea of guilty, and he is now estopped to deny it.

Caffrey v. Dragan, 144 Mass. 294; *Joyce v. Parkhurst*, 150 Mass. 243.

Messrs. Hanly & Libby, Levi Turner, and T. J. Boynton, for plaintiff:

The charge covers the whole question submitted to the jury, and is in entire harmony with the doctrine laid down by this court in the case of *Gee v. Patterson*, 63 Me. 49.

The verdict of a jury is not lightly to be set aside.

Cunningham v. Magoun, 18 Pick. 13; *Lavigne v. Lewiston Mills Co.* (Me.) 10 Atl. 62; *Nash v. Somes* (Me.) 10 Atl. 447.

There was no attempt to commit a crime. The plaintiff had no intention of evading his fare, but if he had in fact evaded his fare, the offense was complete and ended before the arrest of the plaintiff by officer Norman.

Bigelow, Torts, p. 136; *Bowditch v. Balchin*, 5 Exch. 378; *Baynes v. Brewster*, 2 Q. B. 375; 2 Addison, Torts, § 802.

To justify an arrest without warrant for a misdemeanor, even by a constable, the offender must still be found in the very act of committing the offense.

McLennon v. Richardson, 15 Gray, 74, 77 Am. Dec. 353; *Lynch v. Metropolitan Elev. R. Co.* 90 N. Y. 77, 43 Am. Rep. 141.

Personal judgments conclude only the parties to them and their privies. The bar must be mutual to the parties in the later action.

Bigelow, Estoppel, p. 98; *Petrie v. Nuttall*, 11 Exch. 569; *Corbley v. Wilson*, 71 Ill. 209, 22 Am. Rep. 98; *Buttrick v. Holden*, 8 Cush. 233; *Kingston's Case*, 2 Smith, Lead. Cas. 679.

The payment of money by the plaintiff to the court at Brunswick was made under duress of imprisonment by an abuse of legal process. The criminal process against the plaintiff was instituted for the purpose of extorting money from him in settlement of a civil claim. Such an arrest is false imprisonment by all who directly or indirectly procured the same or participated therein for any such purpose.

Hackett v. King, 6 Allen, 58; *Taylor v. Jaques*, 106 Mass. 291.

Savage, J., delivered the opinion of the court:

Trespass for false imprisonment. The verdict was for the plaintiff for \$550. The case comes up on exceptions by the defendant, and on motion to set aside the verdict, on the grounds that it was against law, and 44 L. R. A.

against the weight of evidence, and that the damages are excessive. Substantially the same legal propositions are presented under the motion as under the exceptions. It will be more convenient to consider the motion first, for the conclusion which we think must be reached under the motion will necessarily dispose of the exceptions.

There is little dispute as to the essential facts. The questions at issue are chiefly legal ones. In January, 1896, the plaintiff purchased from the defendant, and there was issued to him, a mileage book or ticket with coupons, one to be detached for each mile the purchaser should travel. By the purchase of this book, the plaintiff became entitled to travel 1,000 miles on the defendant's railroad. Upon the ticket was a contract, which was signed by the plaintiff at the time of purchase. This contract discloses that one of the conditions under which the ticket was sold was the following:

"That it is good only for the person in whose name it is issued, and, if presented by any other person, the right to any remaining rides to which the purchaser might have been entitled shall be forfeited; and the conductor shall be authorized to take up this ticket, and return the same to the general ticket office as forfeited, and conductors are authorized to obtain the signature of the holder of the ticket for identification."

In June, 1896, the plaintiff was a passenger on the defendant's train from Rockland to Brunswick, and, in payment of his fare, tendered to the conductor the mileage ticket above referred to. The conductor was not personally acquainted with the plaintiff, and, for identification, he asked the plaintiff if the name upon the ticket, "Jona. P. Palmer," was his name. The plaintiff refused to say whether it was or not, though he told the conductor that the ticket was his own. The conductor then declined to accept the ticket, and asked the plaintiff to pay a cash fare, which the plaintiff refused to do. As the plaintiff was leaving the train at Brunswick, without further payment or tender of his fare, the conductor caused him to be arrested by a constable, without a warrant, for fraudulently evading the payment of his fare; and this is the arrest complained of. The plaintiff was immediately taken before the municipal court of Brunswick, where the conductor made a complaint, under oath, against him, under Rev. Stat. chap. 51, § 78, which provides that whoever "fraudulently evades payment" of fare over a railroad "by giving a false answer, or by traveling beyond the place to which he has paid, or by leaving a train without paying, forfeits not less than \$5, nor more than \$20, to be recovered on complaint." The plaintiff pleaded "Not guilty." The plaintiff then paid his fare and the costs of prosecution to the judge of the court. An acknowledgment of "complete satisfaction" was filed by the conductor, and the plaintiff was thereupon discharged without further prosecution. No question is raised but that the conductor was acting within the scope of his authority as a servant of the defendant corporation.

The defendant endeavors to justify the ar-

rest. It claims that the conductor had a lawful right to ask the plaintiff, as a means of identification, if the name on the ticket was his name, and that it was the plaintiff's duty to answer truly; and, further, that if the conductor had reasonable cause, from the plaintiff's conduct, to believe that he was fraudulently evading the payment of his fare, and did so believe, the conductor was justified in causing the plaintiff's arrest by an officer, as he was in the act of leaving the train, although the officer had no warrant.

The discussion will be simplified somewhat if we state at the outset two propositions, about which, we think, there can be no real controversy: First, the offense for which the plaintiff was arrested was simply a misdemeanor; secondly, the plaintiff was not guilty in fact. It cannot be said, in any view of the case, that the plaintiff fraudulently evaded the payment of his fare. He owned the mileage ticket. He had a right to travel upon it. He tendered it to the conductor. There was no fraudulent evasion of payment. There was on his part only a wilful, unreasonable obstinacy, which arose, perhaps, from a mistaken sense of pride.

The precise question to be decided, therefore, is whether a private individual who has procured the arrest of an innocent person for a misdemeanor, by an officer without a warrant, can justify by showing that he acted in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds. We think the question must be answered in the negative.

This is a suit, not for malicious prosecution, but for a false imprisonment. It is not for a misuse or an abuse of legal process, but for an arrest without legal process. The action must be sustained, unless the defendant can show a legal justification for causing the arrest to be made.

The principles which, by the common law, regulate the right to arrest, or cause an arrest, without warrant, have been long settled both in this country and England; and by these principles the rights of these parties must be determined. Unless modified by statute, they are recognized by the courts, almost without exception. They are designed to promote the safety of the public and the due administration of public justice, on the one hand, and, on the other, to afford the citizen security against unwarrantable restraints upon his personal liberty. We shall state these principles somewhat more fully, perhaps, than the particular question under consideration requires; but a full statement is valuable by way of illustration, and for the purpose of showing the clear distinction between the powers of an officer and those of a private individual.

By the common law, an officer may arrest for felony, without warrant, upon reasonable grounds of suspicion. 2 Addison, Torts, § 802; *Samuel v. Payne*, 1 Dougl. 360; *Davis v. Russell*, 5 Bing. 354; 1 Hale, P. C. 567; *Burke v. Bell*, 36 Me. 317; *Rohan v. Sawin*, 5 Cush. 281; *Holley v. Mia*, 3 Wend. 350, 20 Am. Dec. 702; *Com. v. Carey*, 12 Cush. 246; *Wills v. Jordan*, 20 R. I. (Part 3) 236, 44 L. R. A.

41 Atl. 233; *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669; *Eanes v. State*, 6 Humph. 53, 44 Am. Dec. 289; *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458; *Holden v. Hall*, 4 Hurlst. & N. 423 [*Griffin v. Coleman*, 4 Hurlst. & N. 269]. And for making such an arrest, the officer is justified, although it turns out that no felony has, in fact, been committed. *Beckwith v. Philby*, 6 Barn. & C. 635; *Simmons v. Vandyke*, 138 Ind. 380, 26 L. R. A. 33, and the cases cited above. But an officer may not arrest on information or suspicion, without a warrant, for a misdemeanor, unless it was committed in his presence. 2 Addison, Torts, § 804; 4 Bl. Com. p. 292; 1 Hale, P. C. 567; *People v. McLean*, 68 Mich. 480; *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458; *Ross v. Leggett*, 61 Mich. 445; *Com. v. Ruggles*, 6 Allen, 588; *Com. v. McLaughlin*, 12 Cush. 615; *State v. Lewis*, 50 Ohio St. 179, 19 L. R. A. 449; *Pow v. Beckner*, 3 Ind. 475; *Webb v. State*, 51 N. J. L. 189; *Krulevitz v. Eastern R. Co.* 143 Mass. 228. In the last-named case, the plaintiff had been arrested, at the request of a conductor, by an officer, without a warrant, for a refusal to pay fare. We have cited these cases *in extenso*, because nearly all of these contain valuable discussions of this subject. In many of these cases it seems to have been held that the authority of an officer to arrest for misdemeanor, without warrant, is limited to breaches of the peace or affrays committed in his presence (see also *Com. v. Wright*, 158 Mass. 149, 19 L. R. A. 206), though the offense has actually been committed, but elsewhere (*Scott v. Eldridge*, 154 Mass. 25, 12 L. R. A. 379). But in still other cases the authority is extended to all crimes committed in the presence of the officer. *Baltimore & O. R. Co. v. Cain*, 81 Md. 87, 28 L. R. A. 688, and cases cited there. But the authority of a private individual is much more limited and confined. He may arrest for felony, but he does it at his peril. If called upon to justify, it has been held by some courts that he must show that the felony had actually been committed, and that he had reasonable grounds for believing the person arrested to be guilty. *Wakely v. Hart*, 6 Binn. 316; *Davis v. Russell*, 5 Bing. 354; *Allen v. Wright*, 8 Car. & P. 522; *Reuck v. McGreggor*, 32 N. J. L. 70; *Holley v. Mia*, 3 Wend. 350, 20 Am. Dec. 702; *Keenan v. State*, 8 Wis. 132; *Beckwith v. Philby*, 6 Barn. & C. 635; *Russell v. Shuster*, 8 Watts & S. 308; *Burns v. Erben*, 40 N. Y. 463; 2 Addison, Torts, § 803; Cooley, Torts, 2d ed. p. 202. But it has been held by other courts, and perhaps with better reason, that he must show that the person arrested was actually guilty of the felony. *Rohan v. Sawin*, 5 Cush. 281; *Com. v. Carey*, 12 Cush. 246; *Morley v. Chase*, 143 Mass. 396. So he may arrest for an affray or a breach of the peace committed in his presence, and while it is continuing. 1 Russell, Crimes, 272; 1 Archbold, Crim. Pr. & Pl. 82; *Timothy v. Simpson*, 1 Crompt. M. & R. 757; *Knot v. Gay*, 1 Root, 66; *Mayo v. Wilson*, 1 N. H. 53; *Phillips v. Trull*, 11 Johns. 486; *Kurtz v. Moffitt*, 115 U. S. 487, 29 L. ed. 458; *Ross v. Leggett*, 61 Mich. 445.

But a private individual may not arrest for misdemeanor, on suspicion, no matter how well grounded. And as, in case of felony, he is bound to show that the felony has been committed, so, in case of affray or breach of the peace committed in his presence, he must show that the party arrested by him was guilty. Nor can a private individual justify, if he procure the arrest of an innocent person for a misdemeanor, by an officer, without warrant. In such case he is answerable. He can no more lawfully cause such an arrest than he can make it himself. *Hobbs v. Branscomb*, 3 Campb. 420; *Hopkins v. Crowe*, 7 Car. & P. 373; *Derecourt v. Corbishley*, 5 El. & Bl. 188; *Price v. Seeley*, 10 Clark & F. 28; *Collett v. Foster*, 2 Hurlst. & N. 356; *Veneman v. Jones*, 118 Ind. 41; *Holley v. Mize*, 3 Wend. 350, 20 Am. Dec. 702; *Samuel v. Payne*, 1 Dougl. 300. In *Baltimore & O. R. Co. v. Cain*, 81 Md. 87, 28 L. R. A. 688, a case analogous in some respects to the one at bar, the plaintiff, by the procurement of the conductor, was arrested as he left the train, by an officer, without warrant. The charge was disorderly conduct on the train. The railroad company was permitted to justify by showing that the charge was true in fact, and that the disorderly conduct amounted to a breach of the peace, for which the conductor, as a private individual, would have been authorized to arrest had he been physically able to do so. The court said that "the act of the conductor in telegraphing for a policeman, and within a short space of time thereafter handing the plaintiff over to the officer, was in no respect different from a formal arrest of the plaintiff by the conductor in the midst of the riot and disorder." In the case at bar, however, the charge was not true, and herein lies one distinction at least, and a vital one. Furthermore, the alleged offense here was not a breach of the peace.

Revised Stat. chap. 133, § 4, provides that every officer shall arrest and detain persons found violating any law of the state until a legal warrant can be obtained. But this statute does not aid the defendant. The plaintiff was not found violating any law of the state. The constable had no lawful authority to arrest him for a misdemeanor of which he was not guilty, on information merely, without a warrant.

We conclude, therefore, that the arrest of the plaintiff was unlawful. And, as already intimated, this conclusion disposes of the first two of the defendant's exceptions; for, assuming that the conductor had a right, as a matter of law, to make the inquiry he did, as a means of identification, and assuming that, by the plaintiff's conduct, the conductor had reason to believe, and did believe, that the plaintiff was fraudulently evading the payment of his fare, still, as we have seen, all this would have afforded no justification in law.

But the defendant further contends that the proceedings had before the municipal court of Brunswick should operate as a bar to this action. The plaintiff paid his fare which he owed, and the costs of prosecution. 44 L. R. A.

The conductor acknowledged "complete satisfaction to Jonathan P. Palmer for evading his railroad fare as per my complaint," and thereupon the plaintiff was discharged. The defendant claims that this settlement should be regarded as an admission by the plaintiff of his guilt. If it were so, we do not see how this could aid the defendant, in view of the uncontroverted facts in this case, or under the law. But it seems to us rather that the settlement was equivalent to an entry of "*nolle prosequi* upon payment of costs." If this settlement could be regarded as authorized by Rev. Stat. chap. 133, § 18, which may well be doubted, it would operate only as a bar to a civil remedy by the railroad company for the injury for which the plaintiff was prosecuted criminally. Id. § 19. The plaintiff "settled" with the state, but the defendant did not settle with the plaintiff. The defendant relies upon *Caffrey v. Drugan*, 144 Mass. 204, and *Joyce v. Parkhurst*, 150 Mass. 243. In those cases it was held that parties who had been arrested without warrant, for intoxication, and had been released without formal complaints having been made against them, had, by their requests and agreements, waived the right to maintain actions for false imprisonment against the officers. But in this case there is no evidence of any agreement on the part of the plaintiff to waive or release his claim against the defendant.

There was no judgment in the criminal case against this plaintiff. If there had been, it would not have estopped him from maintaining this civil action. *Bigelow, Estoppel*, 100. It is the opinion of the court, therefore, that the plaintiff's remedy is not barred and has not been waived. This conclusion disposes of the defendant's third and last exception.

The verdict for the plaintiff was not against law, nor against the weight of evidence. Are the damages excessive? The principles upon which damages are to be assessed in this class of cases were elaborately discussed by this court in *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475. We need state here only the conclusions. Where the justification for an arrest fails, as in this case, the plaintiff is entitled to recover, at least, compensatory damages,—damages for the necessary consequences of the act complained of, although the defendant may have acted in good faith, without malice, and upon reasonable grounds to believe that the plaintiff was guilty of the offense for which he was arrested. If the plaintiff claims punitive damages, or damages for his injured feelings, the spirit and conduct of the defendant may be inquired into, to enhance or aggravate, and as well, the plaintiff's own conduct, and the provocation by him, if any, to mitigate, the damages. *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Phillips v. Trull*, 11 Johns. 486; *Reuck v. McGregor*, 32 N. J. L. 70; *Beckwith v. Bean*, 98 U. S. 266, 25 L. ed. 124; *Chunn v. Morris*, 2 Car. & P. 361; 2 Greenl. Ev. § 207.

Tested by these principles, we think the verdict in this case is unmistakably too large. In his charge, the presiding justice

permitted the jury to assess "a fair and just compensation for the injured pride, the wounded sensibility, the humiliation and mortification of a public arrest." These are, indeed, proper elements of damage; but, in view of all the circumstances of this case, the jury made an undue allowance for them. The damages to the plaintiff in his person, and for loss of time and expenses, were little more than nominal. Nearly the whole of the verdict must have been given as punitive damages, or as damages for the injury to the plaintiff's feelings. But, whichever it was, it is too large. The fault in the first instance was the fault of the plaintiff. He was traveling on a mileage ticket, which could be lawfully used by no other person than the one to whom it was issued. It was the right, as it was the duty, of the conductor, if in doubt, to make himself reasonably certain of the identity of the person presenting it. As one means of identification, the contract upon the ticket itself provided that the conductor might require the signature of the holder of the ticket. But this provision did not exclude other simpler and easier, and equally reasonable, methods of identification. The method adopted by the conductor was a reasonable and lawful one. He simply asked the plaintiff if the name on the ticket was his name. This was asked on three several occasions; and three times

the plaintiff refused to give the information desired. He says he told the conductor he was under no obligation to give his name. The uncontradicted testimony of bystanders is to the effect that he also told the conductor that it was "none of his business." A frank and truthful answer, such as it was his duty to make, would have prevented all trouble. No question is made but that the conduct of the conductor was gentlemanly. The plaintiff was wilful, obstinate, evasive. He chose to regard the inquiry of the conductor as an affront to his honesty or dignity. His wrong was, however, only fancied. We think the plaintiff's conduct gave the conductor reason to believe—and he says he did believe—that the plaintiff was attempting to ride upon a ticket not his own, and which he had no right to use. This, of course, is not a justification; but it deserves full consideration, in determining whether punitive damages are allowable, or in estimating the injury to the plaintiff's wounded sensibilities.

Under all the circumstances, we think \$10 will be ample compensation.

The entry will be: *Exceptions overruled.*

If the plaintiff files a remittitur of all the verdict in excess of \$10 within thirty days after the rescript is received, motion for new trial overruled; otherwise, motion sustained.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan, *ex rel.*
Fred A. MAYNARD, Attorney General,
Appt.,

v.

Village of HOLLY.

(.....Mich.....)

The offer of a reward for testimony that shall secure the conviction of persons who set fire to buildings within city limits is within the general power to make regulations for the safety and general welfare of the inhabitants.

(April 4, 1899.)

APPEAL by complainant from a decree of the Circuit Court for Oakland County granting a temporary restraining order only instead of a permanent injunction in a suit to enjoin defendant from paying certain rewards which had been offered for the discovery of persons who had set fire to certain buildings within the village. *Affirmed.*

The facts are stated in the opinion.

Messrs. Davis & Bromley and Sam J. Patterson, for complainant:

A municipality has not under its general welfare clause the power to offer a reward for the arrest and conviction of criminals.

NOTE.—As to offers of reward, see also *Haskell v. Davidson* (Me.) 42 L. R. A. 155, and footnote thereto; also *Smith v. Gentry* (Ky.) 42 L. R. A. 302; and *Morris v. Kassling* (Tex.) 11 L. R. A. 398, and note.
44 L. R. A.

Loveland v. Detroit, 41 Mich. 367; *Abel v. Pembroke*, 61 N. H. 359; *Hanger v. Des Moines* 52 Iowa, 193, 35 Am. Rep. 266; *Winchester v. Redmond*, 93 Va. 711; *Crofut v. Danbury*, 65 Conn. 294; *Butler v. Milwaukee*, 15 Wis. 498; *Murphy v. Jacksonville*, 18 Fla. 318, 43 Am. Rep. 323; *Baker v. Washington*, 7 D. C. 134; *Gale v. South Berwick*, 51 Me. 174; *Patton v. Stephens*, 14 Bush, 324.

Messrs. Spaulding, Norton, & Dooling, with **Mr. Charles F. Collier**, for defendant:

Municipal corporations have such powers as are expressly granted, and also such implied or incidental ones as are necessary to carry into effect the express powers and to effectuate the object of corporate existence.

The power to prevent danger from fire is the incidental one belonging to all municipal corporations.

2 Bacon, Abr. 147; 1 Dill. Mun. Corp. 3d ed. §§ 141-143.

Even in the absence of express statutory authority this power is inherent in the municipality.

Crawshaw v. Roxbury, 7 Gray, 372; *Mead v. Boston*, 3 Cush. 404; *Brown v. Bradlee*, 156 Mass. 28, 15 L. R. A. 509; 1 Dill. Mun. Corp. 3d ed. § 139, p. 208; 4 Wait, Act. & Def. ed. 1878, 606; *York v. Forscht*, 23 Pa. 391; *Shaub v. Lancaster City*, 156 Pa. 362, 21 L. R. A. 691; *Montgomery County v. Robinson*, 85 Ill. 174; *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634, citing with ap-

proval *Freeman v. Boston*, 5 Met. 56; *Loring v. Boston*, 7 Met. 411; *Janvrin v. Exeter*, 48 N. H. 83, 2 Am. Rep. 185; *Pilie v. New Orleans*, 19 La. Ann. 274.

The municipalities in England had the power to offer a reward for the apprehension and conviction of incendiaries. The borough government is akin to our village or city government.

E. A. Freeman, *City and Borough, McMillan's Mag. May, 1889*; *York v. Forscht*, 23 Pa. 391.

Hooker, J., delivered the opinion of the court:

The village of Holly offered a reward for testimony that should secure the conviction of the persons who had set fire to certain buildings within its limits, and work was done upon the case by Sargeant and Green, and a deputy sheriff named Botsford. The reward seems to have been earned, and the council passed a resolution that unless, within ten days, the parties claiming the reward should agree to arbitrate the question of who was entitled to it, the village attorney should cause a bill of interpleader to be filed against them. Nothing was done, however, under this resolution, and some time afterwards the attorney general filed the bill in this cause to restrain the payment of the reward to the persons named, or any of them. Such persons were not made parties to the suit. A decree was made restraining payment until a judgment should be obtained against the village. The complainant has appealed, and claims that the decree should have allowed a perpetual and unqualified injunction against the payment of the money. As the village has not appealed, we must assume that it is satisfied with the decree, and the only question before us is whether the complainant was entitled to a broader decree.

Holly was incorporated under the general law for the incorporation of villages, which authorizes it to provide for the preservation of public property, and to adopt ordinances and make other regulations for the safety and general welfare of the inhabitants, not inconsistent with the general laws of the state. The authorities are not harmonious upon the subject of rewards. The Massachusetts courts seem to recognize the existence of an implied power to offer rewards for the apprehension of incendiaries who have destroyed property within the city, from what is called the "general welfare clause." *Shute v. Taylor*, 5 Met. 61; *Loring v. Boston*, 7 Met. 411; *Mead v. Boston*, 3 Cush. 406; *Crawshaw v. Roxbury*, 7 Gray, 374; *Brown v. Bradlee*, 156 Mass. 28, 15 L. R. A. 509. In New Hampshire the authority is expressly conferred. See *Janvrin v. Exeter*, 48 N. H. 83, 2 Am. Rep. 185. In Pennsylvania, municipalities have the authority to offer rewards in such emergencies. *Shaub v. Lancaster City*, 156 Pa. 386, 21 L. R. A. 691; *York v. Forscht*, 23 Pa. 391. 2 Bacon, Abr. 147, supports the doctrine that the power to prevent fires is incidental to all municipalities; while Mr. Dil-

lon says: "The governing body of a municipal corporation (which has express power to protect the property and promote the welfare of its inhabitants) may, it has been held, offer a reward for the detection of offenders against the general safety of its people, as, for example, those guilty of the crime of arson within the corporate limits. The contrary doctrine has also been held." [1 Dill. Mun. Corp. 4th ed. § 139, p. 208.] The California supreme court is said to uphold the power, but we are unable to verify it from the citation given. Some of the states deny it. The latest case seems that of *Winchester v. Redmond*, 93 Va. 711, where authorities supporting it are collected. Of these some apply to other offenses, the commission of which affects the inhabitants of the city only in common with those of the state outside of the city. Thus, in *Baker v. Washington*, 7 D. C. 134, it was held that the defendant had not authority to offer a reward for the capture of the slayer of President Lincoln. A similar case, involving a reward for murder, is that of *Gale v. South Berwick*, 51 Me. 174. *Patton v. Stephens*, 14 Bush, 326, applied the same rule to a reward offered for the apprehension of one who, through forgery, had embezzled the city funds. The case of *Hanger v. Des Moines*, 52 Iowa, 193, 35 Am. Rep. 266, was another case of reward for the detection of a murderer. *Butler v. Milwaukee*, 15 Wis. 498, was not a case of arson, and seems to be within the principle of the preceding cases. The rewards in all of these cases are open to the criticism that they were not offered to preserve the welfare of the inhabitants of the municipality, as contradistinguished from those of the general public. The case of *Murphy v. Jacksonville*, 18 Fla. 318, 43 Am. Rep. 323, is not in point, because governed by a prohibitive statute, which, in the absence of a "general welfare clause" (which does not appear), is a sufficient reason for the decision. *Croft v. Danbury*, 65 Conn. 298, is in point, and supports *Winchester v. Redmond*.

The danger of conflagration in cities and villages necessitates preventive measures that are not common in sparsely-settled districts, and such municipalities are authorized to expend large sums for apparatus to extinguish them. But these only serve to prevent the spread of fires. A determined incendiary in a city is a menace which cannot be safely disregarded, and may call for more than the ordinary methods to guard against his acts. We think the "general welfare clause" is sufficiently broad to cover the employment of private detectives, through rewards, in such emergencies. We consider its exercise as "contravening no provision of the Constitution, . . . and made in the exercise of the police power necessary to the safety of the city," and, we may add, impliedly conferred upon it. See *Baumgartner v. Hasty*, 100 Ind. 580, 50 Am. Rep. 830.

The decree is affirmed, with costs.

The other Justices concur.

Hazen S. PINGREE, Governor,
v.
Roscoe D. DIX, Auditor General.

TECUMSEH TELEPHONE COMPANY
v.

Roscoe D. DIX, Auditor General.

(.....Mich.....)

1. Specific taxes within the meaning of the Michigan Constitution, which appropriates them to educational funds and excepts property paying such taxes from the rule of uniformity, do not include an ad valorem tax on property such as a tax on telegraph and telephone lines levied by a state board in lieu of all other taxes.
2. A tax on telegraph and telephone lines under Pub. Acts 1881, No. 166, which is levied by the state board at the average rate of taxes (general, municipal, and local) levied throughout the state during the previous year, in lieu of all other taxes, violates the rule of uniformity imposed by Const. art. 14, § 11, as the rate of taxation is determined in a different way, and is different in amount, from that imposed upon other property.
3. The rule of construction by long and continued usage should be applied to a constitutional provision only in cases of doubt.

(April 26, 1899.)

PETITIONS for writs of mandamus to compel respondent to transfer the proceeds of a tax upon telephone lines from the primary school fund to the general fund of the state, and to require him to cease the collection of the tax as a special tax on the ground that it was unconstitutional and void. *Granted.*

The facts are stated in the opinion.

Mr. Benton Hamellett, for relator:

The tax in question is not a specific tax; it is an ad valorem or property tax.

The taxation is by assessing the value of the property as the property, real and personal, in a city is assessed by the assessing officers of the city, *viz.*, at its cash value.

In both cases the taxation is by levying a rate per cent of tax upon the value of the property taxed. One is as much as the other a taxation of property by the levy of a per cent of tax upon the value of that property.

The Constitution clearly distinguishes between taxes which are specific taxes and taxes which are not specific taxes, and the distinction is this: Taxes which are levied upon capital, or occupation, or upon income, and which are not based upon valuation of property, are specific taxes, while taxes which are imposed upon the valuation of property are not specific; they are what is known as property or ad valorem taxes.

Walcott v. People, 17 Mich. 68; *Kitson v. Ann Arbor*, 26 Mich. 325.

For statutes which were adopted prior to

NOTE.—As to taxes on property in specie, see also *Reelfoot Lake Levee Dist. v. Dawson* (Tenn.) 34 L. R. A. 725; *Levi v. Louisville* (Ky.) 28 L. R. A. 480.
44 L. R. A.

the Constitution granting special charters, in which specific taxes were imposed, the following may be referred to, *viz.*:

Act No. 47, Laws 1837, p. 76, § 32, p. 87; Laws 1846, Act No. 42, p. 37, § 33, p. 61; Act No. 113, p. 170, § 31, p. 191; Act No. 137, p. 227, § 22, p. 234; Laws 1848, Act No. 199, p. 278, § 26, p. 290; Act No. 262, p. 294, § 26, p. 307; Act No. 234, p. 351, § 26, p. 363; Laws 1848, Act No. 62, p. 59, § 18, p. 65; Laws 1848, Act No. 74, p. 76, § 4; Act No. 77, p. 81, § 4; Act No. 85, p. 94, § 4; Act No. 111, p. 127, § 6; Act No. 113, p. 131, § 4; Act No. 115, p. 156, § 4; Act No. 116, p. 138, § 4; Laws 1849, Act No. 64, p. 57, § 4; Act No. 68, p. 62, § 4; Act No. 72, p. 67, § 4.

Distinct from these taxes which were designated specific taxes were taxes which, prior to the adoption of the Constitution, were assessed upon the property upon the basis of its valuation.

Rev. Stat. 1838, title 5, pp. 75-85; Rev. Stat. 1846, title 5, p. 102.

Taxes which are imposed upon capital or occupation or income, without taking into account the valuation of the property, and taxes which are levied upon the property upon the basis of its assessed valuation.

The designation of specific taxes by the authorities is the same as that which has been applied by the legislation and by the Constitution of this state.

25 Am. & Eng. Enc. Law, 17; Cooley, Taxation, 2d ed. 238; Black, Tax Titles, § 83; *Chesapeake & O. R. Co. v. Miller*, 19 W. Va. 425; *State v. North*, 27 Mo. 464; *Bailey v. Fuqua*, 24 Miss. 497; *Pullman Palace Car Co. v. State*, 64 Tex. 274, 53 Am. Rep. 758; *Brookfield v. Tooev*, 141 Mo. 610; *State, Garth, v. Switzler*, 143 Mo. 287, 40 L. R. A. 280.

The imposition of a specific sum to be raised, or a specific rate, or ratio, of tax to be raised upon property on the basis of its valuation, is not the imposition of a specific tax; it is an ad valorem property tax.

Brookfield v. Tooev, 141 Mo. 619; *Chambe v. Durfee*, 100 Mich. 112.

Imposing these taxes for the use and benefit of the university is not applying them in paying the interest upon the primary school fund, or interest upon the university fund.

The university fund is a fund held by the state, upon which the state pays an annual interest to the Board of Regents of the university, and was created from the proceeds of the university lands granted to the state by the following acts:

2 U. S. Stat. pp. 277, 279, § 5; 4 U. S. Stat. p. 180; 5 U. S. Stat. p. 59; Mich. Laws 1836, pp. 57, 59; 1 How. Stat. pp. 36, 37; Mich. Const. 1835, art. 10, § 5; Mich. Rev. Stat. 1838, p. 42; Const. 1850, art. 13, § 2.

The primary school fund was created in like manner, from the proceeds of the lands granted to the state for the use of schools under the following acts:

2 U. S. Stat. pp. 277, 279; 5 U. S. Stat. p. 59; 1 How. Stat. pp. 36, 37; Mich. Const. 1835, art. 10, § 2; Act 104, Laws 1837, p. 209.

The statute imposing a tax must not provide for such partial imposition of the taxes.

Such action would disregard all uniformity and be a means of applying favoritism of the grossest kind in distributing the burden of taxation.

People, St. Mary's Falls Ship Canal Co., v. Auditor General, 7 Mich. 84; *Motz v. Detroit*, 18 Mich. 495; *People, Detroit & H. R. Co., v. Salem Twp. Board*, 20 Mich. 452, 4 Am. Rep. 400; *Jones v. Detroit Water Comrs.* 34 Mich. 273; *Cooley, Const. Lim.* 6th ed. 610, 615, 633; 1 *Desty, Taxation*, §§ 41, 206, 207; *Burroughs, Taxation*, § 51, p. 61; 25 *Am. & Eng. Enc. Law*, 59, 60; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Zanesville v. Richards*, 5 Ohio St. 589; *Wasson v. Wayne County Comrs.* 49 Ohio St. 622, 17 L. R. A. 795; *Fields v. Highland County Comrs.* 36 Ohio St. 476; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 18 L. R. A. 729; *Sutton v. Louisville*, 5 Dana, 28; *Fletcher v. Oliver*, 25 Ark. 289; *Little Rock & Ft. S. R. Co. v. Worthen*, 46 Ark. 312; *Chesapeake & O. R. Co. v. Miller*, 19 W. Va. 408; *Adams v. Mississippi State Bank*, 75 Miss. 701; *State, Garth, v. Scitzler*, 143 Mo. 287, 40 L. R. A. 280; *Atchison, T. & S. F. R. Co. v. Howe*, 32 Kan. 737; *Railroad & Teleph. Cos. v. Board of Equalizers*, 85 Fed. Rep. 302; *Bureau County Supers. v. Chicago, B. & Q. R. Co.* 44 Ill. 229; *Chicago & N. W. R. Co. v. Boone County Supers.* 44 Ill. 240; *Mich. Const.* art. 10, § 1; *People v. McCreery*, 34 Cal. 432.

Mr. Ashley Pond, also for relator:

The taxes in question are not "specific taxes" within the intent and meaning of that term as used in article 14 of the Constitution.

Perry, Principles of Political Economy, 557; *Colton, Public Economy*, 516; *Amasa Walker, Science of Wealth*, 339; *Cooley, Taxation*, 175; *Bailey v. Fuqua*, 24 Miss. 497.

The distinction between specific and ad valorem duties or taxes has been continually kept in mind and emphasized in the legislation of Congress from the earliest custom acts to the present time.

Benton, Thirty Years in Congress.

The legislation of this state, prior to and up to the time of the adoption of the Constitution of 1850, fully recognized the character of specific taxes and the difference between such taxes and ad valorem taxes, that is, taxes based upon an assessment or valuation of property, as a reference to such legislation will demonstrate.

Rev. Stat. 1838, chap. 8, p. 102; *Rev. Stat.* 1846, chap. 21, p. 121.

A franchise tax is a tax upon the right or privilege to be a corporation, and to do business within the state in a corporate capacity.

Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025.

But in this state specific taxes may be imposed upon natural persons not exercising or possessing any franchise.

Walcott v. People, 17 Mich. 68; *Kitson v. Ann Arbor*, 26 Mich. 325. 44 L. R. A.

Messrs. Charles D. Joslyn and Charles Flowers also for relator.

Mr. Carey W. Danton for relator Telephone Company.

Mr. Henry M. Cheever, with **Mr. Horace M. Oren**, Attorney General, for respondent:

The practical construction of the act of 1881 by the legislature, the state officers appointed to execute the statute, and the taxpayer for eighteen years preclude inquiry now as to the constitutionality of the statute.

Parsons v. Russell, 11 Mich. 113, 83 Am. Dec. 728; *Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115; *Atty. Gen. v. Joy*, 55 Mich. 94; *The Laura*, 114 U. S. 411, 29 L. ed. 147; *People, Platt, v. Oakland County Bank*, 1 Dougl. (Mich.) 282; *People, Atty. Gen., v. Bank of Pontiac*, 12 Mich. 527; *People v. Maynard*, 15 Mich. 463; *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389; *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 611; *State v. Flint & P. M. R. Co.* 89 Mich. 481.

Section 11, art. 14, of the Constitution of 1850 is as follows: "The legislature shall provide a uniform rule of taxation except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

The general canon of construction of any writing is that a thing may be within the meaning and not within the words, or within the words and not within the meaning.

Detroit Sisters of Charity v. Detroit, 9 Mich. 94; *Detroit v. Rush*, 82 Mich. 532, 10 L. R. A. 171.

The legislature under this provision of the Constitution is to provide a uniform rule of taxation except on property paying specific taxes.

Property paying specific taxes is exempt from the operation of the command of the Constitution that taxes shall be uniform.

The words "specific taxes" in this Constitution mean that which is applied to a specific purpose, not that which is raised in a specific way.

The word "such" in § 11, "taxes shall be levied on such property as shall be prescribed by law," refers back to the clause immediately preceding, "except on property paying specific taxes."

It allows an assessment to be made in any manner which the legislature may designate.

A provision of a Constitution may or may not be self-executing.

Groves v. Slaughter, 15 Pet. 499, 10 L. ed. 819; *Illinois C. R. Co. v. Ihlenberg*, 43 U. S. App. 726, 75 Fed. Rep. 876, 21 C. C. A. 540, 34 L. R. A. 393; *Peck v. Miller*, 39 Mich. 594; 3 *Thomp. Corp.* § 3003.

The provision of our Constitution with regard to the way in which specific taxes shall be applied is affirmative and mandatory and self-executing.

Walcott v. People, 17 Mich. 68.

The use of the word "specific" in the Revised Statutes of 1835, as applied to taxation, is almost the same as the word "license."

Rev. Stat. 1835, p. 102.

By the Revised Statutes of 1846, specific state taxes and duties are imposed: (1) upon banks, on their capital stock; (2) upon railroad, canal, and turnpike corporations upon the capital stock, which is made in lieu of state, county, and town taxes, and brokers, and exchange dealers, and hawkers, peddlers, and auctioneers are charged with specific taxes.

Rev. Stat. 1846, p. 121.

The word "specific" as employed in the Constitution of 1850 does not refer to the sort of taxes which are spoken of in the Revised Statutes of 1835 and 1846.

Such taxes on business devoted to local purposes are not state taxes such as the Constitution requires to be applied to education.

Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654.

Specific taxes other than those named in the Constitution may be imposed.

Walcott v. People, 17 Mich. 68.

Sometimes the word "specific" is the reverse of "general."

Chaloner v. Bolckow, L. R. 3 App. Cas. 933.

Sometimes, and indeed usually, in reference to public burdens, the word "specific" is employed in the customary revenue and tariff laws. But this special and limited meaning and application of the word "specific" as applying to the manner of imposition, never has been introduced into the general tax laws of either the United States or any state, and the use of the word in our Constitution is entirely exceptional and *sui generis*.

Since nowhere does the Constitution fix the method by which these specific taxes shall be levied and assessed, therefore it is the purpose to which the tax must be applied which fixes its character as specific or general.

Jones v. Detroit Water Comrs. 34 Mich. 273.

The discretion of the legislative power is supreme in the matter.

Kentucky Railroad Tax Cases, 115 U. S. 321; *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810; *Lake Shore & M. S. R. Co. v. People*, 46 Mich. 193; *Michigan C. R. Co. v. Porter*, 17 Ind. 380.

There is no limit to the power of the legislature to tax, unless found distinctly in the Constitution.

State Railroad Tax Cases, 92 U. S. 575, *Taylor v. Secor*, 23 L. ed. 663; *Union P. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. ed. 1098; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121.

Distribution among the several counties is a matter for regulation by the legislature. *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683.

The general right to make exemptions is involved in the right to apportion taxes, and must be understood to exist wherever it is not forbidden.

Butler's Appeal, 73 Pa. 448; *People v. 44 L. R. A.*

Coleman, 4 Cal. 46, 60 Am. Dec. 581; *State v. North*, 27 Mo. 404; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *State, Hall, v. Parker*, 33 N. J. L. 312; *Indianapolis v. Sturdevant*, 24 Ind. 391.

An act of the state legislature not prohibited by the express words of the Constitution or by necessary implication cannot be declared void as a violation of that instrument.

In a case of doubt every presumption not clearly inconsistent with the language and subject-matter is to be made in favor of the constitutionality of the state legislation.

Sears v. Cottrell, 5 Mich. 251; *Atty. Gen. v. Preston*, 55 Mich. 177; *People, Detroit & H. R. Co., v. Salem Twp. Board*, 20 Mich. 452, 4 Am. Rep. 400; *People, Twitcheil, v. Blodgett*, 13 Mich. 150; *Woodbridge v. Detroit*, 8 Mich. 297; *Tyler v. People*, 8 Mich. 333.

The expediency or policy of the exercise of the will of the legislature is not to be considered by the court at all.

Walcott v. People, 17 Mich. 68; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 292, 2 Am. Rep. 82; *People, St. Mary's Falls Ship Canal Co., v. Auditor General*, 7 Mich. 84; *Chippewa County Supers. v. Auditor General*, 65 Mich. 408; *Kitson v. Ann Arbor*, 26 Mich. 331; 1 Cook, Stock & Stockholders, 3d ed. § 561.

The legislature has the power to impose taxation of this character, because it is not forbidden by any express provision of the Constitution.

Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; *Cook, Stock & Stockholders*, § 567; *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514; *Toll Bridge Co. v. Osborn*, 35 Conn. 7; *Lenawee County Sav. Bank v. Adrian*, 66 Mich. 273.

Mr. John J. Speed, also for respondent: The requirement of uniformity does not prevent the division of things taxable into classes and the imposition of taxes which, while bearing equally upon the different members of each class, bear unequally upon the classes in the aggregate.

New Orleans v. Davidson, 30 La. Ann. 554, 31 Am. Rep. 228; *New Orleans v. People's Bank*, 32 La. Ann. 82; *New Orleans v. Dubarry*, 33 La. Ann. 481, 39 Am. Rep. 273; *Durach's Appeal*, 62 Pa. 491; *Weber v. Reinhard*, 73 Pa. 370, 13 Am. Rep. 747; *State v. North*, 27 Mo. 404; *Glasgow v. Rouse*, 43 Mo. 479; *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37; *State, Sanderson, v. Mann*, 76 Wis. 469; *State v. Western U. Teleg. Co.* 73 Me. 518; *Kentucky Railroad Tax Cases*, 115 U. S. 321, *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414; *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. ed. 680; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121; *Cooley, Const. Lim.* 514, 515; *Cooley, Taxation*, 32, 34; *State Bd. of Assessors v. Central R. Co.* 48 N. J. L. 279; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 343; *Head Money Cases*, 112 U. S. 580; *Edge v. Robertson*, 28 L. ed. 798; *Pa-*

cific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810.

Rules must not be variable in their application to the subject of taxation, included in the classification of property.

State, Central R. Co., v. State Bd. of Assessors, 48 N. J. L. 20, 57 Am. Rep. 516.

The statute now in question provides for an assessment by a state board. It is constitutional in that respect.

Central Iowa R. Co. v. Wright County Supers. 67 Iowa, 199; *Franklin County v. Nashville, C. & St. L. R. Co.* 12 Lea, 521.

The specific taxes exempted from the uniform rule to be established as provided by § 11 are upon property.

At the adoption of the Constitution there was a system of general taxation, and it may be fairly argued that the term "specific" was used as opposed to this general system; and the convention held in mind the taxation of the rights and privileges specially as a better means of equalizing taxation and as a condition of their existence, and as such it was to be regarded as a tax on business or on tangible franchises or privileges.

The mode was not essential. It might be a tax on property or apportioned on another basis.

Home Ins. Co. v. New York, 134 U. S. 600, 33 L. ed. 1029; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57; *Delaware Railroad Tax*, 18 Wall. 206, 231; *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888, 896; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 126; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810; *State v. Western U. Teleg. Co.* 73 Me. 518.

The rate of taxation is fixed by reference to certain facts. The legislature may delegate its power to determine such facts or state of facts upon which the law makes or intends to make its own action depend.

Looke's Appeal, 72 Pa. 491; *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294.

There is no difference in principle between the tax at a certain definite rate on the poles and wires of a telephone company and a tax of 4 per cent on the value of the ore mined by copper companies, where in either case it is apparent it was intended as an exaction for a privilege.

If in any sense the tax is specific, the money must be paid into and form part of the school fund, and it is immaterial that the statute does not refer to the Constitution to fix the purpose to which it is to be applied.

Walcott v. People, 17 Mich. 68.

Mr. Alfred Russell, also for respondent:

The practical construction of the telephone and telegraph taxation act of 1881, in connection with the Constitution, recognized by the legislature, by the state officers, and by the taxpayers for the long period of eighteen years, precludes attack upon the constitutionality of the law at present.

Pursons v. Russell, 11 Mich. 113, 83 Am. Dec. 728; *People, Twitchell, v. Blodgett*, 13 Mich. 151.

Necessarily the legislature has the power 44 L. R. A.

to consider various elements in arriving at the amount of a specific tax, because the legislature cannot act arbitrarily and capriciously.

Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807; *Western U. Teleg. Co. v. Atty. Gen. of Mass.* 125 U. S. 530, 31 L. ed. 790.

The requirement of a uniform rule as to taxation simply means that the taxation of all objects or property which are of the same class shall be uniform; and the taxation of property in that class may be different from what the taxation of property of another class is.

The Constitution is conformed to no matter what the mode of assessment, if the result of the assessment is that the property is assessed at its true value in money.

Wagoner v. Loomis, 37 Ohio St. 571; *Western U. Teleg. Co. v. Poe*, 61 Fed. Rep. 449; *State, Poe, v. Jones*, 51 Ohio St. 492; *Western U. Teleg. Co. v. Poe*, 64 Fed. Rep. 9; *Sanford v. Poe*, 37 U. S. App. 378, 69 Fed. Rep. 546, 16 C. C. A. 305; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683; *Western U. Teleg. Co. v. Atty. Gen. of Mass.* 125 U. S. 530, 31 L. ed. 790; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960.

It is of small importance whether the tax be denominated a specific tax or not, for the reason that under the Ohio cases the tax which we are discussing does provide a uniform rule of taxation, and provides the purpose to which the tax shall be devoted as required by § 14, art. 14.

Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037; *Scholey v. Rew*, 23 Wall. 331, 23 L. ed. 99; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 21 L. ed. 164; *Auditor General v. State Treasurer*, 45 Mich. 161.

Hooker, J., delivered the opinion of the court:

In the year 1881 the legislature passed an act (No. 168, Pub. Acts 1881) entitled "An Act to Provide for the Assessment of Telegraph and Telephone Lines within the State of Michigan." Its provisions are, in substance, that the auditor general, state treasurer, and commissioner of the state land office shall assess telegraph and telephone lines at their true cash value, and levy a tax upon said assessment at a rate which shall equal the average rate of taxes (general, municipal, and local) levied throughout the state during the previous year, to be ascertained from the records and files of the auditor general's office, which tax shall be in lieu of all other taxes. This tax has since been paid, and the auditor general has treated it as a specific tax, and credited the amounts collected to the educational fund, under the provisions of § 1 of article 14 of the Constitution, which provides: "All specific state taxes, except those received from the mining companies of the Upper Penin-

cula, shall be applied in paying the interest upon the primary school, university, and other educational funds, and the interest and principal of the state debt, in the order herein recited, until the extinguishment of the state debt, other than the amounts due to educational funds, when such specific taxes shall be added to and constitute a part of the primary-school interest fund. The legislature shall provide for an annual tax sufficient, with other resources, to pay the estimated expenses of the state government, the interest of the state debt, and such deficiency as may occur in the resources." The application of the governor is for a mandamus to compel the auditor general to transfer to the general fund, from the primary-school fund, the amount of moneys collected under the act mentioned, and now on hand, upon the ground that the tax provided in said act is not a specific tax. The Tecumseh Telephone Company's application is based upon the same ground, and asks that the tax be canceled, upon the further contention that the tax, not being a specific tax, is not levied in conformity to other provisions of the Constitution, *viz.*, §§ 11 and 14 of article 14, which are as follows:

"Sec. 11. The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

"Sec. 14. Every law which imposes, continues, or revivess a tax shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

The auditor general has answered both petitions; claiming that the tax is specific, and not a property tax, and that, if it be determined otherwise, the tax is valid.

In addition to the sections quoted, §§ 10 and 12 of article 14 of the Constitution are as follows:

"The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from banking, railroad, plank road, and other corporations hereafter created."

"All assessments hereafter authorized shall be on property at its cash value."

The first question presented, then, is, Does act No. 168 of the Laws of 1881 provide for a specific tax, within the meaning of the Constitution? If it does, it disposes of the cases, and both applications should be denied.

Amasa Walker, in his *Science of Wealth*, at page 339, says that: "Duties are generally of two kinds,—specific and ad valorem. Specific duties are imposed by the pound, yard, gallon, etc." The late Mr. Justice Cooley, in his work on *Taxation*, 2d ed. p. 238, uses a similar classification as to taxes, and says of specific taxes that, "under this head may be ranged those which impose a specific sum, by the head or number, or by some standard of weight or measurement, and which requires no assessment, beyond a listing and classification of the subjects to be

taxed." He describes ad valorem taxes as follows: "Ad Valorem Taxes. A large proportion of the duties on imports are of this description, and so, sometimes, are many of the taxes which make up the internal revenue. The statute laying them prescribes the rule, but requires the action of appraisers in apportioning them between individuals. By far the larger proportion of all state taxation is also upon property by a valuation, and effect can only be given to it by means of assessors, who value the property and apportion the tax by their estimate." A similar description of specific taxes is found in 25 Am. & Eng. Enc. Law, 17. In Colton's *Public Economy*, at page 576, it is said: "A specific duty is assessed by income,—as so much a yard, per gallon, per cwt., per caldron, etc.; the instrument of measure being such as the article requires." Perry, in his *Principle of Political Economy*, says: "What is the difference between specific and ad valorem taxes, and why should the student take careful note of them, both singly and combined? These terms are used more particularly in relation to tariff taxes, but there is nothing in the distinction itself so to limit its application. A specific tax is a tax of so many cents or dollars on the pound, yard, gallon, or other quantity measurable. An ad valorem tax is a tax of so much per centum on the invoiced or appraised money value of the goods subject to the tax." *Bouvier's Dictionary*, tit. *Ad Valorem*, says "Ad Valorem. (Latin.) According to the valuation. Duties may be specific or ad valorem. Ad valorem duties are always estimated at a certain per cent on the valuation of the property." Black's definition is: "Ad Valorem. According to value. Duties are either ad valorem or specific; the former when the duty is laid in the form of a percentage on the value of the property; the latter where it is imposed as a fixed sum on each article or class, without regard to its value. The term 'ad valorem tax' is as well-defined and fixed as any other used in political economy or legislation, and simply means a tax or duty upon the value of the article or thing subject to taxation." Black, *Tax Titles*, § 83, says upon the subject that: "Difference between Specific and Ad Valorem Taxes. In regard to specific taxes, no other apportionment is requisite than that necessarily prescribed by the statute which lays the tax. The share of each taxpayer is completely determined by his condition with reference to the number of the given articles in his possession, or their weight or measurement, or with reference to the fact of his pursuing the particular avocation taxed, or enjoying the particular franchise, or otherwise, as the case may be. But the case is different with respect to ad valorem taxes. Here the intervention of ministerial officers is necessary to effect the apportionment between individuals. Assessors are called upon to estimate the value of the property to be taxed, and apportion the shares according to their valuation." This distinction has been recognized as applied to duties for many years. Benton's *Thirty Years in Congress* says of the custom's act

of 1833: "Specific duties had been the rule, ad valorem the exception, from the beginning of the collection of the custom-house revenue. The specific duty was a question in the exact sciences, depending upon a mathematical solution, by weight, count, or measure." In *Gibbons v. Ogden*, 9 Wheat. 180, 6 L. ed. 66, p. 188, Chief Justice Marshall said: "The framers of the Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." Quoting this language, Judge Cooley, in his *Constitutional Limitations*, said at page 58: "This is but saying that no forced or unnatural construction is to be put upon their language, and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is so often made, by interested subtlety and ingenious refinement, to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to redeclare this fundamental maxim."

It is urged that the framers of the Constitution used the term "specific tax" in a different and broader sense, and that, in contradistinction to the uniform tax contemplated by § 11, it should be construed to mean any tax on property not conforming to such uniform rule. We have only to examine the statute in force at the time the Constitution was adopted, to see that the term "specific tax" was known and applied in this state previous to the meeting of the constitutional convention. Title 5 of the Revised Statutes of 1846 is divided into chapters 20 and 21. The former treats of the "Assessment and Collection of Taxes;" the latter, "Of Specific Taxes and Duties,"—thus indicating that specific taxes and duties embraced taxes other and different from those ordinary taxes which were provided for in chapter 20, and which were assessed and collected locally. An examination of chapter 21 will show that the term "specific taxes" was used in conformity to the definitions hereinafter given. Thus banks were taxed a specified per centum upon the amount of capital stock paid in. A similar tax was imposed upon railroad, canal, and turnpike companies. These taxes were payable to the state treasurer. It will be noticed that they were not based upon the actual value of the real and personal property in possession of the company at the time, but upon the amount of capital that had been previously invested in their business. The interposition of no assessing officer was required to value the property. Reports to the state treasurer were required (see Rev. Stat. p. 214); and presumably he was to determine the amount, and collect the tax, after making a deduction from the amount of capital stock equal in amount to such property, real and personal, of the banks, as was locally assessed and taxed. The legislature of 1846 to 1849, inclusive, passed many acts—some general and some special—imposing taxes of this kind upon corporations created by them, such as railroads, plank roads, and mining companies. The briefs of counsel refer to 44 L. R. A.

them, and we will not repeat the citations. Without exception, they provide for reports from which the amount of taxes were computed. Other recognized specific taxes, such as taxes upon brokers, peddlers, etc., were included in chapter 21 of the Revised Statutes. It even seems to have been thought advisable to distinguish duties from them. Accordingly the title mentions them, and the chapter (21) imposes ad valorem duties upon property sold at auction, and spirituous liquors. In view of these laws, some of which continued in force after the adoption of the Constitution, we are satisfied that the convention understood the meaning of the term "specific taxes," and used it in no other than the common and well-settled sense of the term, which they understood to imply a tax which was made specific in rate and arbitrary in its standard, requiring no assessment beyond a mathematical computation. Of such taxes, Mr. Cooley says: "License taxes, and other taxes on business or occupations, stamp taxes, taxes on franchises, and privileges, are usually specific, as are also many excise and custom taxes. As regards all such taxes, the law by which they are laid is of itself a complete apportionment. Ministerial officers have nothing to do but to list the subjects of taxation; classify them, where that is necessary; ascertain the number, weight, measurement, etc.; and collect the sum which the law has definitely fixed. If the taxes are stamp or license taxes, even the listing may not be required; but the individual who is to pay them will purchase his stamp or his license by voluntary payment, as he may have occasion." Cooley, *Tax'n*, 175. If the tax in this case is clearly an ad valorem tax, if it is a tax on property,—and this cannot be questioned, because the title and the act both call it a tax on telegraph lines, which are property,—there is nothing in the law to indicate that an occupation tax or tax upon business was intended, even were we to hold that its ad valorem feature would not necessarily preclude its being denominated a specific tax. It follows that the auditor general should not treat this as a specific tax, by crediting it to the educational fund.

It remains to inquire whether this tax can be sustained as an ad valorem tax. We have seen that the Constitution requires uniformity of taxation, except as to property specifically taxed. Not being a specific tax, this must comply with this requirement, which it can hardly be said to do. It is to be assessed according to its cash value, which is a compliance with section 12; but if assessment as a whole, and not locally, and by a state board, and not by a local board, as in ordinary cases, can be said to be permissible,—which we do not decide,—the fact remains that the rate is determined in a different way, and is different in amount, from taxes imposed upon other property which contributes to state taxes. We must infer that this is a state tax, for it is payable to the state treasurer, and the law does not provide for its application to local purposes. The taxes generally assessed for the state bear a proportion to the amount to be raised, and

all taxable property, except that paying specific taxes, is charged with a given and equal per centum upon its assessed value. That cannot be said of this property, for the rate is to be the average of all taxes raised for all purposes,—local as well as state. It is not a specific tax, and it is not within the uniform rule of taxation prescribed for other property, and the law providing for it must therefore be held void.

Counsel urge that this statute has been a law since 1879, recognized by the departments as valid, and acquiesced in by the corporations taxed under it, and by the public, and ask us to apply to this case the doctrine that "long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of words." This principle should be applied more cautiously to Constitutions than to laws. The inference that the public is satisfied with a construction of a law giving it an effect which the legislature might have lawfully provided, and which would not be disputed, had its language shown an intent to do so, is much greater than in the case of a constitutional provision, where the question arises, not in regard to legislative intention, but to legislative power. And, if we could eliminate this distinction, the ability to easily change the law by legislative action would give more force to a construction in conformity to usage than would be justified in the case of a constitutional provision, which cannot be so readily altered. It is a rule which should not be applied, except in cases of doubt. Mr. Cooley, in *Constitutional Limitations* (page 71), says: "Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed; and it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the Constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed." The rule of contemporaneous construction was applied in the case of *McPherson v. Blacker*, 92 Mich. 377, 16 L. R. A. 475, where the question was, What was meant by the language of the Federal Constitution which provides that "each state shall appoint in such manner as the legislature thereof may direct a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress?" The opinion in that case, and in the case of *Detroit v. Chapin*, 108 Mich. 136, 37 L. R. A. 391, review the authorities sustaining that rule. In the latter case it was held that the question must be a doubtful one, to 44 L. R. A.

permit contemporaneous construction to have weight. Again, this usage has not the force that it would otherwise have, because the law was not passed until nearly thirty years after the adoption of the Constitution. To apply this principle would be to hold, in substance, that the practical construction of a department, acquiesced in by those affected by the law, possibly satisfied with it because of the favorable consideration that it gives them, has made necessary or proper a construction of the Constitution, upon a most important subject, which, in the absence of the practice under it, would not be indulged.

The applications must be granted,—that of the telephone company, as prayed; that of the governor, to the extent of requiring the amount collected under the law, and now in the hands of the treasurer, to be credited to the general fund. Costs will not follow.

All the other Justices concur with Hooker, J.

Montgomery, J., concurring:

I concur in the opinion of Mr. Justice Hooker. I think it cannot be maintained that a tax on property based on assessments is a specific tax. The definition of "specific tax" stated by Judge Cooley is a tax which "imposes a specific sum, by the head or number, or by some standard of weight or measurement which require no assessment beyond a listing and classification of the subjects to be taxed." Cooley, *Tax'n*, 2d ed. 238. It is true, the capital stock of a corporation may be made the basis of the levy of a specific tax or franchise tax, but this is a method of measuring the tax without resort to assessment. In *Burroughs, Tax'n*, 168, referring to the Federal decisions on the subject, the author states: "When the tax is on the nominal capital of a bank, without regard to the value of the property of which it is composed, such a tax is annexed to the franchise as a royalty for the grant, and is a tax on the franchise, and not on property." But the Supreme Court of the United States, in *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 195-226, 41 L. ed. 683-697, in speaking of a tax imposed under the Nicholls law of Ohio, which is, in this respect, similar to the statute involved in this case, say, "The taxation is essentially a property tax." So, in *State, Poe, v. Jones*, 51 Ohio St. 492, the court labored to show that the tax under the Nicholls law was a property tax; i. e., that the good will embraced the value of the taxable property, and might be considered in assessing the value of the property as property. It was said: "If, by reason of the good will of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money, within the meaning of the Constitution because good will and other elements indirectly entered into its value." The au-

thoritative decisions under the Nicholls law (i. e., that of the Ohio supreme court and that of the Federal Supreme Court) both rest upon the ground that the tax imposed was a tax on property, and not a tax on franchise or privilege. The distinction between a franchise tax and a tax on property is well illustrated by two decisions of the Federal Supreme Court. In *New York Bank of Commerce v. New York City & County Tax Comrs.* 2 Black, 620, 17 L. ed. 451, it was held that, as a tax on the national securities cannot be levied by a state or local municipality, the same result could not be reached by taxing the value of the stock of a bank which was wholly invested in such securities. But in the case of *Provident Inst. for Savings v. Massachusetts*, 6 Wall: 611, 18 L. ed. 907, the court had under consideration the statute of Massachusetts which provides for a tax on the average amount of deposits standing on the books of the institution. The court held this a tax on the franchise, and not a property tax. Referring to the case of *New York, Bank of Commerce, v. New York City & County Tax Comrs.* the court said: "The statement of that case shows that the assessment was made under a then recent law of the state, which required the tax to be imposed upon a valuation of the stock, like the property of individual citizens, and not, as formerly, on the amount of the nominal capital, without regard to the depreciation. Prior system of taxation in that state was different, and this court admits that, according to that system, it was immaterial as to the character of description of the property which constituted the capital, as the tax was one annexed to the franchise as a royalty for the grant, and was imposed wholly irrespective of the character of the property." In *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904, the court went still further. There the tax was assessed upon the excess of the market value of the capital stock over the assessed value of the real estate and machinery of the corporation. The court held this to be a tax on franchise, and not on property. So, in the same case, the supreme judicial court of Massachusetts had reached the same result. The reasoning by which the result was reached is shown by reference to the opinion of the court in *Com. v. Hamilton Mfg. Co.* 12 Allen, 302. The court says: "The statute does not require that there should be any return made of the personal property held by corporations to the board of commissioners, who are to fix the amount on which the assessment is to be reckoned; nor is there any valuation or estimate of such property to be made in order to arrive at the amount of the excise or duty." In the same opinion the court says: "It certainly cannot be contended that the legislature can legitimately impose a tax on property in the name or under the guise of laying an excise or duty. Such legislation would be a palpable evasion of a distinct and clearly-defined constitutional restriction, and would substitute an unequal and arbitrary system of taxation upon property for one which was intended . . . to be 44 L. R. A.

equal and proportional." In no case to which my attention has been called has a tax imposed on the property of a corporation at a valuation fixed by assessors been treated as a tax on a franchise, as distinguished from a tax on property. The case last cited comes the nearest to so holding of any, and this makes the market value of the shares the basis, and distinctly negatives the right to so treat a valuation fixed by assessment. The case of *Bailey v. Fuqua*, 24 Miss. 497, distinguishes between a specific and an ad valorem tax. The test adopted is whether the tax is assessed on value, and, as the statute under consideration so provided by clear implication, it was held to provide a specific tax. See also *Brookfield v. Tooley*, 14 Mo. 613. It is contended, however, that the specific taxes provided for in our Constitution may be taxes on property, and that this implies that they may be assessed upon value. I do not think the latter proposition is necessarily a sound deduction from the former. The exception from the rule of uniformity provided by § 11, of property paying specific taxes, does not necessarily imply that specific taxes may, in one sense, be laid upon property. In one sense, specific taxes are laid on property when the capital stock of the corporation or its gross earnings is made the basis for a levy; and yet, as we have seen, taxes so levied are specific taxes, or taxes on the franchise, with accepted definitions. The argument made, that the statutes in force when the Constitution was adopted, and which are continued in force, provided for taxes on property which were by the Constitution treated as specific taxes, is sufficiently answered by my brother Hooker. As pointed out by him, none of these acts provided for an assessment on the property according to value, but the rate was fixed and calculated on the basis of capital invested, without regard to depreciations. Is the tax imposed uniform with that imposed on other property bearing the same relation to the state? Treating the tax imposed as one on property, based on valuation, and not as a specific tax, the corporations and associations mentioned in this act can no more be discriminated against, as to the assessments made or taxes exacted, than can merchants, manufacturers, or farmers. The tax levied in this act is the average rate of all taxes levied by the state, counties, and municipalities throughout the state. A telephone company in Tecumseh, where the local taxation added to the state tax may not exceed 1½ per cent, may, under this act, be required to pay 2½ per cent. Under the Atkinson bill, a railroad in the Northern Peninsula is required to pay the same rates as one having a terminus in Detroit, and extending through territory in which local improvements are expensive, and schools are maintained at great cost.

Grant, Ch. J., and Moore and Long, JJ., concur with **Montgomery, J.**

Grant, Ch. J., concurring:

I concur in the opinion of my Brothers Hooker and Montgomery, but desire to ex-

press my views somewhat more fully. Our Constitution authorizes only two kinds of taxes,—one, specific, imposed without regard to the value of the thing taxed; the other, general, based upon assessed cash value, and requiring uniformity. The principal question for determination is, Is the tax imposed by this act a specific tax? If it is a specific tax, the act is valid; if it is not a specific tax, it is void, for noncompliance with § 14, art. 14, of the Constitution, which provides that “every law which imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object.” This law does not provide the object to which the tax is to be applied. This is so obvious, that I spend no time in discussing it. When a tax is specific, the Constitution fixes the object to which it is to be applied. It appears to me impossible to read the definitions of the lexicographers and the decisions of the courts without reaching the conclusion that the terms “specific tax” and “ad valorem tax” have a well-defined meaning; and in the Constitution of this state, as well as in the statutes and decisions, these definitions are clearly recognized. Concise definitions are given in 25 Am. & Eng. Enc. Law, 17, note 3, and Cooley, Const. Lim. 238. As these are found in the opinions of my brothers, I will not restate them. These two definitions are, in substance, the same as given by other authorities, both legal and lay. A tax based upon the assessed cash value of property assessed is not a specific tax. It is an ad valorem tax, and any enactment by a legislature that it is a specific tax does not make it so; otherwise the legislature could determine what was meant by the use of terms in the Constitution which have a well-defined meaning. The fact that, in imposing a specific tax, the value of the thing taxed is taken into consideration in determining the amount of it, does not change the nature of the tax. A tax upon the capital stock of a corporation, paid or unpaid, or upon its bonds issued or money borrowed, is just as much a specific tax as is so much per article upon the thing produced. The real value of the capital stock is not its par value. It would probably be safe to say that there is not a corporation in this state whose stock, paid or unpaid, at its par value, is its real value, or whose indebtedness in money borrowed represents its value. It is a well-known fact that the actual value of many of our mining corporations is many times greater than the par value of the stock, while that of others is many times less than the par value. So a tax upon the bonds or upon the borrowed money of a corporation is not a tax upon the value of the corporation. The next day the money borrowed may be put into improvements which will increase the real value of the property much greater than the amount of the money borrowed, while in other instances it will be a loss. All such taxes are not taxes upon value, but upon the specific thing regardless of its real value. It is undoubtedly true, as argued by the learned counsel

for the relator, that value enters into every specific tax. The people do not tax, specifically or otherwise, worthless property. Probably the specific tax on a ton of copper or silver would be placed at a much higher sum than a tax upon a ton of iron, but this fact does not change the nature of the tax. I speak of this because it is argued that when the framers of the Constitution, in § 10 of article 14, provided: “The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from banking, railroad, plank road and other corporations hereafter created,”—they used the term “specific” with reference to its meaning in the laws as they then existed. This is conceded to be correct; and Messrs. Hanchett and Pond, who, at the request of the governor, have appeared as counsel for the respondents, also argued that the term was so used in all laws prior to the adoption of the Constitution of 1850, where a tax upon value was understood to be a specific tax. We have examined all the laws referred to, and we do not find that in any single act passed prior to 1850 is there any language to justify the conclusion that the term “specific tax” was used to apply to an ad valorem tax, as in the act under discussion. In all these acts,—and they were many,—the only thing to be done was for the ministerial officer to list the property, and the law stepped in and determined the tax. There was no officer of the state appointed to assess the value. The real value was wholly immaterial, and not to be considered. The money borrowed might be invested profitably or unprofitably. The tax was on the specific thing, and not upon value. This is the criterion to determine whether the tax is specific or ad valorem. There is nothing, therefore, in these acts, to show that the legislature had ever intended to impose a specific tax upon an ad valorem assessment. On the contrary, we think the plain conclusion is that the framers of the Constitution used these terms within the definitions above given. In *Bailey v. Fuqua*, 24 Miss. 497, the court says: “The term ‘ad valorem tax’ is as well defined and fixed as any other used in political economy or legislation, and simply means a tax or duty upon the value of the article or thing subject to taxation.” It is stated by one of the learned counsel for the relator, in his brief, that the specific taxes levied prior to the adoption of the present Constitution were not, with possibly one exception, levied upon an assessed value. That exception, I suppose, was under the law approved April 25, 1846; being an act declaratory of the interests of the state of Michigan in mines and minerals. Section 4 of that act (being § 2567 of the Compiled Laws of 1857) provided for a “specific tax of 4 per cent, to be in lieu of all other state taxes . . . to be assessed thereon upon the average yield and value of such ores.” This is called a specific tax in the law, and is a specific tax, being a tax upon the specific article produced, and recognizes a proper principle in specific taxation, viz., that of

considering value an element in fixing the amount. But there was no attempt to assess and tax the entire property of the company. A specific tax may be so much per pound, or so much per dollar upon the value of the article produced. In neither case is any attempt made to assess and tax all the property of the corporation.

In *Walcott v. People*, 17 Mich. 68, at pages 89 and 90, Justice Campbell, in a dissenting opinion, after referring to §§ 11 and 12 of article 14, says: "Taking these sections together, and reading them according to their natural construction, the conclusion seems unavoidable that taxation by an assessed valuation of property must be the rule, and specific taxation the exception." The points in that case upon which the court disagreed were (1) whether the power given by the Constitution to continue specific taxes, and to impose specific taxes on corporations thereafter created, limited the right of specific taxation to such cases, or left the legislature at liberty to apply it to other branches of business; (2) whether it was repugnant to that clause of the Federal Constitution which gives Congress the power to regulate commerce among the several states. That case was referred to in *Kitson v. Ann Arbor*, 26 Mich. 325, which again recognizes the two classes of taxation permissible under our Constitution,—the one an assessment upon the property at its cash value; and the other, specific taxes not based upon value. Both an ad valorem and a specific tax may be imposed. *State v. North*, 27 Mo. 464, upheld an ad valorem tax on the goods of merchants, and also a tax on their occupation, to be collected in the form of a license. In *Brookfield v. Tooley*, 141 Mo. 619, an ordinance of the state levied a license tax of 1 per cent per annum upon the cash value of the stocks of merchants. The court held that this was a property tax, pure and simple, and to call it a tax upon occupation was a misnomer. It was held to be void because not uniform upon all the personal property of the city, because it levied \$1 upon every \$100 of assessable personal property belonging to the merchant, and exempting all personal property not belonging to merchants. So, in *State ex rel. Garth v. Switzer*, 143 Mo. 287, 40 L. R. A. 280, a succession tax levied upon the appraised value of the whole estate left by the deceased, and requiring the personal representatives to pay it, was held to differ in no particular from a general tax upon property, and void because it violated the constitutional requirement of uniformity. In *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, the statute required every railroad in the state to pay to the state an annual excise tax for the privilege of exercising its franchises in the state; the amount to be determined by the gross transportation receipts of each corporation, person, or association. No question of specific or ad valorem taxes was involved. The Constitution of Ohio required that laws should be passed taxing by

uniform rule all moneys, securities, investments in bonds, stocks, and in joint-stock companies, or otherwise, and also all real or personal property, according to its true value in money. It also provided that the general assembly "shall provide by law for taxing the notes, or bills discounted or purchased, moneys loaned, and all other property, effects or dues of every description (without deduction) of all banks now existing or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals." The legislature provided for different modes and agencies to determine the true value of property liable to assessment. This law came before the supreme court of Ohio in *Wagoner v. Loomis*, 37 Ohio St. 571. The result of the law was an unjust discrimination against railroad companies, but this was held to be the fault of the assessing officers, and not of the law. If the officers had performed their duty, the assessment would have been as nearly equal as human judgment could make it. A statute of the state of Maine provided that every telegraph corporation, company, or person should annually pay into the state treasury a tax of 2½ per cent on the value of any telegraph line owned by said corporation, company, or person within the limits of the state, including all poles, wires, insulators, office furniture, batteries, and instruments, and any circumstances or conditions which affected the value of the property. The second section of the act provided for a return to the secretary of state, to be made under the oath of the superintendent of the company. The governor and council were then required to determine the valuation and assess the tax. The telegraph company claimed that the act was void, under article 9, § 8, of the Constitution of Maine, which is as follows: "All taxes upon real and personal estate assessed by authority of this state shall be apportioned and assessed equally according to the just value thereof." The opinion concedes that, if the act imposed a tax upon property, it was void, and then proceeded to demonstrate that it imposed a "tax or excise upon a specific use of the property, and therefore was not within the limitation of the Constitution." The opinion states that the law does not cover all the property of the company, and concludes that the purpose was to levy a tax upon the use or business of the company, and that in reality such was the tax imposed. I do not wish to be considered as assenting to the reasoning of that case. It seems to me a fair deduction from reading the act, which is given in full in the opinion, that the intention was to cover all the property of the company, and put a tax upon the valuation of all its property, but the court held otherwise; and that is the distinguishing feature of the case. In determining the character of this tax, the court says: "The name is not material. It is the nature of the tax imposed which settles the question as to its validity. If the tax is upon the

property as such, it is illegal, by whatever name we may christen it. If upon the franchises, it is clearly within the legislative power, though the name be omitted, and though the value of the franchises may be ascertained by an estimate of certain property." The title of the act here in question is, "An Act to Provide for the Assessment and Taxation of Telegraph and Telephone Lines within the State of Michigan," etc. Section 3 of the act requires the board to assess "said telegraph and telephone lines at the true cash value thereof." If our statute includes all the property of the company, and imposes an ad valorem tax upon it, then the Maine case supports the contention of those attacking the validity of the act. The evident design was to place this property upon an equality, so far as possible, with other property of the state, to make it bear its fair share of the public burdens. The act has none of the features of a specific tax. We are not now concerned with the question whether the appointment of a board to assess the property of these corporations is valid. Some of the authorities already cited support it. So, also, do *Central Iowa R. Co. v. Wright County Supers.* 67 Iowa, 199; *Franklin County v. Nashville, C. & St. L. R. Co.* 12 Lea, 521. I see no objection to this mode of assessment, when the design and effect of the law are to place the property of these corporations upon the same basis as other property of the state.

Anna VOSS et al., Plffs. in Err.,
v.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(.....Mich.....)

1. Children to whom a policy of insurance on their father's life is payable, if their mother be not living at his death, have a vested, though contingent, interest, and on the death of one of them before the mother's death his interest will descend to his widow and children.
2. An insurance policy issued without change, except as to amount, from one which was surrendered merely for reduction, is to be construed with reference to the interest of a beneficiary who has died before the surrender, as of the date of the original contract.
3. One of two beneficiaries in an insurance policy cannot maintain an action to enforce the policy without making the other a party.

(January 3, 1899.)

NOTE.—On the question, Who are "heirs" within the meaning of life insurance policies?—see note to *Hubbard v. Turner* (Ga.) 30 L. R. A. 593.

For the similar question, Who are "legal representatives" within the meaning of such policies?—see note to *Rose v. Wortham* (Tenn.) 30 L. R. A. 609.
44 L. R. A.

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to enforce payment of the amount alleged to be due on a policy of life insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. John G. Hawley, for plaintiffs in error:

If a person, for whose benefit a policy of insurance is taken out dies before the policy is payable, the heirs of that person succeed to his or her rights.

Continental L. Ins. Co. v. Palmer, 42 Conn. 60; *Connecticut Mut. L. Ins. Co. v. Fish*, 59 N. H. 126.

Messrs. Moore & Goff, for defendant in error:

The word "children" cannot be extended to include grandchildren.

Re Chapoton, 104 Mich. 11; *Re Curry*, 39 Cal. 529; *Adams v. Law*, 17 How. 417, 15 L. ed. 149; *Reeves v. Brymer*, 4 Ves. Jr. 698; *Pride v. Fooks*, 3 DeG. & J. 252; *Palmer v. Horn*, 84 N. Y. 518; *Mowatt v. Carow*, 7 Paige, 328, 32 Am. Dec. 641.

To reach the construction contended for by plaintiff, two steps from the letter of the policy must be taken.

The first step is to hold that the word "children" includes grandchildren.

The second step is to hold that grandchildren, though designated by the word "children," do not take *per capita*, but only by representation through their deceased parent.

Winsor v. Odd Fellows' Ben. Asso. 13 R. I. 149.

In *Small v. Jose*, 86 Me. 120, construing a policy of life insurance, the words "the surviving children" were held not to include grandchildren.

To the same effect are *Continental L. Ins. Co. v. Webb*, 54 Ala. 688; *Russell v. Russell*, 64 Ala. 500; *United States Trust Co. v. Mutual Ben. L. Ins. Co.* 115 N. Y. 152.

Joseph Engelking, an alleged child of Katharina Engelking, is not made a party to the suit.

Even if it should be held that "children" means grandchildren and widows, there is no right of recovery shown by the declaration, in the plaintiffs.

Continental Ins. Co. v. H. M. Loud & Sons Lumber Co. 93 Mich. 139; *Herriter v. Porter*, 23 Cal. 385; *Logan v. Caffrey*, 30 Pa. 106; *Colvin v. Corwin*, 15 Wend. 557; *Alcott v. Hugus*, 105 Pa. 350; *Smith v. Jones*, 15 Johns. 229; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 614.

Long, J., delivered the opinion of the court:

This is an action on a life insurance policy issued by the defendant company to George Engelking, and payable to Katharina Engelking as beneficiary. The declaration recites: "For that whereas, the said Anna Voss is the widow of George Voss, deceased, and the said other plaintiffs are children and heirs of the said George Voss; and whereas, the

said George Voss was in his lifetime one of the two children of Katharina Engelking, deceased; and whereas, the said Katharina Engelking was in her lifetime the wife of George Engelking; and whereas, heretofore, to wit, on the 22d day of December, A. D. 1886, at the city of Pittsburg, in the state of Pennsylvania, the said defendant, for good and sufficient consideration to it in hand paid by the said George Engelking, did make, execute, and deliver to the said George Engelking its certain policy of insurance, wherein and whereby the said defendant expressly promised and agreed to and with the said George Engelking that, upon the death of the said George Engelking, the said defendant would pay to the said Katharina Engelking, or, in the event of her prior decease, to her children, the sum of \$5,000; and thereupon, afterwards, to wit, on the 27th day of December, 1878, the said sum so payable was, by the mutual consent of the parties, reduced to \$3,000 the said policy in all other respects remaining in full force; and thereafter, to wit, on the 23d day of December, 1882, the said sum so payable was, by mutual consent of the parties, further reduced to the sum of \$2,500, the said policy in all other respects remaining in full force; and thereupon, afterwards, to wit, on the 31st day of December, 1883, the said sum so payable was, by the mutual consent of the parties, further reduced to the sum of \$2,000, the said policy in all other respects remaining in full force; and thereupon, afterwards, to wit, on the 22d day of December, 1885, the said sum so payable was, by the mutual consent of the parties, further reduced to the sum of \$1,500, the said policy in all other respects remaining in full force; and whereas, then and there, to wit, at Pittsburg, on December 22, 1866, the said George Voss and Joseph Engelking were the children, and the only children, of said Katharina Engelking; and whereas, afterwards, to wit, on the 1st day of April, A. D. 1887, at the said city of Pittsburg, the said Katharina Engelking died, the said George Engelking still living; and whereas, afterwards, to wit, on the 1st day of May, A. D. 1888, the said George Engelking died at the said city of Pittsburg, the said policy of insurance being then in full force, leaving surviving the said plaintiffs and said Joseph Engelking, the said George Voss and the said Joseph Engelking being the persons named in said policy of insurance as the children of said Katharina Engelking; and whereas, the said George Voss died, to wit, at the city of Detroit, on the 8th day of June, A. D. 1880, leaving him surviving, the plaintiffs in this suit, his widow and children, as hereinbefore recited; and thereupon, afterwards, to wit, on the 4th day of January, A. D. 1897, the said defendant, in consideration of the premises, undertook and faithfully promised the said plaintiffs to pay them, the said plaintiffs, the sum of \$750, one half of the sum secured by the said policy of insurance, whenever thereafter requested so to do, yet

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the said defendant has not, although often requested so to do, paid to the said plaintiffs the said sum of money, or any part thereof; to the damage of the said plaintiffs," etc. A demurrer was interposed to this declaration and the demurrer sustained in the court below. Plaintiffs bring error.

Inasmuch as the policy sued upon is contained in the record, and is treated by counsel in their briefs as a part of the declaration, we quote from its provisions. It is recited therein that the insurance company does "hereby insure the life of George Engelking," etc., "for the time of his natural life, in the sum of \$1,500, for the sole use and benefit of Katharina Engelking, wife of said insured; the said sum insured to be paid at the office of this company, in Hartford, Connecticut, to the said assured, or her legal representatives, within ninety days after due notice and satisfactory evidence of the death of said insured during the continuance of this policy; or, if the said assured be not then living, the said sum insured shall be payable as above to her children, or to their guardian, if under age," etc. It appears from the declaration that George Voss, one of the alleged children of Katharina Engelking, the beneficiary, died in 1880, and that his mother, Katharina Engelking, died April 1, 1887, nearly seven years afterwards. Defendant's contention is that, as this contract of insurance (when it was reduced to \$1,600, and a new policy issued, dated December 22, 1885) was made after the death of George Voss, therefore no money could be payable to these plaintiffs, the widow and children of George Voss, unless the word "children" should be construed to mean grandchildren. There might be some reason for this contention if the contract of insurance had been made originally in 1885; but, on the contrary, the contract was made December 22, 1866. George Voss was then living. The contract was, from time to time thereafter, surrendered for reduction only. The form of the contract was the same as in the original, and undoubtedly each new contract of reduction was based upon the same application, the only changes made being to reduce the amount. The contract, then, must be construed as it stood in 1866, except as the amount has been reduced to \$1,500. Katharina Engelking, or her legal representatives, was to receive this sum on the death of George Engelking; but, if she was not living at the death of her husband, the payment was to be made to her children. Katharina Engelking was not living at the time of the death of the assured. Her son George also died before that time, leaving children, who are plaintiffs here. Had Katharina Engelking lived beyond the life of her husband, she would have been entitled to the moneys. She died before the assured, and consequently had George, her son, lived, he, with the other child, if living, would have been entitled by the terms of the policy to receive the moneys thereon. Can it be said that it was within the terms of this policy, or within the con-

temptation of the parties, that should Katharina die before the assured, leaving no children, but grandchildren, that the policy should lapse? We think not.

In the case of *Continental L. Ins. Co. v. Palmer*, 42 Conn. 80, 19 Am. Rep. 530, it appeared that Betsey A. Palmer insured the life of her husband, Benjamin W. Palmer, in the sum of \$3,000, payable to herself, if living; if not, to their children. She died before her husband. Amos F. Palmer, one of the children, also died during the lifetime of his father, leaving issue, Charles P. Palmer. The question reserved for the supreme court was whether Charles P. Palmer took an interest in the policy, or whether the whole sum insured vested in the surviving children. It was said by the court: "Amos F. Palmer [the son of the assured] at the time of his decease had an interest in this policy which was transmissible by descent; and consequently the respondent, Charles P. Palmer, is entitled to that portion of the fund which his father would have taken if living." One of the reasons given by the court for that holding was that "the moment this policy was executed and delivered it became property, and the title to it vested in someone; . . . [that it vested in the payees]. These payees consisted of two parties, the wife and the children. As only one party could take and enjoy the property ultimately, it did not vest in all as tenants in common; nor did it vest in either so as to give a right to the present enjoyment of it. It was not, however, a mere expectancy nor a naked possibility, but it was a possibility coupled with a present interest. It was visible, tangible property, and, like any other insurance policy, it was capable of assignment and had an appreciable value. Each party took a conditional, not an absolute, right to the whole policy. It was not a condition precedent, but subsequent. The title vested in point of right immediately, but was liable to be divested upon the happening of a subsequent event. The right to the policy, in a strict sense, was not contingent. The possession and enjoyment of the fund thereby created were postponed to the future, and were contingent. This contingency applied to both parties,—to the wife as well as to the children. Her enjoyment of the fund depended upon her surviving her husband; the children's upon her husband surviving her. In respect to each, it was a then present right to the future enjoyment of property, but it was liable to be defeated by a subsequent contingency, and was certain to be defeated as to one of them. That such a right is recognized as property, and is transmissible to heirs, is a proposition abundantly established by the authorities."

The general rule is that, where the contingency is of such a nature that no interest vests until the happening of the event upon which the estate depends, nothing is transmitted to the heirs. So, too, if the death of

a party in whom a contingent interest is vested is an event by reason of its happening before some other event upon which the estate is given to others, the heirs take nothing. In the present case, however, the widow was to take the whole on condition she survived her husband; but, if she departed this life before him, the fund was to be paid in full to her children. These children, then, as in the case of *Continental L. Ins. Co. v. Palmer*, were vested with this fund on condition that the mother died before the assured. This event happened. The right was more than a mere expectancy or naked possibility. It was a possibility coupled with an interest, which was transmissible to the heirs of the children. This rule was adopted in *Connecticut Mut. L. Ins. Co. v. Fish*, 59 N. H. 126; *Winslow v. Goodwin*, 7 Met. 363. See also *Lockwood v. Michigan Mut. L. Ins. Co.* 108 Mich. 334. The rule is stated by Chancellor Kent (4 Kent, Com. p. 261), that "all contingent and executory interests are assignable in equity, and will be enforced if made for a valuable consideration; and it is settled that all contingent estates of inheritance, as well as springing and executory uses and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent, and are devisable and assignable." Redf. Wills, p. 389, also lays down the rule that "it seems to be settled beyond all question that all vested estates, even though liable to be defeated by conditions subsequent, are transmissible, and by consequence devisable."

The policy expressly provides that it shall not be assigned, and there is nothing contained in it giving the assured the right to name new beneficiaries. It is therefore certain that George Voss, at the inception of the contract contained in the policy, had a vested interest therein, though contingent, and at his death that interest descended to his widow and children, and they may maintain an action therefor.

The declaration sets forth substantially that Katharina Engelking, at her decease, left two children her surviving. It nowhere appears but that the other child is still living. If so, that child, or the representative of that child, is equally interested in this litigation, and should share the proceeds of this policy with the widow and children of George Voss. That child is not made a party to this suit. The plaintiffs cannot be permitted to thus split up the demand. It is a single cause of action, and the plaintiffs cannot present a part of it in this action, and leave the rest to be litigated in another suit. The rule was settled in *Continental Ins. Co. v. H. M. Loud & Sons Lumber Co.* 93 Mich. 139, and the cases there cited.

The demurrer must be sustained on this ground, but without prejudice to the bringing of an action, in which all the necessary parties are joined.

The other Justices concur.

MONTANA SUPREME COURT.

STATE of Montana, *ex rel.* E. W. KNIGHT,
JR., *et. al.*, *Appts.*,

v.

HELENA POWER & LIGHT COMPANY,
Respt.

(.....Mont.....)

The operation of a line of street railway which has been abandoned cannot be specially enjoined as a legal duty by writ of mandate, where the right of the corporation to use the streets was given by ordinances granting it the franchise and easement of maintaining its railway in the street, subject to forfeiture for failure to operate it, and there is no express provision requiring the maintenance or operation of the line.

(March 31, 1899.)

A PPEAL by relators from a judgment of the District Court for Lewis and Clarke County denying a writ of mandamus to require defendant to operate a portion of its street-railway system. *Affirmed.*

The facts are stated in the opinion.

Messrs. Clayberg, Corbett, & Gunn for appellants.

Messrs. Toole, Bach, & Toole and Massena Bullard, for respondent:

The writ of mandate will not be granted unless the court can place its finger upon a specific duty imposed by the law.

Before the city authorities have directed us what to do there is no positive duty to run the cars at any particular time or times.

Northern P. R. Co. v. Washington Territory, Dustin, 142 U. S. 492, 35 L. ed. 1092.

A contract to run cars could not be enforced by a mandamus.

High, *Extr. Legal Rem.* §§ 25, 321; *State, Mount Pleasant Cemetery Co., v. Paterson, N. & N. Y. R. Co.* 43 N. J. L. 505.

There is no particular service which, under any circumstances this court can compel. To merely operate a road is too indefinite.

High, *Extr. Legal Rem.* §§ 538, 539, 561.

A distinction is to be made between a street-railway franchise, granted by the legislature, and the permission of a municipality to the occupation of its streets by a railway company; the latter is not a franchise, but a license, which may be forfeited or abandoned.

23 Am. & Eng. Enc. Law, p. 977; *Galveston City R. Co. v. Galveston City Street R. Co.* 63 Tex. 529; *Chicago City R. Co. v. People, Story*, 73 Ill. 541; *Belleville v. Citizens' Horse R. Co.* 152 Ill. 171, 26 L. R. A. 681; *People v. Rome, W. & O. R. Co.* 103 N. Y. 106; *Northern P. R. Co. v. Washington Territory, Dustin*, 142 U. S. 498, 35 L. ed. 1094.

A permission to occupy streets with a railroad track should plainly appear and not be left to be derived by doubtful implication from the generality of language.

NOTE.—For mandamus to compel the operation of a railroad or street railway, see also *State, Little, v. Dodge City, M. & T. R. Co.* (Kan.) 24 L. R. A. 564 and note; also *Chicago & A. R. Co. v. People, Hunt* (Ill.) 26 L. R. A. 44 L. R. A.

See also 45 L. R. A. 837.

Chicago, D. & V. R. Co. v. Chicago, 121 Ill. 176.

There was no authority in the city council at the time of the passage of ordinances Nos. 20 and 212 to grant the franchise mentioned therein, and hence there was no authority to impose a condition that the road should be continuously operated under that franchise.

San Antonio Street R. Co. v. State, Elmdorf, 90 Tex. 520, 35 L. R. A. 662; *Northern P. R. Co. v. Washington Territory, Dustin*, 142 U. S. 492, 35 L. ed. 1092; *Com. v. Fitchburg R. Co.* 12 Gray, 180; *State, Atty. Gen., v. Southern Minnesota R. Co.* 18 Minn. 40; *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 58 Am. Rep. 484.

Per Curiam:

Relators applied to the district court of Lewis and Clarke county for a peremptory writ of mandamus requiring the respondent, a street-railway company, to operate a portion of its system. The affidavit in support of the petition or application discloses the following facts: That respondent is a corporation under the laws of Montana, and for several years last past has been, and now is, engaged in the business of operating street railways in the city of Helena; that on July 13, 1889, and on October 8, 1890, by two several ordinances of the said city there were granted to the predecessors in interest of the respondent the right, license, franchise, and easement of laying down and maintaining in certain streets of Helena a street-railway track, and of operating a line of street cars thereon, by which ordinances it was, among other things, substantially provided that unless the grantees, or their successor or assigns, should within a certain period of time construct and operate a designated portion of the line of railway, the right and privilege so granted would be forfeited as to the parts of the line where the failure occurred; that by § 12 of article 8 of chapter 19 of the Revised Ordinances of the City of Helena of 1890, it is provided: "On all routes the cars shall be run for such number of hours each day, and at such intervals, and allowed to stand for such length of time at either terminus of the road, as the city council may from time to time direct by resolution or order;" that in 1894 respondent succeeded to the rights of the original grantees named in the ordinances; that the respondent, after acquiring the rights granted by the ordinances, operated the railways from 1894 until June 30, 1898, and that on or about the date last mentioned it refused to run its cars on its line known as the "Lenox Addition Line," or to operate the same, although requested so to do, and has abandoned the same, and threatens to, and will, unless otherwise directed, take up and destroy the

224: *People, Cantrell, v. St. Louis, A. & T. H. R. Co.* (Ill.) 35 L. R. A. 656; *San Antonio Street R. Co. v. State, Elmdorf* (Tex.) 35 L. R. A. 662; and *State, Grinsfelder, v. Spokane Street R. Co.* (Wash.) 41 L. R. A. 515.

track built to and through the Lenox addition; and that the railway company is fully equipped with apparatus necessary for its operation. Respondent demurred for insufficiency. The demurrer was sustained, and a judgment entered dismissing the application. Relators appeal.

The writ of mandate may be issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Code Civ. Proc. § 1961. Is the operation of the line of street railway which respondent has abandoned an act specially enjoined as a legal duty? We think it is not. It does not appear that the charter of respondent, or the statute under which it was organized, requires it to maintain or operate a line of railway; nor is it claimed that the state has delegated to respondent the right to exercise the power of eminent domain. It does not appear, indeed, whether it owes its existence to a special act of the legislature, or to a compliance with the terms of some general act authorizing the formation of corporations thereunder. At the argument the statement was made that respondent was organized and exists under chapter 25, div. 5, Comp. Stat. 1887, entitled "Corporations for Industrial or Productive Purposes;" but nothing contained in that chapter may be so interpreted as to impose upon the respondent the obligation to continue the operation of any portion of its system of railways. The ordinances of the city are barren of language expressing or implying the intention of the council to impose such duty. On the contrary, they merely grant the right and privilege of constructing, operating, and maintaining railways in particular streets. The precise point arose in *State, Elmendorf, v. San Antonio Street R. Co.* 10 Tex. Civ. App. 12, where the court held that, under such circumstances as those presented in the case at bar, the specific duty was imposed upon the corporation to operate its line, and that mandamus would issue to compel performance. The case was taken to the supreme court by writ of error to the court of civil appeals, and in the court of last resort the judgment was reversed. *San Antonio Street R. Co. v. State, Elmendorf*, 90 Tex. 520, 35 L. R. A. 662. The question received the most careful consideration of the supreme court of Texas, and its opinion, which was filed in 1897, is the latest enunciation of the principles applicable thereto. So clearly and accurately does the court state the reasons for its decision, that we, believing them sound, and controlling the determination of this cause, quote and adopt the following: "It is one thing to hold that a company which has accepted a charter authorizing it to construct a line of railroad, with power to condemn property, and has constructed and is maintaining its line, may be compelled to so operate its line as reasonably to meet the necessities of the public; and, as we think, it is quite a different one that a railroad company, by the acceptance of its charter, which simply makes it lawful to construct and maintain a railroad, assumes an obligation to construct it, and to

maintain its operation so long as its corporate existence may continue. . . . The legislature, in creating a corporation, has the power to give it an option to do or not to do the acts which it is authorized to perform. On the other hand, it may impose upon the corporation, as the law of its creation, the obligation to exercise to their fullest extent the powers which are granted. In either case the proposed corporators may accept or not; and in the latter, if they do accept, they may be compelled by mandamus to perform the duties so imposed. But to say that in granting a charter to do a public service there is no difference between making it lawful to do an act, and imposing it as an obligation to perform it, is to say that, by reason of the public interest involved, language is to have a different construction and effect from what it would have in statutes in general or in private contracts. Expressions may be found in the opinions of courts which countenance that doctrine, but we think there it is based upon an assumption that cannot be maintained upon sound principle. In legislating, the lawmaking power undertakes to determine what is to the interest of the public, and, under the limitations of the Constitution, it is the sole judge of what will promote the public utility, and must be presumed to be capable of expressing its will in intelligible words. When, therefore, a corporation, whether quasi public or purely private, is granted the privilege of doing an act, and there are in its charter no express terms which make it obligatory to do the act, or other words from which by fair construction that intention can be gleaned, we do not see upon what sound principle the duty can be imposed. The allegations in the petition in this case show that the respondent company was chartered merely for the purpose of constructing and operating street railways in the city. The special act merely gave it the right of corporate existence for the purpose indicated. *Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 480, 492. The streets were under the control of the city council. The company could do nothing without the consent of the council. The franchise in question was granted by the city council, and the claim is that it is by virtue of that concession, and its acceptance by the company, that the duty arose. But the ordinance (which is quoted above) merely grants 'the privilege' of constructing and maintaining street railways over the lines therein designated. No clearer words of mere permission could have been employed. Not only this, but there is in the ordinance neither sentence, phrase, nor word, that indicates that it was the intention of the council to make it a condition of the acceptance of its grant that the company should be bound to construct and operate railways over the streets which were therein specified. The company are required to observe all the ordinances of the city then existing, but it is not averred that there was any ordinance in existence at the time of the acceptance of the franchise which imposed that obligation. . . . It is clear that the ordinance in this case neither by express terms nor by implication imposes the duty

upon the company. If the duty to construct and maintain the line is to be established, it must be upon the assumption that every privilege granted by a legislative body in reference to matter of public interest imposes upon the grantee who accepts it the duty to perform the acts he is allowed to perform. The assumption, in our opinion, is, as we have already intimated, not based upon sound reason; and is in opposition, at least, to the weight of authority. . . . We are of opinion, also, that the fact that the road has been constructed and operated, and that a part is now operated, makes no difference. Under the grant of a privilege to construct and maintain, if, after acceptance, it is permissive only to construct, it is not obligatory to maintain. But we do not hold that the company can, against the will of the city, operate a part of its line, and not the whole. A privilege to establish an entire line of street railway may be granted when the privilege of constructing and operating a part only would not be, and for a failure to operate a part it would seem that the whole might be forfeited. It seems to us that the remedy in this case is to forfeit the franchise to operate the branch line in controversy. . . . We would not be understood as holding that the common law does not impose some duties upon companies chartered as common carriers, which may be enforced

by mandamus, although no mention of such duties may be found in their charters. All carriers who undertake to transport goods or passengers for the public assume certain duties to the public; but certainly carriers who are not corporations may at any time discontinue the business, if they elect to do so; and we see no good reason why corporations may not discontinue their enterprises, when the charter does not in express terms or by fair implication forbid it. If it is the will of the legislature, or of a municipal body to whom the power to confer the privilege may have been granted, to impose upon the corporation the duty to construct and to continue to operate the work, instead of a mere permission to do so, it is not difficult so to provide by incorporating into the grant some language which evinces that intention." See also Booth, Street Railways, § 65.

If the council, by resolution adopted or order made under the authority of § 12 of article 3 of chapter 19, *supra*, should attempt to regulate the running of the cars on a portion of the system not abandoned, but in operation, a question different from that involved in this case, and requiring the application of other principles, would be presented.

The judgment is affirmed.

TEXAS COURT OF CRIMINAL APPEALS.

V. A. UPCHURCH, Appt.,

v.

STATE of Texas.

(86 Tex. Crim. Rep. 624.)

1. Under a statute permitting discharge of the jury in a felony case upon one of them becoming sick or in case of accident or circumstance occurring to prevent their being kept together, the necessary facts must be judicially determined, and if the judge, when absent from the courtroom, and in the absence of the prisoner, acts upon representations made to him, and excuses a juror, the prisoner will be entitled to release.

2. A plea of former jeopardy should be sustained where after the evidence for the state had been introduced at the former trial the judge, when absent from the courtroom, and in the absence of the prisoner, released a juror upon representations as to the dangerous sickness of his wife which resulted in the discharge of the jury without a verdict.

(December 22, 1896.)

A PPEAL by defendant from a judgment of the District Court for McLennan County convicting him of murder. *Reversed.*

The facts are stated in the opinion.

NOTE.—Former jeopardy by reason of the discharge of the jury in the prisoner's absence.

- I. Introduction.
- II. General rule.
- III. Plea allowed.
- IV. Plea disallowed.

This note is confined to the consideration of the question of former jeopardy by reason of the discharge of the jury in the prisoner's absence, and does not deal with cases which in any way involve the question of his consent to such discharge.

I. Introduction.

The cases would seem to be in harmony in holding that the defendant in a criminal prosecution has a right to be present in court at the time the jury is discharged before they have arrived at a verdict,—especially where his ab-

See also 48 L. R. A. 254.

sence is not due to his own voluntary or unlawful acts.

The case of UPCHURCH v. STATE fully supports the holding of the courts in this direction, and is in full accord with the principles declared in the earlier cases of Rudder v. State, 29 Tex. App. 262; State v. Sommers, 60 Minn. 90; State v. Wilson, 50 Ind. 487, 19 Am. Rep. 719; State v. Alman, 64 N. C. 364, 367; *Ex parte* Tice, 32 Or. 179; and other cases *infra*, II., III.

A distinction is clearly drawn between a discharge of a jury in the presence of the prisoner and a discharge in his absence, in the case of Maden v. Emmons, 83 Ind. 331, *infra*, III., which also supports the above rule.

The cases also appear to be unanimous in holding that if the absence of the prisoner is due to his own voluntary and unlawful act he cannot object to the court's action in discharging the jury. This is shown by the cases of People v. Higgins, 59 Cal. 357; Alston v. State,

Messrs. Sam B. Thomas, F. H. Robertson, and John W. Davis for appellant.

Mr. Mann Trice, for the State:

The action of the trial court in discharging juror Abbott upon receipt of information that his wife was sick and would probably die before morning, and subsequently discharging the entire panel, thereby making mistrial of the cause, is amply supported by Code Crim. Proc. art. 737, which provides: "If, after the retirement of the jury, in a felony case, any one of them becomes so sick as to prevent the continuance of his duty, or any accident or circumstance occur to prevent their being kept together, the jury may be discharged."

See *Ellison v. State*, 12 Tex. App. 580; *Sterling v. State*, 15 Tex. App. 249; 1 Thomp. Trials, § 90.

109 Ala. 51, 53; Price v. State, 36 Miss. 531, 72 Am. Dec. 195.

II. General rule.

In Bishop's Crim. Proc. § 272, subd. 2, it is said, if any fact is to be established requiring or necessitating the discharge of the jury before the verdict, as the sickness of one of the panel, plainly the prisoner must be present.

The principle of law which governs the court in this class of cases is that a prisoner accused of felony must appear in person in all proceedings had in his case and the rule therefore necessitates his presence in a capital case through every stage of the trial. *Rudder v. State*, 29 Tex. App. 262.

While the inability of the jury to agree may be such a necessity as will entitle the court to discharge them, yet if the defendant is prosecuted for a felony he has the right, unless he has waived it, to be present at the time of such discharge; and if in such a case the jury is discharged without the consent of the defendant and during his enforced absence, he cannot be again tried for the same offense, and his plea of former jeopardy will stand. *State v. Sommers*, 60 Minn. 90.

The case of *State v. Hurlburt*, 1 Root (Conn.) 40, was also one in which the court held that the defendant must appear or there would be no propriety in receiving a verdict, but the report only shows that the defendant was out upon bail, and it does not further appear whether his absence was voluntary or otherwise.

The discharge of the jury must, however, arise from a necessity determined by law. *Miller v. State*, 8 Ind. 325.

III. Plea allowed.

In *UPCHURCH V. STATE* the above statement of the law by Mr. Bishop is upheld and commented upon. In this case the action of the court in discharging the jury was held to be without authority of law, and the defendant was therefore ordered to be discharged upon his plea of former jeopardy. The action of the judge in discharging the jury was not in open court. It was at night some distance away from the courtroom and in the absence, not only of the jury, but of the prisoner and his counsel. It was also taken on the *ex parte* statement of an officer of the court that someone had informed him that the wife of one of the jurors was very sick.

One of the grounds of the decision of the court in the above case was that the defendant had a right to be heard at the time of the discharge of the jury, and was not forced to wait until a subsequent term in order to ascertain whether the court's action in so discharging the jury was correct or not.
44 L. R. A.

The rule that the prisoner must be present and consent to the discharge is not arbitrarily applied to all times and conditions as it only applies to express waiver by defendant. Contingencies may arise in which the law enters the waiver for him, that is, so far as he might object to again being placed upon trial, for instance, the sickness or death of the judge or a juror pending trial. The necessities of such case force a mistrial by operation of law.

1 Bishop, Crim. Law, § 1032; 1 Bishop, Crim. Proc. § 272; *State v. Smith*, 44 Kan. 75, 8 L. R. A. 774.

Henderson, J., delivered the opinion of the court:

Appellant was convicted of murder in the second degree, and given ten years in the

In *Rudder v. State*, 29 Tex. App. 262, the defendant's plea of former jeopardy in a prosecution for murder in the second degree was upheld where the jury at the former trial had failed to agree upon their verdict and were discharged by the court without the consent, and in the absence, of the defendant, who was confined in the county jail under order of the court, and over the objections of his counsel. In this case the jury had been absent some forty-eight hours.

It is perfectly settled that in a trial for felony no order which may prejudice the prisoner can rightfully be made in his absence. *State v. Alaman*, 64 N. C. 364, 367. In this case the prisoner was indicted for murder, and the jury were discharged during his absence, and also during that of his counsel, upon their reporting to the court that they were unable to agree upon a verdict after a deliberation of about forty-five hours. The court ordered the prisoner discharged.

And the discharge of the jury worked a release of a prisoner indicted for an attempt to kill where the cause was submitted to the jury, who reported to the judge that they were unable to agree, whereupon he discharged them without notice to, or the consent of, the defendant, or of his attorney, and in the absence of both. *State v. Shuchardt*, 18 Neb. 454. In this case the jury had only been in consultation eleven hours, and not long enough to show that there was no probability of their agreeing, and therefore the court had no power to discharge them on that ground alone, without the consent of the defendant, and it was also shown that the court remained in session for some days afterwards.

The plea of former jeopardy was upheld in *Finch v. State*, 53 Miss. 363, 365, upon an indictment for grand larceny, where the jury returned into court, announced the prisoner guilty, and were thereupon discharged without the prisoner's presence, who had, by order of the judge, been placed in jail, and the jury were thereupon recalled. The court held that the accused had the right to be present when the verdict was received, and that the court had no right to discharge the jury under the circumstances, and that the defect was not cured by the subsequent recalling of the jury, as they could not after a discharge be lawfully reassembled.

In *State v. Smith*, 44 Kan. 75, 8 L. R. A. 774, the sickness of one of the jurors was reported to the court in the absence of the prisoner. The judge in open court, and when the defendant's counsel was present, but the prisoner was absent in jail, discharged the panel. On these facts the plea of former jeopardy was

penitentiary; hence this appeal. On the trial of the case, appellant interposed a plea of former jeopardy. The plea set out that the case against this defendant had been tried at a former term of the court; that pending the trial, and after all the evidence for the state had been introduced, and the court had adjourned over night, the wife of one of the jurors was reported to be very ill, the report being made to the sheriff. At about 12 o'clock of that night, the sheriff reported the fact, as communicated to him by a neighbor of the juror, Jesse Abbott, that the wife of said Abbott was taken suddenly sick, and not expected to live, said report being made to the judge at his room, some distance from the courthouse; whereupon the court directed the sheriff to discharge said juror, Jesse Abbott, and permit him to go home to his wife, which was accordingly

done. In the morning, when the court opened, but eleven of the jurors appeared, defendant and his counsel being present and ready to proceed with the trial. The defendant and his counsel for the first time were then apprised of the action of the judge in discharging said juror. They stated that they were unwilling to proceed without a full jury, and the court then proceeded to, and did, discharge the rest of the jury, on its own motion, over the protest of the defendant, and continued said case until the next regular term of the court. This action of the court was properly excepted to at the time. This plea was *in propria forma*. On the trial of the case, the judgment discharging the jury at the former trial, and reciting the facts, was presented to the court and the action of the court invoked on said plea, which was overruled, and the plea per-

upheld upon the ground that the record ought to show affirmatively the existence of the fact which induced such order and justified the exercise of the power, and, as the sickness did not happen in the immediate presence of the court the fact ought to be established in accordance with the rules which govern in all cases where a fact ought to be judicially established.

And the plea was held to constitute a sufficient bar to any further prosecution in *State v. Wilson*, 50 Ind. 487, 19 Am. Rep. 719, where the defendant, who was indicted for murder, was absent by reason of his confinement and restraint in jail when the jury were discharged upon their reporting to the court that they could not agree upon a verdict.

In this case the jury had been deliberating on their verdict for thirty-two hours, and their answer showed that there was no probability of their agreeing on a verdict.

The fact that the prisoner was not present was the ground of the holding of the court in the above case, as the court distinctly states that in that case the discharge of the jury would have been proper if the defendant had been present in court, even though he had objected to the discharge, unless he had shown some good ground why the jury should not have been discharged, and that in such a case the discharge could not have been pleaded in bar of further prosecution of the case. *State v. Wilson*, 50 Ind. 487, 19 Am. Rep. 719.

So, the court upheld the plea of former jeopardy in *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436, for the reason that if the jury were unable to agree they should have been called into court and have announced their inability in the presence of the court and of the defendant, and that in the absence of this or some equivalent showing, the court was not authorized to make an order of discharge upon that ground. In this case the defendant was tried and convicted of murder in the first degree. And after the jury had retired to consider their verdict the court ordered the sheriff to proceed to the door of the jury room and inquire if they had agreed upon a verdict, to which they replied that they had not and could not agree, and the sheriff reported their reply to the court, whereupon the court ordered an adjournment of the term, which would not by operation of law have expired until the evening of the ensuing day.

And the court upheld the plea of former jeopardy in *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281, 53 Ga. 137, where the defendant was indicted for murder and the jury returned a verdict of voluntary manslaughter and were discharged in the absence of his counsel, and al-

so that of the defendant who was in jail, and without his consent.

In this case the court distinctly pointed out that the mischief was done by discharging the jury without any legal necessity and without obtaining from it something that the law could recognize as a verdict, the error lying in the receiving of a formal verdict in the prisoner's absence, as he had a right to such a verdict as each of the jurors would avow before his face.

In *Maden v. Emmons*, 83 Ind. 331, which was an indictment for larceny, the jury, while deliberating upon their verdict, dispersed without the knowledge of the court, counsel, or of defendant, upon their discovering that one of their number was not a resident of the county, and it was held that this was equivalent to an acquittal and placed the defendant in a position of former jeopardy upon a subsequent trial.

In the above case the court pointed out that a discharge of a jury may be proper where it appears that one of them is absent, but drew a distinction between a discharge when the prisoner is present and when he is not so present.

In *State v. Leunig*, 42 Ind. 541, the defendant indicted for murder was out on bail and during the adjournment of the court, while the jury were deliberating upon their verdict, the bailiff took the jury into a public square where he left them, and went to the defendant's saloon, and got some beer and gave it to the jury to drink without the consent or knowledge of the court. The court discharged the jury and also the defendant. It was held upon appeal that as the discharge of the jury was unnecessary there was no error in discharging the defendant. In this case it does not further appear whether the defendant was present in court at the time of the discharge of the jury or not.

The case of *Ex parte Tice*, 32 Or. 179, 192, although it does not raise the exact point, cites with approval the decision of the court in *State v. Wilson*, 50 Ind. 487, 19 Am. Rep. 719, to the effect that even where grounds for the discharge of a jury do exist the prisoner must be present when the order discharging the jury is made. In that case the jury were discharged on a Sunday as they had failed to agree on a verdict, and the court stated that there was no power to so discharge them, as § 208, Hill's Anno. Laws, was limited by § 928, and that the business referred to in the latter section, which might be presented on a Sunday, did not include the discharge of a jury.

The case of *Miller v. State*, 8 Ind. 325, also supports the above theory, but inasmuch as the defendant's appeal from an order of the court denying his motion for discharge was not prop-

mitted to go to the jury, and the defendant excepted. The matters contained in the plea on the trial of the case were presented to the jury, and proof made, said proof being in substantial accord with the statement heretofore made, the main points of which were not controverted, but conceded to be true. When the jury were charged, appellant asked a charge, in substance, directing the jury to find that said plea of former jeopardy was true, and to acquit the defendant thereon. This was refused by the court, and an exception reserved. The court's charge on this point was as follows: "If you find from the evidence in this case bearing upon the issue of former jeopardy, that the wife of the juror, Abbott, was sick, and that her condition upon the night in question was such that it was necessary that Mr. Abbott be with her immediately, then, if

you so find, you will find said plea to be untrue; but if you find that said Abbott's wife was not sick, or that if she was sick, that her condition was not such that created a necessity that said Abbott should go to the bedside of his wife, then, if you so find, then you will find said special plea true, or, if you have a reasonable doubt thereon, then you will find said special plea to be true. But, in determining this issue, you must consider all of the facts and circumstances as they appeared upon the night in question, to wit: May 2d, 1895, and not as they appear at this day." So the question as to former jeopardy, which involved the action of the court in discharging the jury, is fairly and properly presented to this court for determination. It is not necessary in this case to discuss the question as to whether it is competent for the court, under our Con-

erly taken the defendant's motion was dismissed. See this case *infra*, III.

In *State v. M'Kee*, 1 Ball. L. 651, 21 Am. Dec. 499. It is said that the discretion of the court in discharging a jury is a legal discretion, and must be exercised in conformity to known rules. In this case the jury were discharged by the court upon the ground that the foreman had declared that he would not convict the defendant or any other white person of murdering a slave. It does not, however, appear whether the defendant was present or not at the time of the discharge.

The case of *Andrews v. State*, 2 Sneed, 550, also shows that the prisoner must be present during the trial and until final judgment is rendered, and that if he is absent either by reason of his imprisonment or by his escape, there is a want of jurisdiction. This case, however, was not one of a discharge of a jury by the court, but was one in which the prisoner escaped from custody during the time in which the jury had retired to consider their verdict, and was not present in court at the time of the verdict rendered.

In *Jones v. State*, 97 Ala. 77, the jury returned their verdict at night after the adjournment of court, and the same was received by the clerk and read, whereupon the jury disbanded and went to their homes. The discharge of the jury under such circumstances was held to be unauthorized and to operate as an acquittal of the defendant. The record in this case did not show that the prisoner was present, but it showed that this proceeding was had without any instruction from the court, and without the consent or sanction of the defendant or his attorney.

IV. Plea disallowed.

In *State v. Wamlre*, 16 Ind. 357, it is said to be settled in that state that the court is not bound to discharge the jury because of the voluntary absence of the defendant during the trial, where he was present at its commencement.

There was held to be no former jeopardy in a case in which the court discharged the jury in consequence of the act of the defendant in voluntarily absenting himself from the court, as in that case he made it impossible for the jury to render a verdict, and created the necessity of a discharge without a verdict. *People v. Higgins*, 59 Cal. 357. In this case the defendant fled during the progress of the trial, and the efforts of the court to procure his presence were unsuccessful.

A plea of former jeopardy was held not to 44 L. R. A.

contain sufficient merit to overrule a demurrer, in a case in which the trial was not concluded on the day on which it began, and upon the court convening again the defendant did not appear and was not present to answer the charge, whereupon the case was withdrawn from the jury who were discharged, and the case continued. *Alston v. State*, 109 Ala. 51, 53.

And from the case of *State v. Battle*, 7 Ala. 259, it would appear that upon the defendant's not appearing in court at the time the jury return the verdict the court has power to order the jury to be discharged without giving a verdict, and thus direct a mistrial, and in such a case the defendant cannot take advantage of the discharge of the jury in his absence. In this case the defendant had fled.

In *People v. Smalling*, 94 Cal. 112, 117, the defendant was not present at the time the jury was discharged, but his presence had been waived by his consent. There was a legal necessity for the discharge of the jury because they were unable to agree. It was held that his objection to the jury's discharge at that time would have been ineffectual, and, as his right to be present had been waived, his plea of once in jeopardy was no bar to a further prosecution.

The plea of former jeopardy was held to be no bar to a further prosecution on the same charge in a case in which the jury were, with the prisoner's consent, instructed to find a sealed verdict if they should agree before the opening of the court on the following day, where, during the night-time, they informed the sheriff they had agreed upon a verdict, which they delivered to the sheriff and dispersed with the consent and permission of the bailiff, but reassembled the next morning and returned their verdict and were discharged by the court. *Terwin v. State*, 37 Fla. 396.

In this case the real ground of objection to the discharge of the jury was the absence of the defendant's consent thereto, but the case does not show whether he was present in court or not, and the court distinctly points out that the consent of the accused is not necessary to the proper discharge of the jury where such discharge becomes otherwise necessary. *Ibid*.

In *Miller v. State*, 8 Ind. 325, the prisoner was indicted for grand larceny, and after the jury had been out twelve hours they returned and stated that they could not agree. He was not brought up from the jail, nor consulted, but the court on its own motion then discharged the jury over the objections of the prisoner's counsel, who moved for the discharge of the prisoner on the ground that the discharge of the jury operated as an acquittal, but the motion

stitution and laws, to discharge a juror on account of the sickness of some member of the juror's family, pending the trial of a person charged with felony. The question we will consider is whether or not the court is authorized to take such action as was taken here, in the absence of the prisoner, and not in open court. Our statute provides (Code Crim. Proc. 1895, art. 737) as follows: "If, after the retirement of the jury in a felony case, any one of them become so sick as to prevent the continuance of his duty, or any accident or circumstance occur to prevent their being kept together, the jury may be discharged." Conceding that the legislature had the power to enact this article, and conceding that the severe illness of the wife of a juror is such a circumstance as would authorize the discharge of the jury,—propositions about which we express no opinion, because unnecessary,—still, it was absolutely necessary to judicially ascertain the fact of sickness before the jury could be legally discharged. This apprehends a judicial finding. It is a step in the progress of his trial, and an important one, so far as defendant's rights are concerned. Mr. Bishop says, that in all trials for felony, at every material stage in the trial, it is absolutely necessary that the accused be present, else there can be no valid judgment against him. 1 Bishop, Crim. Proc. § 273. And he also lays down the following: If any fact is to be established requiring or necessitating the discharge of the jury before the verdict, as the sickness of one of the panel, plainly the prisoner must be present. § 272, subd. 2. We also quote from the well-considered case of *State v. Smith*, 44 Kan. 75, 8 L. R. A. 774. This was a case that came up much in the same way as the case before us, and under a statute somewhat similar to ours, with reference to the discharge of a juror on account of sickness.

was denied and the prisoner was ordered to be taken in custody and held for another jury. The court on appeal held that the prisoner should have been discharged, but as the appeal was irregularly taken it was dismissed. In this case the fact that the jury reported that they could not agree after twelve hours' consultation did not make the discharge a necessity determined by law.

Where during the progress of the trial and in the absence of the prisoner and of his counsel, and without their knowledge, the court of its own motion permitted the jury to separate over an adjournment after instructing them as required by statute, and the defendant, although informed of the fact at the next session of the court, made no objection except in his motion for a new trial, he was taken to have waived any error in the action of the court. *Henning v. State*, 106 Ind. 386, 55, Am. Rep. 756.

In *Wheelock v. State* (Tex. Crim. App.) 38 S. W. 182, the bill of exceptions showed affirmatively that the jury had been kept together for such a time as rendered it altogether improbable that they would agree upon a verdict, and that the defendant was present and consented to the discharge of the jury, but as he offered no evidence showing that the same was a false and fraudulent entry, and that in truth and in fact he was not present and did not agree to the discharge of the jury, the court affirmed the judgment of conviction, and distinguished 44 L. R. A.

In that case one of the jurors was taken sick, and it was reported to the court, in the absence of the prisoner, that he was unable to be present in the court during the trial, on account of his illness. The judge thereupon, in open court, and when defendant's counsel were present (but the prisoner was absent in jail), discharged the panel, and the question of jeopardy was presented. Among other things, the learned judge, in deciding said case, uses this language: "When an order is made by a trial court discharging a jury without verdict, to which has been committed the question of the guilt or innocence of a prisoner charged with a crime, the record ought to show affirmatively the existence of the fact which induced such order, and justified the exercise of such extraordinary power. . . . Now the record in this case shows that one of the causes for which the trial court is authorized to discharge a jury in a criminal case, by the statute of this state, happened on this trial, to wit, the sickness of a juror. The sickness did not happen in the immediate presence of the court. The juror took sick at home, during a recess of the court, and the fact of sickness had to be established in accordance with the rules that govern in all cases when a fact is to be judicially established, and made a finding upon which to base a legal conclusion or judicial action." And, in conclusion upon this point, the court says: "We think that error was committed in determining the sickness of a juror as a cause for the discharge of the jury, in the absence of the appellants." Now, in the case at bar, the action of the judge was not in open court at all. It was at night, some distance away from the courtroom, in the absence, not only of the juror, but of the prisoner and his counsel. Not only so, but this action was taken on the *ex parte* statement of an officer of the court that someone had in-

the case from that of *Rudder v. State*, 29 Tex. App. 262, *supra*, II.

In *Shaffer v. State*, 27 Ind. 131, the discharge of the jury was held not to work a discharge of the defendant where ample time had been spent in deliberation and they were unable to agree. In this case the record does not show whether the defendant was present in court on the return of the jury, or whether he assented to their discharge, but at the same term he filed a written motion claiming his discharge on the ground that the jury had been discharged without his consent, and that he could not again be put in jeopardy.

In *Price v. State*, 36 Miss. 531, the prisoner was not present owing to his escape or voluntary withdrawal from the court at the time of the rendition of the verdict and the discharge of the jury by the court. The question of the power of the court to discharge a jury prior to verdict was discussed in this case, but the question of the right of the court to do so without the presence of the defendant was not considered. The case, however, shows that the absence of the defendant at the time the jury return their verdict must not be due to his own unlawful acts, and it may therefore be taken that the voluntary or unlawful absence of the prisoner at the time of the discharge of the jury cannot be taken advantage of by him. See *People v. Higgins*, 59 Cal. 357, *et ubi supra*.

E. W.

formed him that the wife of the juror, Abbott, was very sick. Could the court, under such circumstances, make a judicial finding of so important a fact in the progress of this trial—one which involved the discharge of the jury? If so, the discharge of a juror in any case would appear to be a matter entirely within the arbitrary discretion of the judge—a power which he could exercise in the absence of the prisoner, and without any judicial procedure, to ascertain the fact which would authorize his action. Such arbitrary power would place it entirely within the province of a judge to discharge a jury of his own motion, and without investigation. If, in any given case, he should desire the conviction of a defendant, and it should appear that the jury was not likely to convict, that the state had not entirely made out its case, by his arbitrary discretion he could discharge the jury, and upon a subsequent trial, the state being better prepared, secure conviction. This was the practice of the courts in the days of the Stuarts, but happily not so now. It is well settled that the court's discretion is a judicial discretion, and not an arbitrary discretion. Take this case as it appears to us from the subsequent trial, in which the facts were presented; if this investigation had been had when the defendant was arraigned on his first trial, if he had been present, and had objected to the discharge of the jury, and insisted, as he had a right to do, upon an examination as to the necessity for such discharge, the record, as it now presents itself to us, we think, would have shown that there was no such existing necessity for the

discharge of the juror. At a subsequent term of the court, not at the time the jury was discharged, evidence was received bearing upon the fact as to whether the juror's wife was sick or not. The testimony received relating to that fact, as we have said above, shows that the jury ought not to have been discharged, but the investigation into the facts should have been made before the jury was discharged, and not at the time the plea was interposed. The defendant had a right to be heard then, and not forced to wait until a subsequent term to ascertain whether the court had acted correctly or not. In *Wright v. State*, 35 Tex. Crim. Rep. 158, in a case involving the question of jeopardy, this court used the following language: "Again, the record informs us simply that the court discharged the jury. We are left to inference as to the reasons prompting him to this action. There should have been a judgment of the court finding and declaring that the jury had been kept together such a length of time as to render it altogether improbable that they could agree"—citing *Adams v. State*, 34 Fla. 185. If the court is to find and ascertain the fact which authorizes him to act in discharging a jury, this apprehends a trial—a trial in open court, in the presence of the accused, and not an *ex parte* proceeding, at which he is neither present nor consenting.

Because, in our opinion, the action of the court in discharging the jury was without authority of law, the defendant having once been placed in jeopardy, *the judgment of the court below is reversed, and the defendant ordered to be discharged.*

NEW YORK COURT OF APPEALS.

Re Application of Charles KNOWACK and Wife, *Respts.*,
For Restoration of Their Children in Custody of the CHILDREN'S AID SOCIETY of Rochester, New York, *Appt.*

(158 N. Y. 482.)

The restoration to their parents of infants committed to a charitable institution by a court or magistrate of competent jurisdiction under Penal Code, § 291, is within the general jurisdiction of the supreme court of New York as a court of chancery, and is also within the power conferred on the court by Laws 1884, chap. 438, providing for the return of pauper children to the custody of their parents when the interests of the children shall be promoted thereby, and the parents are fit, competent, and able to give them proper support and education.

(April 18, 1899.)

NOTE.—As to state guardianship of children, see *Whalen v. Olmstead* (Conn.) 15 L. R. A. 598, and *note*.

For commitment of children to reformatories without any conviction of crime, see *State, Olson, v. Brown* (Minn.) 16 L. R. A. 691, and *note*.
44 L. R. A.

A PPEAL by defendant from an order of the Appellate Division of the Supreme Court, Fourth Department, affirming an order of a Special Term for Monroe County in favor of petitioners in a proceeding to regain possession of petitioner's minor children. *Affirmed.*

The facts are stated in the opinion.

Mr. John H. Hopkins, for appellant:

Persons committed by the final judgment of a court or magistrate of competent jurisdiction, in a criminal proceeding, cannot be discharged by the supreme court by virtue of its general equitable powers.

The commitment of these children was a final commitment, in a criminal proceeding, by a court of competent jurisdiction.

Re Forbes, 4 Park. Crim. Rep. 611.

When a child is finally committed to a charitable institution, under § 291 of the Penal Code, there is no way by which the institution can be deprived of its custody except by the consent or in consequence of the misconduct of the institution itself; unless, of course, the commitment is directly and successfully attacked by appeal, under § 749 of the Code of Criminal Procedure, or by habeas corpus proceeding.

When a child is finally committed under

§ 291 of the Penal Code, the right of its parents to its custody absolutely ceases, and thereafter they have no better standing in court, on any question relating to the disposition of the child, than a stranger in blood.

Laws 1896, chap. 272, § 61; *People, Zeese, v. Masten*, 79 Hun, 580; *State, Cunningham, v. Ray*, 63 N. H. 406, 56 Am. Rep. 529; *People, Van Heck, v. New York Catholic Protectory*, 101 N. Y. 195; *People, Van Riper, v. New York Catholic Protectory*, 106 N. Y. 604; *People v. Giles*, 152 N. Y. 136; *Wilcox v. Wilcox*, 14 N. Y. 575.

Mr. Delbert C. Hebbard, for respondents:

The supreme court has jurisdiction of all matters pertaining to the care, custody, and control of infants. In this proceeding it has jurisdiction to order that the above-named infants be returned to their parents when, in the opinion of that court, it will be for the best interests of said children, and when that court is satisfied that the parents are able, fit, and competent persons to have the care, custody, and control of said infants.

De Manneville v. De Manneville, 4 Kent, Com. 195, *note; *Wellesley v. Beaufort*, 2 Russ. Ch. 1; *Wilcox v. Wilcox*, 14 N. Y. 575; *People, Johnson, v. Erbert*, 17 Abb. Pr. 395.

These children have, since the 5th day of June, 1895, been a charge upon the poor fund of the city of Rochester. They come clearly within the definition of poor persons as found in § 2 of the Poor Laws, 2 Birdseye's Rev. Stat., Code, and General Laws, 2d ed. p. 2294, and as such have been in the care and custody of the Children's Aid Society.

Bartlett, J., delivered the opinion of the court:

This is a proceeding based upon a petition addressed to the supreme court of the state of New York by Charles Knowack and Johanna, his wife, praying that their four children, now in the custody of the Children's Aid Society of Rochester, be restored to their care and control. At the time this petition was verified, on the 22d of December, 1897, the four children of the petitioners—the only issue of the marriage—were aged, respectively, Frank, twelve years; Gustave, eleven years; Emil, eight years; and Freddie, six years. It appears that some two years before the present application was made, and on the 5th day of June, 1895, these children were committed by a police justice of the city of Rochester to the care of the Children's Aid Society, under § 291 of the Penal Code, on the ground of the intemperance and neglect of their parents. Each child was committed by a separate commitment, which was headed "Destitution Commitment," and recited that the child "was found not having any home or other place of abode, or proper guardianship, being in a state of want and suffering, and destitute of means of support, in violation of statute," etc. The child was to remain in charge of the society "until therefrom discharged in manner prescribed by law, not to exceed the period of its minority." Section 291 of the Penal Code is contained in chapter 3, entitled "Abandon-

ment and Other Acts of Cruelty to Children." This section is somewhat lengthy, and provides that any child, actually or apparently under the age of sixteen years, who is found under certain circumstances, may be duly committed. Subdivision 2 states: "Not having any home or other place of abode or proper guardianship; or who has been abandoned or improperly exposed or neglected, by its parents or other person or persons having it in charge, or being in a state of want or suffering; or [subdivision 3] destitute of means of support," etc. So far as this record discloses the facts, the petitioners do not dispute the regularity of the original commitments, nor does the Children's Aid Society controvert the allegations in the petition and accompanying affidavits. The petitioners aver that whatever ground might have existed on the 5th day of June, 1895, for the removing of the children from their care and custody has been fully and absolutely removed; and that since the last-named day they have been sober, industrious, and have tried by all means possible to live honorable and respectable lives. It further appears that the father and mother are both earning good weekly wages for persons in their position; that they are in comfortable financial circumstances, and have a substantial bank account with the Rochester Savings Bank of the city of Rochester, and own good and valuable chattels and securities; that they are free from all debts, and are in comparatively independent circumstances for persons in their station in life. The petitioners further aver that they are in every way able, willing, and desirous of caring for their four children, who are now a charge upon the poor fund of the city of Rochester for their food, clothing, and care, and that all the facts touching their willingness, ability, and desire are more fully set forth and confirmed by the affidavits attached to the petition. The petitioners further show that they have made frequent demands of the president and other officers of the Children's Aid Society for the return of their children, and that they even offered that the children be returned to them on trial, to be taken away again without resort to law, whenever the petitioners' conduct might seem to the officers of the society to justify such proceeding, but the officers have at all times refused to comply with these demands and requests. It further appears that the children are all anxious and desirous of returning to the home of their parents. Annexed to the petition are a number of affidavits of third parties, corroborating, in detail, the allegations that the petitioners are sober, industrious, and for a long time have been living honorable and respectable lives. The truth of the allegations of the petition and affidavits is admitted; the Children's Aid Society, in substance, demurring to these facts. It is claimed by the learned counsel for the society that persons committed by a final judgment of a court or magistrate of competent jurisdiction in a criminal proceeding cannot be discharged by the supreme court in the exercise of its general equitable powers. Counsel further

states that when a child is finally committed to a charitable institution, under § 291 of the Penal Code, there is no way by which the institution can be deprived of its custody, except by the consent or in consequence of the misconduct of the institution itself, unless the commitment is directly and successfully attacked by appeal under § 749 of the Code of Criminal Procedure, or by a habeas corpus proceeding.

The main position of the society is based upon an erroneous conception of the situation now presented. This is not a criminal proceeding; there is no prisoner and no crime has been committed. We have already called attention to the fact that the section of the Penal Code (291) under which these commitments were made is contained in the chapter (3) entitled "Abandonment and Other Acts of Cruelty to Children." The state, as *parens patrie*, by this legislation seeks to protect children who are destitute and abandoned by those whose duty it is to care for and support them. To regard proceedings under this benign statute as criminal in their nature, and hedged about with all of those consequences that follow a judgment of conviction for crime, is to confound remedies. The law relating to the commitment of minors to penal and charitable institutions is largely of American origin, and rests upon statutory provisions. These commitments are naturally relegated into three classes,—commitments as a punishment for crime, commitments where the proceeding is quasi criminal, and commitments for care and guardianship. 30 Cent. L. J. 53. In the first class are cases of actual crime, where the proceeding often results in the commitment of the defendant to a reformatory by reason of his minority, rather than to send him to a penitentiary or state prison, where he would be thrown in contact with hardened criminals. Notwithstanding this consideration extended to the defendant, he stands in the attitude of a criminal duly convicted of crime. The second, or quasi criminal, class may be illustrated by the case of a parent or guardian who makes application and complaint to a magistrate, asking the commitment of a minor child to some reformatory or charitable institution on the ground that he is incorrigible or beyond domestic control. The main object of such a proceeding is to reform a child, if possible, and this commitment is governed by different rules than either of the other classes. The third class, where the state intervenes to care for and protect the homeless and destitute child, is far more numerous, and is the one that embraces the case at bar.

The single question presented by this appeal is whether the supreme court of the state of New York, having general jurisdiction in law and equity, and being vested with all the jurisdiction which was possessed and exercised by the court of chancery in England at the time of our separation from the mother country, except as modified by the Constitution and statutory provisions (Code Civ. Proc. § 217), has power to interfere in this case, and restore these children to the custody and care of their parents. It

certainly is a most startling doctrine that a child, who is a public charge and has been committed for such reasons as are disclosed in this case, cannot be restored to parental care and control, where conditions have changed and are such that neither in law nor morals the separation of parent and child should be continued. We are not now called upon to decide what effect legal adoption in good faith by third parties would have on an application like this. The Children's Aid Society stands in this proceeding upon the bald proposition of law already stated, that without its consent to their release these children are to remain in the custody of this institution during their minorities. As the youngest child was only three and one half years of age when thus committed, it would be subjected to legal custody for a period of more than seventeen years. This record fails to inform us as to the charter provisions of the Children's Aid Society. Stripped of all form and technicality, we have this situation: Intemperate parents are deemed to be unfit custodians of their children, and the state steps in and cares for and supports them for the time being. It now appears that the parents have reformed, are living honorable lives, and are abundantly able to care for their children. It seems self-evident that public policy and every consideration of humanity demand the restoration of these children to parental control. If the court of chancery can interfere and take the child from the custody of its parents, it can also intervene and restore it to their care, in the exercise of the same discretionary power. A recent English writer declares that the court of chancery has, from time to time, exercised the widest powers of interference in behalf of infants who stood in need of its protection. Eversley, Dom. Rel. 2d ed. 501. Chancellor Kent said that "courts of justice may, in their sound discretion, and when the morals or safety or interests of the children strongly require it, withhold the infants from the custody of the father or mother, and place the care and custody of them elsewhere." 2 Kent, Com. *205. The arbitrary character of this power is well illustrated in two English cases often cited. Lord Thurlow, in a case where it appeared that the father's affairs were embarrassed, that he was an outlaw and resided abroad, and that his son, an infant, had considerable estate, and that the mother lived apart from her husband and principally directed the child's education, restrained the father from interfering without the consent of two persons nominated for that purpose; and, with reference to the objection that the court had no jurisdiction, he added that he knew there was such a notion, but he was of opinion that the court had arms long enough to reach such a case, and to prevent the father from prejudicing the health or future prospects of the child, and he signified that he should act accordingly. *Cruze v. Hunter*, 2 Bro. Ch. 510, note, 2 Cox. Ch. Cas. 242. And see *Whitfield v. Hales*, 12 Ves. Jr. 492. The leading case on this subject is *Wellesley v. Beaufort*, 2 Russ. Ch. 1, which went on appeal from Lord Eldon to the House

of Lords, and in which the learned lord chancellor was unanimously affirmed. *Wellesley v. Wellesley*, 2 Bligh, N. R. 124; Schouler, Dom. Rel. 5th ed. § 246. Lord Redesdale, in a luminous opinion in the House of Lords, goes over the ground of the jurisdiction of the court of chancery in case of infants. Speaking of the case before him, he said: "Upon what ground is the court required to maintain these children out of their property, and not at the expense of the father? It is because that father is an improper person to have the care of these children; and, as it is proposed that their maintenance and education should be put out of his control, it is therefore as he may refuse to afford them more than will supply them with their bare maintenance, which the law of the country would require from every person who had the means to maintain his children. It is for that reason that the court is to take upon itself, out of the property that those children have, instead of accumulating the income of their property for their benefit, till they should be capable of taking possession of it themselves, to apply a part of it for their maintenance and education." It appears generally in this case that the father was a dissolute and abandoned character, and totally unfit to discharge the duties of a parent towards his children. It was under these circumstances that the court of chancery interfered and took the children from his custody and control. It is such a power as is here disclosed that is now exercised by the supreme court of the state of New York; and, in a case where there has been interference by the court to protect and care for the child at the public's expense, that power seems only to be limited by the necessities of the case, having a due regard for the welfare of the infant. This power is fully recognized in *Wilcox v. Wilcox*, 14 N. Y. 576, where it was held that a court of equity has jurisdiction and authority to take a minor child from a guardian appointed by a surrogate on the death of its father, and to deliver it to the care and custody of its mother, where this is for the advantage of the child. In the case cited the court was set in motion by a petition of the mother. It appeared that the respondent and Nathan B. Wilcox, the son of the appellant, were married in 1838; they had two daughters, one nine and the other seven years of age; that after the birth of the first daughter her mother was in too feeble health to take care of her, and she was placed and taken care of in the family of her grandfather, where she afterwards continued to reside except during short intervals. Within a few years after the birth of the first child the father failed in business and became intemperate, and the respondent, with her other daughter, went to her father's and there resided with him until his death, in 1852. The father was of large estate, and by his will made ample provision for his daughter and the children. The father of the children died in 1854 without having made any legal disposition or guardianship of the eldest child. A few days after his death the grandfather was appointed by the surrogate the general guardian of the eldest

child. The respondent was at this time temporarily absent from the state, and the appointment was made without notice to her or any other relatives. It thus appears that the eldest daughter had been placed in the custody of the grandfather voluntarily, and had remained there for years; and yet, when circumstances had changed, and the mother became possessed of ample means, the court intervened, and restored the child to the custody of the mother, notwithstanding the relations that had grown up in the grandfather's family between the child and other relatives there residing, and without regard to the letters of guardianship that had been duly issued to the grandfather. While the decision in this case was rendered upon a divided court, there was no difference of opinion as to the main proposition that the court was possessed of this power. The only question upon which the judges were at variance was whether the power could be exercised at chambers or at a regular session of the special term. In later cases it has been held that considerations affecting the health and welfare of a child may justify the court in withholding the custody of it temporarily even from the father acting as its legal guardian, and that they were so purely matters of discretion with the court of original jurisdiction that this court will not review the conclusion thereon, unless some manifest error or abuse of power is made to appear. *Re Welch*, 74 N. Y. 299; *People, Pruyn, v. Walts*, 122 N. Y. 238. Many other cases might be cited illustrating the general and ample powers of the court of chancery in the premises, but it is unnecessary.

It is urged on behalf of the petitioners and respondents that the restoration of these children can be effected under the general provisions of the poor law of the state (5 Rev. Stat. [Banks & Bros. 9th ed.] p. 3373), on the ground that they have, since the 5th day of June, 1895, been a charge upon the poor fund of the city of Rochester. Section 2 enacts: "A poor person is one unable to maintain himself; and such person shall be maintained by the town, city, county, or state according to the provisions of this chapter." Further on the section provides: "The town poor are such persons as are required by law to be relieved or supported at the expense of the town or city." Section 56 provides, in detail, for the commitment of poor children under sixteen years of age. Chapter 438, Laws 1884, entitled "An Act to Revise and Consolidate the Statutes of the State Relating to the Custody and Care of Indigent and Pauper Children by Orphan Asylums and Other Charitable Institutions," is still in force. See 2 Birdseye's Rev. Stat. 2d ed. p. 2308, where he inserts § 4 of this chapter as § 56d of the poor law. The section deals generally with the removal of children from one institution to another, and also provides for delivery of a child into the custody of the parent. It reads as follows: "But no parent of such pauper child, so in such asylum or other institution as in this section aforesaid, shall be entitled to the custody thereof, except in pursuance of a judgment or order of a court or judicial of-

ficer of competent jurisdiction, adjudging or determining that the interests of such child will be promoted thereby, and that such parent is fit, competent, and able to duly maintain, support, and educate such child." We have here disclosed a statutory scheme in regard to the committal and subsequent discharge from custody of poor children that is practically in line with the general chancery powers of the supreme court. In the case of *People, Inebriates' Home, v. Comptroller of Brooklyn*, 152 N. Y. 399, Chief Judge Andrews, while writing upon a kindred subject, states (at page 407, 152 N. Y.), as follows: "The duty of the state is discharged when it affords necessary relief to those whose support is cast upon the public, and it is plain that it should be given for such a length of time only as necessity demands. There is nothing more to be deprecated than encouragement to pauperism, or the extension of public aid to those who are able to support themselves, or the keeping of inmates in charitable institutions, whether children or adults, beyond the time that they can be self-supporting, or when they could be safely allowed to shift for themselves. Nor are institutions of charity subserving their proper function when they relieve friends or relatives of indigent persons, able and bound to maintain them, from the burden of their support." It is true that the petition in this case is an appeal to the general equitable powers of the court, and is not filed in the statutory proceeding; but it is evident that whether in the supreme court, or based upon the statute, the questions controlling are the same, to wit, the best interests of the child, and the ability of the parent, both moral and financial, to discharge his duty in the premises.

The order of the Appellate Division should be affirmed, without costs.

All concur.

Albert HERTER, *Respt.*,
v.

Jeremiah MULLEN *et al.*, *Appts.*

(150 N. Y. 28.)

The retention of one room in a leased building for fifteen days after the expiration of the lease because it is occupied by a member of the tenant's family who is too ill to be safely moved, is not such a holding over, where prior notice of intention to surrender the premises has been given and the usual notice to let has been placed on the building by the landlord, as will create an implied contract or duty imposed by law on the tenant to pay rent for the remainder of a new term after the premises are completely surrendered.

(*Gray, Bartlett, and Fann, JJ., dissent.*)
(April 18, 1899.)

NOTE.—On the effect of illness to relieve a tenant from the effect of holding over for a short time, the above case is an exceedingly important one.

For another striking case respecting the effect of holding over, see *Goldsbrough v. Gable* (Ill.) 15 L. R. A. 294.
44 L. R. A.

A PPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, First Department, in favor of plaintiff upon exceptions ordered to be heard in that court in the first instance which were taken at a Trial Term for New York County in an action brought to recover rent. *Reversed.*

The facts are stated in the opinions.

Mr. Bernard J. Tinney, for appellants: The holding over was unavoidable and in no manner the fault of the tenant. It could not be avoided, and for it defendants are not liable as hold-over tenants for another year, as held by the court below.

Haynes v. Aldrich, 133 N. Y. 291; *McAdam, Land. & T.* 2d ed. § 21, p. 33; *Greaton v. Smith*, 1 Daly, 386; *Tuomey v. Dunn*, 10 Jones & S. 291; *Jones v. Shears*, 4 Ad. & El. 832.

The defendants, being prevented by the act of God from removing from the demised premises, are not liable.

People v. Tubbs, 37 N. Y. 586; 1 Am. & Eng. Enc. Law, pp. 174, 175; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388, Affirming 24 Barb. 174; *Proprietors of Mill Dam Foundry v. Hovey*, 21 Pick. 441; *Dexter v. Norton*, 47 N. Y. 64, 7 Am. Rep. 415; *Harmony v. Bingham*, 12 N. Y. 107, 62 Am. Dec. 142; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371.

The learned justice, before whom the cause was tried, should have submitted the case to the jury.

Haynes v. Aldrich, 133 N. Y. 291; *Smith v. Allt*, 7 Daly, 492; *Shanahan v. Shanahan*, 23 Jones & S. 339; *McCabe v. Evers*, 30 N. Y. S. R. 833; *Manly v. Clemens*, 39 N. Y. S. R. 199; *Zimmer v. Black*, 37 N. Y. S. R. 312; *Frost v. Akron Iron Co.* 1 App. Div. 449.

The holding over must be shown to be wrongful and tortious.

Schuyler v. Smith, 51 N. Y. 314, 10 Am. Rep. 609; *Pickett v. Bartlett*, 107 N. Y. 282; *Smith v. Allt*, 7 Daly, 492.

Where the tenant holds over involuntarily, not for his own convenience, but because he cannot help it, the act is not tortious, and the question should be submitted to the jury to say whether there was such a holding over as entitled the landlord to treat the occupant as a tenant for another year.

Smith v. Allt, 7 Daly, 492.

This action cannot be maintained, for at most all the plaintiff can recover is double the rent for the fifteen days' occupancy of the house, the defendants having given notice of their intention to quit at the expiration of the term created by the lease.

4 Rev. Stat. Banks' 8th ed. § 10, pp. 2457, 2458; *Hall v. Ballentine*, 7 Johns. 536; *Wood, Land. & T.* § 558, p. 967; *Washb. Real Prop.* 5th ed. 638, 639.

Mr. George Putnam Smith, for respondent:

Upon a tenant's failure to yield the premises at the time provided by the lease the landlord has the option either to treat him as a trespasser and dispossess, or to consider the lease renewed for another term of the lease.

Schuyler v. Smith, 51 N. Y. 309, 10 Am. Rep. 609; *Adams v. Cohoes*, 127 N. Y. 182; *Haynes v. Aldrich*, 133 N. Y. 287; *Oussani v. Thompson*, 19 Misc. 524; *Regan v. Fosdick*, 19 Misc. 489.

And neither the notification by the tenant of his intention to depart, or even the posting of a notice "To Let" by the landlord, will create an acceptance of the premises so as to discharge the tenant from liability.

Shanahan v. Shanahan, 23 Jones & S. 339.

The illness of defendants' mother, even if it be considered an "act of God," did not discharge them from liability under their contract.

Regan v. Fosdick, 19 Misc. 489.

O'Brien, J., delivered the opinion of the court:

The plaintiff's action was to recover rent alleged to be due upon the lease of certain premises for the month of May, 1895, and the six following months of that year. The lease was executed in March, 1894, and was to terminate in one year from the 1st of May following. The defendants, who were the tenants under the lease, vacated the premises on May 15, 1895, but, as it was claimed that they held over after the expiration of the lease for fifteen days, it was held that they were liable for the rent for another year, and the plaintiff recovered for the seven months of the year that had elapsed before the commencement of the action. The rent, by the terms of the lease, was payable monthly, and the court directed a verdict for the plaintiff for \$558.63, being the stipulated rent for the seven months, with interest.

The complaint alleged the making of the lease, the possession thereunder by the defendants, and that they had continued in possession until the time of the commencement of the action. The defendants, in their answer, allege that they surrendered possession of the premises to the plaintiff on May 15, 1895, and that he accepted such surrender; that they had notified him in the month of February preceding that they would not take or keep the house for another year after May 1, 1895, when the term fixed by the lease expired; that, after this notice, the plaintiff was permitted to show the premises to persons wishing to hire or purchase them, and to place upon the house the usual notice that it was to let; that the defendants moved from the house, with all their property and belongings, and that of the family, on the 1st day of May, 1895, before the lease expired, except from the bedroom, where their mother was confined by a dangerous illness until the 15th of May following, when she was removed, and the premises wholly vacated; and that they were forbidden by the physician in charge from moving or disturbing the mother during the fifteen days, and were informed by him that it would imperil her life if an attempt was made to remove her. These affirmative allegations in the answer were pleaded together as a single defense. On the trial it was conceded that the defendants had the affirmative of the issues since the written

lease was produced and admitted by the pleadings and the possession under it.

It appears from the record that the defendants' counsel then proceeded to open the case to the jury, and at the close of the opening the court suggested that the controversy would resolve itself into a pure question of law, and that the facts should be agreed upon. The plaintiff's counsel then admitted that the notice from the tenants of their intention to surrender up the premises on the 1st of May had been given in February, as alleged in the answer. The defendants' counsel then stated that the reason for holding over after the expiration of the lease was the sickness of the defendants' mother, she then being a member of their family; and he stated that, unless he could have it admitted as it is pleaded, he wanted no admission whatever. The plaintiff's counsel then admitted that fact, as set forth in the answer. The last clause of the answer contained an allegation that the holding over was with the knowledge and permission of the plaintiff, the landlord, and at the suggestion of the plaintiff's counsel this allegation was withdrawn. The case then states that upon the record and the defendants' counsel's opening, the court, at the request of the plaintiff's counsel, directed a verdict against the defendants for \$558.63, and that the defendants excepted to this direction.

It is somewhat difficult to ascertain from the record just what questions were passed upon by the court at the trial. It is clear enough that he held that the defendants were liable for another year's rent from the 1st of May, 1895, notwithstanding the facts alleged in the answer with respect to the illness of the defendants' mother, and the impossibility of her removal without endangering her life. The learned court must also have held that the other allegations of the answer pleaded in connection with the fact just referred to—that, upon the removal of the mother on the 15th day of May, 1895, the defendants surrendered the premises to the plaintiff, and that the latter accepted such surrender—were not available as a defense. In view of the fact that the defendants were requested to withdraw a particular clause in the answer, which was complied with, and of the further fact that the "case" states that a verdict was directed upon the record and the opening of the defendants' counsel, it must, I think, be assumed that the decision was that the answer contained no defense after the allegation had been withdrawn, which stated that the holding over was with the consent of the landlord. After the defendants' counsel had withdrawn this allegation, he stated that he desired to have the other facts admitted just as he had pleaded them, and this request was complied with. The admission, therefore, must be held to cover all the facts affirmatively pleaded in the answer, except the particular allegation which had been withdrawn. After verdict was directed against the defendants, it would not be a fair construction of what took place at the trial to hold that the admission applied only to the single fact of holding over on account of the sickness of the mother. If

must, I think, be held that it was an admission of all the facts affirmatively pleaded, except the single allegation which the plaintiff's counsel requested to be withdrawn. The direction having been made upon the opening of the plaintiff's counsel, which does not appear in the "case" and upon the record, the fair construction is that a verdict was directed upon the answer, after modification by the withdrawal of the allegation referred to, and upon the opening of counsel. The record in this connection must mean the pleadings in the case. *Kley v. Healy*, 127 N. Y. 555. It was therefore admitted by the plaintiff's counsel that fifteen days after the expiration of the term provided by the lease the tenants surrendered the premises to the landlord, and that the latter accepted the surrender. After the surrender, there could be no recovery of rent, since the landlord could not have the use of the premises and the stipulated rent at the same time. When a landlord accepts a surrender of the premises, this act operates to discharge the tenant from all liability for rent in the future; and, if the construction of the proceedings at the trial suggested be the correct one, then the direction of a verdict against the defendants was error.

But, perhaps the most important question in the case arises upon the facts and circumstances which it is claimed constitute a holding over by the tenant after the expiration of the term specified in the lease. For every purpose necessary to the determination of that question we must assume that the facts are as alleged in the answer, since it must have been upon that assumption that the verdict was directed. There can be no doubt that the rule of law is settled beyond debate or controversy which permits the landlord, at his election, to treat the tenant as holding for another year when the latter remains in possession after the expiration of the term. When the demise is for a definite term of one year at a fixed rent, and the tenant holds over after that term expires, the landlord may treat him as a tenant for another year, and collect rent accordingly. *Haynes v. Aldrich*, 133 N. Y. 287; *Adams v. Cohoes*, 127 N. Y. 175. But the question is whether the tenant did, in fact, hold over after the expiration of the term, within the meaning of that rule. If it is an arbitrary one, applicable under all circumstances and conditions, and to be enforced in every case, without regard to the reason upon which it is founded, it may be said that, in a strict sense, there was a holding over in this case. But this rule that obtains in the relation of landlord and tenant is a part of the common law, the chief merit of which is supposed to consist in its adaptability to changing circumstances and new conditions as developed in the progress of time. It is not an unchangeable code, like that of the Medes and Persians, but a system that has grown up with the growth of civilization, and is capable of being molded to meet the wants of society in every stage of its progress. From the facts disclosed by the answer in this case the tenant vacated the house at the expiration of the term, ex-

cept one bedroom, in which a member of his family was confined by illness so serious that he was warned by the physician that any attempt to remove her would imperil her life. The decision of the learned trial court in the case virtually holds that on the last day of the tenant's term he was placed in a position where he must either pay rent for another year for a house that he did not intend to occupy or to take the risk of becoming, in a certain sense, responsible for the death of his mother by attempting to remove her from a sick room against the protest of a physician. This would seem to be pushing a rule of law applicable to the relation of landlord and tenant to a point which makes it very unreasonable, if not absurd; and, before assenting to such an application of it, we are naturally forced to inquire whether there was, in fact, any such holding over by the tenant in this case as the rule fairly contemplates. Does a tenant who, on the last day of the term is upon his death bed, or is quarantined in his house by the public authorities to prevent the spread of some dangerous or infectious disease or is insane, or compelled to remain in the house, against his will, by some superior force or stress of circumstances, hold over within the meaning of the law, or in the sense that permits the landlord to treat him as a tenant for another year? The principle upon which the rule is founded is that the holding over is such an act of the tenant that the law implies a contract on his part, or leasing of the premises for another year. But whenever the law implies a contract from the act or conduct of the party, the act itself, whatever it may be, must be voluntary. The law does not imply a contract or obligation from an act of the party which proceeds from mistake or fraud, or which results from force or coercion of any kind, or is due to any stress of circumstances which involves peril to his life or that of some member of his family. To infer a promise or contract from any act plainly resulting from such causes would manifestly be contrary to reason and justice. The question therefore occurs whether the tenant in this case, by failing to remove his mother from the bedroom in the house, or by her presence there during the fifteen days after the expiration of the term, should be held for another year's rent, on the principle that an agreement to hold for another year is to be implied by law from his conduct under the circumstances. If this question must necessarily be answered in the affirmative, there would be no grounds for any further discussion. But it seems to me that, upon reason and all the analogies of the law, a hiring for another year cannot and should not be implied against the tenant under such circumstances. The case is not within the reason of the rule, and therefore is not governed by it. While this court has firmly adhered to the principle that the landlord is entitled to treat the tenant who holds over as lessee for another year, it is plain, from what was said in one of the most recent cases, that the rule was not considered an arbitrary one. On the contrary, it is intimated that it was not

so rigid that it could not properly be made to bend in exceptional and peculiar cases. *Haynes v. Aldrich*, 133 N. Y. 287. Where the holding over is wrongful or voluntary, and not unavoidable in the strictest sense, the rule must be permitted to have full application. But where the tenant, as in this case, is obliged to retain a room in the house for a short period of time in order to avoid the peril of exposing a member of his family to danger and death, it cannot properly be said that it is a holding over within the meaning of the law. Where a party acts under such a stress of circumstances, the act cannot be said to proceed from his own volition any more than if he had been detained in the house by the police under the direction of the health authorities.

In *Haynes v. Aldrich*, 133 N. Y. 287, this court enforced the rule in a case where the facts were quite different from those appearing in the record now before us. In that case, however, the learned judge who spoke for the court evidently had in mind some case which might be considered an exception to the rule. That is the plain inference from the following paragraph of the opinion: "I do not mean to say that whether there has been a holding over at all may not sometimes be so doubtful upon the facts as to require a submission to the jury. I mean to say that there is no such doubt in the present case. I reserve the question, also, whether there might not be an unavoidable delay, in no manner the fault of the tenant, directly or indirectly, which would serve as a valid excuse. It is enough that here was a holding over not unavoidable, which might have been provided against, and where the chief difficulty grew directly out of the tenant's own wrongful act." In *Jones v. Shears*, 4 Ad. & El. 832, the defendants had rented a coal mine for twenty-one years, with the proviso that they might terminate the tenancy at any time by giving a previous notice to that effect. The term commenced in April, 1825, and four years thereafter the defendants gave the notice provided for. They, however, continued in possession for two months after the expiration of the time limited by the notice, working the mine. The landlord brought an action for the rent, claiming that the holding over gave him the right to treat them as tenants at the former rent. The defendants claimed that this holding over was not with any intent to waive the notice and renew the tenancy, and that they had the right to show the circumstances under which they so held over. Upon this question of intent they therefore proposed to show that the coal worked by them during those two months was taken from pillars of coal which supported the roof of the mine, and that it was customary for the tenant on leaving the mine to cut away as much coal as could with safety be removed. This evidence was allowed, and Coleridge, J., left it to the jury to say whether, under the circumstances, the defendants held over with the intent to waive the notice and continue the tenancy or not. The jury found a verdict for the defendants, and a subsequent motion for a new trial was denied. Upon 44 L. R. A.

appeal to the King's bench the ruling at the trial was affirmed, Lord Denman, Ch. J., saying: "It was impossible, upon this issue, not to leave the question to the jury, and it was for them to decide whether the parties, by their mode of continuing in possession, showed an intention to waive their notice to quit, and to remain tenants as before." Littledale, J., also said: "I do not know that where a tenant holds over he is always to be considered as bound to hold upon the same terms as far as they are applicable."

Here, however, the question was not whether the parties held over on the terms of the original tenancy, but whether they held over as tenants at all. It was for the jury to say whether the defendants intended to avail themselves of their notice to quit, or whether the acts done by them amounted to a waiver of such notice." In *Chitty, Contr.* 8th Am. ed. pp. 286, 287, after discussing the effect of the receipt by the landlord of rent after the expiration of the term, and a holding over by the tenant, the learned author adds: "And both the fact of holding over and the payment of rent may be explained so as to rebut the presumption that the parties intended thereby to create a tenancy from year to year." The law in many cases excuses a party from the performance of a contract or some other act when disabled by sickness. Such was the decision of this court in a case where a party had contracted to render personal services for a specified time, but, after a partial performance, was disabled by sickness. It was held that, notwithstanding the nonperformance by reason of this disability, the person rendering the services was entitled to recover upon a *quantum meruit*. *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388. The disability of a party to do the particular thing or to perform the contract by reason of sickness is held to be a disability by the act of God. So it has been held that sureties upon a recognizance to secure the attendance of the principal at court to answer to a criminal charge may, when sued upon the recognizance, defend upon the ground that the principal was disabled from attending by reason of sickness. *People v. Tubbs*, 37 N. Y. 586. The general rule is that, where the performance of a duty or charge created by law is prevented by unavoidable accident without the fault of the party, he will be excused. *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Proprietors of Mill Dam Foundry v. Hovey*, 21 Pick. 441.

It is important to note with more distinctness the wide difference between this case and *Haynes v. Aldrich*, 133 N. Y. 287. In that case the tenant violated one of the covenants of the lease by subletting the premises. The sub-tenant held over after the expiration of the term, and the tenant was sued for rent upon the principle that the holding over created a tenancy for another year. The tenant sought to excuse the holding over by the allegation that a distant relative of the subtenant, who was in possession, was detained in the house after the expiration of the term by sickness. This court held that, inasmuch as the subletting was in violation of the lease, and was a wrongful act on the

part of the tenant, he could not be excused by a situation which was plainly the result of his own violation of a covenant of the lease. It is plain that the situation which it was claimed excused the tenant was of his own creation by putting another party in possession of the premises. The holding over in that case was very properly attributed to the wrongful act of the tenant in putting a stranger into possession of the demised premises.

When a tenant for a year actually holds over after the expiration of the term, the legal consequences which follow are well settled and understood. The landlord may, at his election, treat him either as a trespasser or a tenant for another year; but in any case the fact of holding over must be established. The landlord cannot treat him as a tenant, and collect the rent for another year, unless the facts are such as to justify him in proceeding against him as a trespasser. An act which might ordinarily constitute a trespass when done or committed intentionally or voluntarily, cannot always be such when done or committed involuntarily. Moak's Underhill, Terts, pp. 10, 15. The mere fact that the tenant or some member of his family is obliged to remain in a room in the house after the expiration of the demised term, may not necessarily amount to a trespass. Whether it does or not must depend upon circumstances. If he is detained there by the act of God, or of some superior legal power, or some unavoidable necessity, he is not ordinarily deemed to be a trespasser. A trespass presupposes some wrongful act towards the person or property of another. If the tenant in this case actually held over, the plaintiff could maintain ejectment against him; but, since his intention to remove on the day the lease expired is clear, and this purpose was defeated only by the dangerous illness of a member of his family, it would, I think, be difficult to say that he had such a possession of the house as would support an action of ejectment; and the same facts and circumstances that would protect him from such an action would also defeat the present claim, which is based upon the theory of an implied agreement to lease for another year. I do not mean to say that the facts stated in the answer would be a defense to an action by the landlord for damages based upon the breach of the covenant in the lease to surrender the demised premises at the expiration of the term. A duty or obligation imposed by law and one created by contract or covenant stand upon different grounds when the party seeks to be excused by the act of God, or unavoidable accident, or stress of circumstances. But in this case the right of the landlord to collect rent for the second year does not depend upon any express contract or covenant. It rests wholly upon the legal implication derived from the wrongful act of the tenant in holding over; and if that act was not in fact wrongful, but, under the circumstances, excusable, then there is no basis for any implied promise or agreement. I assume that if the tenant, or some member of his family, should die on the last day of

the term, that no one would then contend that the continued occupation of the house for a few days during the funeral would amount to a wrongful holding over within the meaning of the law. Such an interpretation of a principle of the common law would shock, not only our sense of justice, but every feeling of decency and humanity. The case before us differs from that only in degree. Both cases must be governed by a common principle. It is obvious that in the application of the rule now under consideration to the relation of landlord and tenant there must be a point beyond which we cannot go, and that point is reached when the alleged holding over cannot be attributed, directly or indirectly, to some fault on the part of the tenant. There may be cases in which the occupation of a room in a house after the lease has terminated will not amount to a trespass, or warrant the implication of a lease for another year. Since a party cannot, as a general rule, commit a trespass or make a contract without some effort of volition on his part, an act due to unavoidable accident, or resulting from some overruling necessity or stress of circumstances, can form no basis for imputing a wrong or inferring a contract. It is reasonable, therefore, to conclude from the facts and circumstances stated in the answer that the defendant was not a trespasser during the fifteen days that his mother occupied the room in the house, and could not be removed without endangering her life, nor a tenant for another year. It follows, therefore, that the plaintiff was not entitled to recover rent from the time when the house was completely vacated.

It may be said that this conclusion is a departure from precedent, but it is not easy to see how it is. No case has been cited, and none has been found, where it was held that such a state of facts or such a situation as is disclosed by the answer amounted to a holding over by the tenant within the meaning of the rule that is invoked by the landlord to sustain this action. Legal rules may sometimes be pushed to a point where they accomplish the grossest injustice, and it then becomes the duty of the courts to limit their application to cases that are within their true scope and fair meaning. We go no further than to say that upon the facts stated in the answer, if conceded or established, there was no holding over by the tenant within any fair or reasonable meaning of the rule which permits the landlord to continue the lease for another year.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Martin, J., concurring:

This action was to recover seven months' rent of a dwelling house situated upon Madison avenue, in the city of New York. There was a lease between the parties, by which the defendants rented the premises from May 1, 1894, for the period of one year, the rent payable in monthly instalments in advance. The rent for that term has been paid. By this action the plaintiff seeks to recover rent for a portion of the succeeding

year, on the ground that the defendants held over after the expiration of their term, and thus became liable for the rent of the premises for that time. The facts are undisputed. The defendants alleged as a defense to the action the making of the contract or lease with the plaintiff; that in the month of February, 1895, before the expiration of their term, they notified the plaintiff that they would not retain the premises for another year, and that after such notice the plaintiff and his agents were permitted to show the premises, and to place the usual notice "To Let" upon them, which remained during the balance of the term. The defendants then specially alleged that on May 1, 1895, the defendants were prevented from yielding up the possession of the premises by the act of God in afflicting their mother, who was a member of their family, with a disease which, at that time, previously, and subsequently, including May 15, confined her to her bed so that it would have endangered her life to take her from the house; that for that reason, and no other, of which the plaintiff had full knowledge and notice, the defendants were obliged to and did occupy a small portion of the premises until May 15; that all their property, furniture, and belongings and their family were removed from the premises, and every part thereof, on May 1, 1895, except from the sick room in which their mother was confined, and that they were forbidden by the physician in charge to remove her until May 15, when she was at once removed. Upon the trial it was admitted that upon the 1st of February, 1895, the defendants notified the plaintiff that on the 1st of May they would give up and surrender the possession of the premises. That they were occupied under the lease was admitted, also the rate of rent, and the fact that the defendants, from necessity, held over after the expiration of the lease some fifteen days. The plaintiff then admitted the facts set up in the answer as to the impossibility of the defendants' surrendering possession at the expiration of the year, so that the question presented is whether, notwithstanding the facts alleged in the answer, the plaintiff was entitled, as a matter of law, to recover rent for the succeeding year, upon the ground that the defendants held over after the expiration of their term.

The admission of the plaintiff amounts to a concession that, by reason of the sickness of the defendants' mother, it was impossible for them to surrender up the possession of the premises to the plaintiff; that, so far as it was possible, they did so; and hence, that their retention was wholly involuntary. If there was any doubt as to the question of impossibility, it should have been submitted to the jury, and the defendants' exception to the direction of a verdict was well taken. Thus, in a word, the question is whether that impossibility justified the defendants' action, or whether, although it was impossible, to surrender the entire premises, the holding of a small part for a few days imposed upon them a liability for rent for the succeeding year. It is well settled that, where a tenant voluntarily holds over after

the expiration of his term, he may be held as upon an agreement to hold for a year upon the terms of the prior lease. *Conway v. Starkweather*, 1 Denio, 114; *Commissioners of Pilots v. Clark*, 33 N. Y. 251; *Haynes v. Aldrich*, 133 N. Y. 287, 289. The basis of this liability is often said to be an implied agreement upon the part of the tenant to hold for another year. While I doubt, as I always have, the propriety of calling this class of obligations implied contracts, but think they are to be regarded as duties which the law imposes, yet, whether they be denominated implied contracts or duties created by law, in either case the right arises upon an implication of law, and in no sense upon an express or absolute contract.

It is also well settled that, where a duty or charge is created by law, and the performance is prevented by inevitable accident or the act of God, without fault of the party sought to be charged, he will be excused, but where a person absolutely, and by express contract, binds himself to do a particular thing, which is not at the time impossible or unlawful, he will not be excused, unless through the fault of the other party. The reason given for the latter portion of this rule is that he might have provided by his contract against inevitable accident or the act of God. *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415. Thus, the most that can be said of the obligation that arises from the relation of landlord and tenant and follows by a general lease is that the tenant is charged with the duty of vacating the premises at the end of his term. If he fails, it is a breach of his duty, and ordinarily the law implies or creates a liability on his part for another year's rent. This being a duty implied or created by law, and not by an express or absolute agreement, it falls within the first part of the foregoing rule, and hence it is obvious that, if the tenant's removal was rendered impossible by inevitable accident or the act of God, he is excused for his omission to surrender the premises, at least so far as it creates a liability for a year's rent which is implied by law. The reason for the distinction between the effect of impossibility of performance, occasioned by inevitable accident or the act of God, upon an obligation created by express contract and upon an obligation which the law implies, has been held to rest "upon the unwillingness of the law to at once create, impose, and exact the performance of an obligation forbidden or rendered impracticable by the interposition of Providence." *School Dist. No. 1 v. Dauchy*, 25 Conn. 536, 68 Am. Dec. 371. Under the principle of the authorities relating to this subject, I think it is clear that, as the obligation sought to be enforced was one created by law, and not by the agreement of the parties, impossibility of performance was a valid excuse, and the defendants cannot be held for the rent for the subsequent year. Moreover, the same result may be reached upon another ground. There are many cases where the courts have implied a condition in a contract

to the effect that a party is relieved from its terms where its performance has, without his fault, become impossible. The principle upon which those cases are based is that, when the contract was made, the parties contemplated that the condition which subsequently existed might arise, and render performance impossible, and that the implied condition is to be construed as a part of the existing contract, and thus relieves the party from liability in case that condition arises. *Deater v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Lorillard v. Clyde*, 142 N. Y. 456, 462, 24 L. R. A. 113; *Stewart v. Stone*, 127 N. Y. 507, 14 L. R. A. 215; *Spalding v. Rosa*, 71 N. Y. 40, 44, 27 Am. Rep. 7; *Taylor v. Caldwell*, 3 Best & S. 826; *Robinson v. Davison*, L. R. 6 Exch. 269; *Kein v. Tupper*, 52 N. Y. 550, 555; *Dolan v. Rodgers*, 149 N. Y. 489, 492. To hold in this case that this agreement was made upon an implied condition that the defendants should not be required to vacate the premises at the expiration of their term in the event that it was rendered impossible by inevitable accident or the act of God is quite within the principle of the authorities cited. But, be this as it may, it is manifest that the charge or liability which the plaintiff seeks to enforce was created by law, and not by agreement, and that, as its performance was prevented without the defendants' fault, they were excused from the onerous liability which the plaintiff now seeks to enforce. It may well be, and doubtless is, true that the plaintiff may recover for the time the premises were occupied by the defendants, or if, by reason of their failure to surrender up the premises, additional damages follow, that they may be recovered in a proper action so that all damages caused by the defendants' misfortune would be borne by them, but that he cannot recover the rent for the subsequent year upon the implied contract or duty imposed by law seems to me clear.

These considerations lead me to the conclusion that the judgment in this action should be reversed, and a new trial ordered, with costs to abide the event.

Parker, Ch. J., and Haight, J., concur.

Gray, J., dissenting:

This action was brought to recover of the defendants the rent of certain premises in the city of New York, which had been originally leased to them by the plaintiff for the term of one year from May 1, 1894. The defendants held over for some fifteen days after the expiration of the term, and the rental moneys claimed in the action were for seven months subsequent to May 1, 1895. The defense set up in the answer was, in substance, that, prior to the expiration of the term mentioned in the written lease, the defendants had notified the plaintiff that they would not take the premises for another year, and that they had hired another house, but they had been prevented from yielding up possession "by the act of God in afflicting the mother of these defendants, who was a member of the family of the defendants, with a disease which . . . was so great

that it would have endangered her life to have taken her from the room." The lease contained the usual agreement of the lessees to quit and surrender the premises at the expiration of the term. Upon the trial no evidence was given, the facts being then and there stipulated between the parties. The plaintiff admitted that the defendants notified him, in February, 1895, that on the 1st day of May, 1895, they would surrender the possession of the premises, and the defendants admitted that they remained over after the 1st of May without the assent of the plaintiff. The plaintiff admitted to be true the statement of the defendants that the mother of the defendants was ill on the 1st of May, 1895, and in the condition alleged in their answer. Upon these admissions of the parties, the trial judge directed a verdict for the plaintiff for the amount of rental moneys demanded under the terms of the written lease. To that direction the defendants excepted, and, the appellate division having affirmed the judgment entered against them, they further appeal to this court.

The question thus raised for our consideration is whether the rule of law, which has always controlled in such cases, is to be affected by the fact that the holding over by the defendants was by reason of the illness of their mother, as a member of the family, and therefore, in that sense, involuntary. The doctrine has been long a settled one in this state that a tenant who holds over his term, either is a trespasser or continues to be a tenant, at the sole election of the landlord, and that, in the latter case the legal implication is that he holds at the former rent. As this appeal should be disposed of upon authority, I shall advert to a few cases and to the opinions which have been expressed. The question was early discussed in what may be regarded as the leading case of *Conway v. Starkweather*, 1 Denio, 113, where the tenant held over his term for the period of two weeks. Bronson, Ch. J., in his opinion, laid down the rule with considerable pertinency, and said that "the tenant has no such election as that which belongs to the landlord. If he holds over, though for a very short period, without any unequivocal act at the time to give his holding the character of a trespass, he is not afterwards at liberty to deny that he is in as a tenant, if the landlord chooses to hold him to that relation. If the tenant may hold over for two weeks, and then say he is not a tenant, I see no reason why he may not give the same answer after holding over as many months or years. The plaintiff's counsel regards the holding over as only presumptive evidence of the continuance of the tenancy, which would have been sufficiently rebutted by the offered proof that the plaintiff, before his term ended, refused to keep the property another year, even at a reduced rent. But such are not my views. I do not think this a case for balancing presumptions, but one where the act of the plaintiff in holding over has given the defendants a legal right to treat him as tenant; and that it is not in his power to throw off that character, however onerous it may be." A number of years lat-

er, in the case of *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609, the defendants had held over for the period of three weeks after the expiration of the lease, and they opposed the claim of the plaintiff to hold them as tenants for the whole year, upon the ground that they had given him notice, before the expiration of the term, that they did not intend to keep the premises for another year, and, with his knowledge, had made arrangements to occupy other premises. Judge Earl, relying on the rule of law as settled by *Conway v. Starkweather*, and since recognized by other cases, that, where a tenant holds over after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of the prior lease, overruled their contention, and said: "The safe and just rule I believe to be the one established by authority, that a tenant holds over the term at his peril; and the owner of the premises may treat him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far as applicable." Still later, in *Adams v. Cohoes*, 127 N. Y. 175, Judge Potter, delivering the opinion of this court in the second division, discussed this question in the light of the authorities and observed that "so absolute is the implication, from holding over for a few days only, of a hiring for another year, that the tenant will not be excused from the payment of rent, even where he gave the landlord notice before the end of the term that he did not intend to hire for another year, and had hired other premises, which would be ready for his occupancy in a few days." Finally, we have the case of *Haynes v. Aldrich*, 133 N. Y. 287, where the holding over by the defendant was from the 1st to the 4th of May, and it was sought to be excused upon these facts, viz.: That the 1st day of May was a holiday; that on the 2d day of May there was a difficulty in engaging trucks, and that a sick boarder could not be removed with safety until the 4th day. Judge Finch discusses, in his opinion, the efficacy of such a defense somewhat elaborately, and referring to the rule as well settled by authority that where there is a holding over by the tenant the law will imply an agreement to hold for a year upon the terms of the prior lease, makes the following observations upon the argument of the appellant: "The appellant does not deny the rule, but seeks to qualify it so as to mean that it is only where the tenant holds over voluntarily, and for his own convenience, that the landlord's right arises, and that it does not so arise when the tenant holds over involuntarily, not for his own convenience, but because he cannot help it. I am averse to any such qualification. It would introduce an uncertainty into a rule whose chief value lies in its certainty. The consequent confusion would be very great. Excuses would always be forthcoming, and their sufficiency be subject to the doubtful conclusions of a jury, and no lessor would ever know when he could safely promise possession to a new tenant." Again, he says that "if the rule in this case seems to involve a hardship, that is sometimes true of every general rule, however

just and wise, but does not justify its abrogation. To sustain this defense would open the door to a destruction of the settled doctrine, and tend to involve the rights of both lessor and lessee in uncertainty and confusion." This is pretty strong language; but the appellants, nevertheless, seek to distinguish the case as an authority, because there it was a subtenant whose illness prevented the surrender of possession, and the question was reserved whether there might not be an inevitable delay, in no manner the fault of the tenant, which would serve as a valid excuse. It is true that there is that much of a distinction between the two cases, but I think the distinction to be somewhat shadowy, so far as the excuse for not yielding up the premises promptly is concerned, and I agree with the reasoning of the opinion at the appellate division in the present case [9 App. Div. 595], that "no such qualification should be, or could safely be, imported into the absolute rule of law. It would make the landlord, rather than the tenant, suffer by reason of a misfortune to the tenant, which he, and not the landlord, should bear the burden of." It seems to me that Judge Finch, in *Haynes v. Aldrich*, has given a convincing reason against importing any qualification into a well-settled rule of law, by which its application might be rendered uncertain according to the facts pleaded by the tenant. Since the leading case of *Conway v. Starkweather*, I am not aware of any qualification of the rule having been admitted, and I think that, if a case arises in which it operates harshly, the misfortune is one which, for the sake of the stability of the rule, should be borne by the tenant, rather than by the landlord. The underlying principle is that the rights of the parties are determined by their engagements, and effect must be given to the contract. The doctrine, as settled by the decisions of the courts of this state obtains in many other jurisdictions. *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Moore v. Beasley*, 3 Ohio, 294; *Vrooman v. McKaig*, 4 Md. 450, 59 Am. Dec. 85; *Bacon v. Brown*, 9 Conn. 334; *Hemphill v. Flynn*, 2 Pa. St. 144; *Wolfe v. Wolff*, 69 Ala. 549.

This is in no sense to be considered like a case where performance of a condition is prevented by the act of God, nor one where the discharge of an obligation was not fully intended by the parties. It is simply that of a contract which, by its terms, gave the occupancy and use of the premises of the owner for a specified term, and under specified conditions, which fixed the rent to be paid, and which contained the covenant of the lessee to quit and surrender the premises at the expiration of the demised term. The distinction is well settled between an obligation or duty imposed by law and that created by covenant of the party. In the former case, if the party is disabled from performing without any default of his own, the law will excuse him. Illustrations of this are where waste to a tenement is caused by its destruction by tempest or by enemies, or where the contract is for personal services, and the condition of continued existence is raised by

implication. But where the party creates a duty by his own contract he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. 2 Saund. 422, note 2; *Proprietors of Mill Dam Foundry v. Hovey*, 21 Pick. 417, 441; *Dexter v. Norton*, 47 N. Y. 62, 64, 7 Am. Rep. 415.

Of course, there was nothing to submit to

the jury, and the defendants did not request a submission. All the facts for a judgment were stipulated when the case came on for trial, and they presented the one question for the court whether, in law, they established the plaintiff's right to the rent demanded. I think the judgment should be affirmed, with costs.

Bartlett and Vann, JJ., concur.

RHODE ISLAND SUPREME COURT.

James SAMPSON and Wife

v.

John H. BAGLEY, Admr., etc., of Sylvester Grogan, Exr., etc., of Margaret Grogan, Deceased.

(.....R. I.)

1. **The liability of a tenant for life for loss by an accidental fire** as established by the English statute of 6 Edw. I. chap. 5, known as the statute of Gloucester, does not exist in Rhode Island, as that statute, though in force except as modified, is practically superseded by the Rhode Island statutes.
2. **The mere acceptance by a life tenant of a devise of real estate containing a direction to keep in repair** does not impose upon him the duty to rebuild in case of the accidental destruction of buildings by fire.
3. **A life tenant receiving insurance for the loss of a building by fire** must hold any excess of the amount received over the value of his life interest as a trustee for the remainderman, unless the money is used to rebuild.

(February 6, 1899.)

ON DEMURRER to the complaint in an action by a remainderman to recover from the personal representative of a life tenant the value of a dwelling house destroyed by fire while in the possession of the life tenant as such. *Sustained.*

The facts are stated in the opinion.

Mr. Samuel W. K. Allen, for defendant in support of demurrer:

This is an action on the case upon the implied promises of Margaret O'Connell in her lifetime to rebuild said house. The declaration does not state a case wherein the law implies any such promise. The only promise implied is the promise of every life tenant not to commit waste.

White v. Wagner, 4 Harr. & J. 373, 7 Am. Dec. 674; *Re Skingley*, 3 Macn. & G. 221.

In relation to the insurance money which it is alleged that Mrs. O'Connell received, it nowhere appears that she received for, or had insured, anything but her life estate. She had a right to insure her life estate, and was entitled to such insurance in full in her own right.

NOTE.—As to the proceeds of insurance on premises held by a life tenant, see also *Harri-son v. Pepper* (Mass.) 33 L. R. A. 239. 44 L. R. A.

. See also 46 L. R. A. 525.

Welsh v. London Assur. Corp. 151 Pa. 607.

Messrs. Charles E. Gorman and James T. Egan, for plaintiffs, *contra*:

The action is not an action for waste or for damages under the statute, but an action based upon the agreement of the life tenant to repair, created by the devise and the life tenant's acceptance of it.

The statute of Marlbridge made all tenants for life liable for waste committed or suffered.

Coke says: "Since the statute of Marlbridge, if a lessee for life or years had committed voluntary or permissive waste, he should answer in damages."

2 Inst. 145.

By statute 6 Anne, tenants were exempt from liability for loss by accidental fire. This statute has never existed in Rhode Island.

At common law lessees were not answerable for accidents or negligent burning; then came the statute of Gloucester which made tenants for life and years liable to waste without any exception, consequently rendering them answerable for destruction by fire.

Woodfall, Land. & T. 246.

The statute of Anne, chap. 31, excepted from the statute of Gloucester accidental fires, but left it therefore to the parties to contract so as to impose the liability.

Brown v. Quilter, 2 Ambl. 620; *White v. Wagner*, 4 Harr. & J. 373, 7 Am. Dec. 674.

To repair was an obligation on a tenant, whether for life or years, imposed by law; so that a tenant to-day who fails to repair would be guilty of waste.

Clemence v. Steers, 1 R. I. 272, 53 Am. Dec. 621; *Fay v. Brewer*, 3 Pick. 203.

It is common to include in leases a covenant to repair, and so an action arises on the covenant; but were the lease silent on this matter the obligation to repair would still exist.

White v. Wagner, 4 Harr. & J. 373, 7 Am. Dec. 674.

While it may be true that the reversioner has no right for want of privity to avail himself of the insurance effected by the life tenant, or to compel its application, still the life tenant's neglect to insure or to apply the proceeds of insurance ought to render him in justice liable.

4 Kent, Com. p. 82; Co. Litt. 53a; *Rook v. Warth*, 1 Ves. Sr. 462; *Brough v. Higgins*,

2 Gratt. 408; *Graham v. Roberts*, 43 N. C. (8 Ired. Eq.) 99.

Under a general covenant to repair the tenant is liable for the destruction of the buildings not rebuilt by him though the destruction may have occurred by fire or other accident.

Phillips v. Stevens, 16 Mass. 238; *Tilden v. Tilden*, 13 Gray, 103; *Ross v. Overton*, 3 Call. (Va.) 309, 2 Am. Dec. 552; *Scott v. Scott*, 18 Gratt. 166; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143; *McIntosh v. Loun*, 49 Barb. 550; *Lockrow v. Horgan*, 58 N. Y. 635; *Schmidt v. Pettit*, 1 MacArth. 179; *Ely v. Ely*, 80 Ill. 532; *Hoy v. Holt*, 91 Pa. 88, 36 Am. Rep. 659.

Even if after lease the fire district is extended and a more expensive building required.

David v. Ryan, 47 Iowa, 642; *Harris v. Heackman*, 62 Iowa, 411; *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430; *Wade v. Malloy* 16 Hun, 226; *Pay v. Brewer*, 3 Pick. 203; *Sackett v. Sackett*, 5 Pick. 191; *Wood v. Griffin*, 46 N. H. 237.

A general covenant to repair is binding upon the tenant under all circumstances.

Libbey v. Tolford, 48 Me. 316, 7 Am. Dec. 229; *Hoy v. Holt*, 91 Pa. 88, 36 Am. Rep. 659; *Magaw v. Lambert*, 3 Pa. 444.

The acceptance of a devise creates an obligation which can be enforced in law or equity.

Veazey v. Whitehouse, 10 N. H. 409.

Where a life tenant dies before repairing, the remainderman has an action against his executor for a sum sufficient to repair.

1 Leake, Uses & Profits of Lands, 93; *Barthyan v. Walford*, L. R. 33 Ch. Div. 630; *Woodhouse v. Walker*, L. R. 5 Q. B. Div. 404, 49 L. J. Q. B. N. S. 609.

At common law all life tenants were liable to the action of waste; no matter what might be the power to repel the waste from being done, if it was committed they were bound to repair. The infant age of the defendant would not free him from the responsibility.

White v. Wagner, 4 Harr. & J. 373, 7 Am. Dec. 675; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

The obligation to repair includes the maintenance of the estate and its appurtenances in a serviceable condition.

Stevens v. Rose, 69 Mich. 259; *Consolidated Coal Co. v. Savitz*, 57 Ill. App. 659; *Re Skingley*, 3 Macn. & G. 221.

The life tenancy and the obligation to repair were created by the same instrument and the acceptance of the devise bound and obligated the devisee for life to perform the condition.

Smith v. Jewett, 40 N. H. 530; *Veazey v. Whitehouse*, 10 N. H. 409; *Wheeler v. Lester*, 1 Bradf. 293; *Gridley v. Gridley*, 24 N. Y. 130; *Ditch v. Sennott*, 117 Ill. 362; *Taylor v. Popham*, 1 Bro. Ch. 168; *Barnardiston v. Fane*, 2 Vern. 306; *Hodgson v. Rawson*, 1 Ves. Sr. 47; *Wigg v. Wigg*, 1 Atk. 383; *Messenger v. Andrews*, 4 Russ. Ch. 478.

Apart from the life tenant's agreement to repair, a sound public policy would require that the money received by a life tenant on a

loss by fire should be used in rebuilding; and if not so used, then to pay it over to the remainderman.

Welsh v. London Assur. Corp. 151 Pa. 607.

Tillinghast, J., delivered the opinion of the court:

This is an action of assumpsit, and is brought to recover the sum of \$3,000, alleged to be the value of a dwelling house which was destroyed by fire during the time it was held by the defendant's testatrix, as life tenant thereof, under the will of Bernard O'Connell. The devise in said will to defendant's testatrix is as follows: "Second. I give and devise to my affectionate and beloved wife, Margaret O'Connell, my house and lot in the village of Wickford, in the town of North Kingstown, with all the privileges and appurtenances thereto belonging, for and during her natural life; she to keep the same in repair. At her decease I give and devise said house and lot to my niece Julia O'Connell; to her, her heirs and assigns, forever." The declaration alleges that immediately upon the death of said Bernard O'Connell the said Margaret O'Connell (afterwards Margaret Grogan) elected and decided to accept said devise, and entered into possession of said real estate, and a house then thereon standing, of the value of \$2,000, and thereby assumed upon herself the obligation to keep said house in repair, and so promised and agreed to keep said house in repair during her tenancy, to wit, during the continuance of her natural life. It then avers that, while thus in possession of the premises, the house situated thereon was wholly destroyed by fire, and that it was the duty of said Margaret Grogan, under the terms of said devise, and of her promise made upon accepting the same, to rebuild said house, which she failed to do, notwithstanding the fact that she received the insurance money for the insurance which was upon said house when it was burned, whereby the plaintiff Julia Sampson, being the owner of the estate in remainder created by said devise, was damaged in the sum of \$3,000, and has become entitled to have and recover the same of the defendant executor. Sylvester Grogan having deceased since the commencement of this action, John H. Bagley, his administrator, has assumed the defense thereof.

The defendant demurs to the declaration on the ground that, as a matter of law, it was not the duty of said Margaret Grogan, under the terms of said devise, to rebuild said house. We agree with the plaintiff's counsel that the action cannot be regarded as an action of waste or for damages, under the statute (R. I. Gen. Laws, chap. 268, § 1), but that it is based entirely upon the agreement of the life tenant to repair, created by the devise, and the life tenant's acceptance thereof. So that the case turns upon the legal effect to be given to the language of said devise. But, while this is so, yet as the plaintiff's counsel, both in his elaborate brief and also at the bar, has carefully discussed the law of waste, and as the prin-

ciples thereof are closely related to the main question involved, we will consider it.

The plaintiff's counsel argues that, even conceding that an action for waste, under the statute (R. I. Gen. Laws, chap. 268), cannot be maintained, because the injury to the disherison was caused by accidental fire, yet that the life tenant is liable for all waste; that the statute of this state is like the English statute of Marlbridge, in defining the liability, and like that of Gloucester in declaring a forfeiture and giving a double penalty.

By the ancient common law, not only might he that was seised of an estate of inheritance do as he pleased with it, but, also, waste was not punishable in any tenant, save only in three persons, namely, guardian in chivalry, tenant in dower, and tenant by the curtesy; and not in tenant for life or years. 4 Coke's Inst. 209. The reason of the diversity, as stated by Blackstone, was that the estate of the first three above named was created by the act of the law itself, which therefore gave a remedy against them, but tenant for life or for years came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee, and, if he did not, it was his own fault. Cooley, Bl. Com. bk. 2, p. 282; Tiedeman, Real Prop. § 72; 4 Kent, Com. 12th ed. *80; *Shrewsbury's Case*, 5 Coke, 13. Subsequently, in favor of the owners of the inheritance, Stat. 52 Hen. III. chap. 23, known as the "Statute of Marlbridge," was passed, in A. D. 1267, § 2 of which provides as follows: "Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to form, without special license had by writing of covenant, making mention that they may do it; which thing, if they do, and thereof be convict, they shall yield full damage and shall be punished by amercement grievously." "Under this statute the disability of committing waste was made an ordinary and general incident to all kinds of estates for life and for years (Tiedeman, Real Prop. *supra*), and the actual damages sustained by the reversioner were recovered in an action of waste. 1 Washb. Real Prop. 5th ed. 158. Under the common law, as thus modified by the statute of Marlbridge, only single damages were recoverable by way of punishment for waste, except in the case of a guardian, who also forfeited his wardship, by virtue of the great charter. See Stat. 9 Hen. III. chap. 4; Cooley, Bl. Com. bk. 2, p. 283. Thus the law remained until the passage of the statute of 6 Edw. I. chap. 5, in A. D. 1278, known as the "Statute of Gloucester," which provides "that a man from henceforth shall have a writ of waste in the chancery against him that holdeth by law of England, or otherwise for term of life or for term of years, or a woman in dower; and he which shall be attained of waste shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at." Our statute of waste above referred to is based upon the one last quoted.

44 L. R. A.

Under the law as it stood after the passage of the statute of Gloucester, not only tenants by the curtesy and in dower were held responsible for accidental fires at the common law, but tenants for life and years, created by the act of the parties, were also held responsible therefor as for permissive waste, under the last-named statute. 4 Kent, Com. p. 82. Under the language of this statute, that "he shall lose the thing that he hath wasted," "it hath been determined," says Blackstone, "that the place is included; that if the waste be done sparsim, or here and there all over a wood, the whole wood shall be recovered, or if in several rooms of a house, the whole house shall be forfeited, because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other." It was waste, under said statute, to pull down a house, or to suffer it to decay. If it was uncovered or ruinous at the commencement of the term, and the tenant suffered it to become more so; if he suffered the house to be burned by neglect or mischance; if it was uncovered by tempest, and he suffered it afterwards to decay; or even if glass or windows were broken,—he was liable for waste. In short, it seems that the only exception to the liability of the tenant for damages to the reversion was where the damage was caused by the acts of God and public enemies, and the acts of the reversioner himself. See Woodfall, Land. & T. 461 *et seq.*; 4 Coke, 536. "It is common learning," said Heath, J., in *Attersoll v. Stevens*, 1 Taunt. 198, "that every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land in lease, by whomsoever it may be committed." Chambre, J., in the same case (p. 196), said: "The situation of the tenant is extremely analogous to that of a common carrier. To prevent collusion (and not on the presumption of actual collusion), both are charged with the protection of the property intrusted to them, against all but the acts of God and the King's enemies; and as the tenant in the one case is charged with the actual commission of the waste done by others, so, in the other case, the carrier is charged with actual default and negligence, though he loses the goods by a force that was irresistible, or by fraud, against which no ordinary degree of care and caution could have protected him." Lord Coke is not less explicit, for he says: "Tenant by the curtesy, tenant in dower, tenant for life, years, etc., shall answer for the waste done by a stranger, and shall take their remedy over." 1 Co. Litt. 54a. See also 2 Co. Inst. 145, 303; 4 Kent, Com. p. 77; 1 Co. Inst. 57a, note, 377; 3 Bl. Com. p. 228; Comyn, Land. & T. 188; 1 Gray, Cases on Property, 560. The law of waste, as thus briefly outlined, continued in force in England until the passage of the statute of 6 Anne, chap. 31, in A. D. 1707, which guarded the tenant from the consequences of accidental misfortune in case of fire, by declaring that no suit should be had or maintained against any person in whose house or chamber any fire should accidentally begin, nor any recompense be

made by such person for any damage suffered or occasioned thereby. 4 Eng. Stat. at L. p. 314. (10 Wm. III., Anne). This statute was afterwards enlarged by the statute of 14 Geo. III. chap. 78, § 86, passed in 1774, so as to include stables, barns or any other buildings on the estate. 8 Eng. Stat. at L. p. 397 (7 Geo. III.—18 Geo. III.). Speaking of the statute of 6 Anne, Chancellor Kent says: "Until this statute, tenants by the curtesy and in dower were responsible at common law for accidental fires; and tenants for life and years, created by the act of the parties, were responsible, also, under the statute of Gloucester, as for permissive waste." 4 Kent, Com. p. 82. As to the question whether the action for permissive waste lies against a tenant for years, most of the authorities are collected in the notes to *Greene v. Cole*, 2 Saund. 252, where it is stated as clear law that at common law the action only lay against tenant by the curtesy, tenant in dower, or guardian, but that by the statute of Gloucester (6 Edw. I. chap. 5) the action is given against lessee for life or years, or tenant *per autre vie*, or against the assignee or tenant for life or years for waste done after the assignment. *Harnett v. Maitland*, 16 Mees. & W. 261.

The first practical question raised by the argument of plaintiff's counsel, as aforesaid, is whether the law of waste, as it existed in England after the passage of the statute of Gloucester, and before the passage of the statute of 6 Anne (for the latter statute has never been in force in this state), is so far binding in this state as to hold a life tenant responsible for an accidental fire. We do not think the doctrine of permissive waste has ever been understood to extend so far as to include damages thus occasioned. The rule was adopted in England in very early times, and was then adapted to the doctrine which there prevailed regarding the almost sacred rights of landowners under feudal tenures, which had not then been abolished, and were not until Stat. 12 Car. II. chap. 24, passed in A. D. 1660. But even in England, with all the inherited tendencies of the governing classes in favor of the feudal system, and the superior rights of the landed aristocracy, the law evidently came to be considered too rigid, as it was finally repealed, so far as the liability for accidental fires was concerned, by the aforesaid statute of Anne. It is true that the statute of Gloucester is one of the English statutes which was found to be in force in this state by the committee appointed by the general assembly in October, 1748, to prepare a bill "for introducing into this colony such statutes of England as are agreeable to the Constitution" (5 R. I. Col. Rec. 289; Acts and Laws of His Majesty's Colony of Rhode Island, 1745-52, p. 70); and, as modified by our statute of waste, it is probably still in force. But we think it has never been considered that under our statute, which practically supersedes the statute of Gloucester, a tenant for life or for years could be compelled to rebuild premises destroyed by accidental fire. See 3 Dane, Abr. 228, 229; *Parker v. Chambliss*, 12 Ga. 235. Speaking of per-

missive waste. Chancellor Kent says: "There does not appear to have been any question raised, and judicially decided, in this country, respecting the tenant's responsibility for accidental fires, as coming under the head of this species of waste. I am not aware that the statute of Anne has, except in one instance, been formally adopted in any of the states." (It has since been adopted in Wisconsin; and also in New York, in regard to fires in woods and fallow land. See 1 Washb. Real Prop. 156, 157, and notes.) "It was intimated upon the argument in the case of *White v. Wagner*, 4 Harr. & J. 373, 7 Am. Dec. 674, that the question had not been decided, and conflicting suggestions were made by counsel. Perhaps the universal silence in our courts upon the subject of any such responsibility of the tenant for accidental fires is presumptive evidence that the doctrine of permissive waste has never been introduced, and carried to that extent, in the common-law jurisprudence of the United States." Mr. Kerr, in his late work on Real Property, under the head of "Permissive Waste," says: "The tenant for life is answerable if the houses or other buildings on the premises are destroyed by fire from the negligence or carelessness of himself or his servants; and he must rebuild within a convenient time at his own expense. The life tenant is not liable, however, if the fire is the result of an accident, and he and his servants are free from fault." See also Hopk. Real Prop. (Hornbook Series) 62, 63, and cases cited. Mr. Washburn, in his work on Real Property, 5th ed. 157, states the law to be that, if the fire occurs without the fault of the tenant, he would not be responsible. Such seems to be the well-settled, if not, indeed, the unquestioned, law in this country as to permissive waste. And it is certainly entirely consistent with right and reason. If a building is destroyed by fire through the carelessness or negligence of the tenant or of his servants, which is the same thing, he is, and ought to be, responsible in damages therefor; for he is bound to the exercise of due care and diligence in the use of property, the fee of which is in another. But he is not, and cannot in reason be held, liable for damages caused by an accident, where he is entirely free from fault. See *Fay v. Brewer*, 3 Pick. 203; *Barnard v. Poor*, 21 Pick. 378; *Scott v. Scott*, 18 Gratt. 165; *Clark v. Foot*, 8 Johns. 421; *Wade v. Malloy*, 16 Hun, 226; *Maull v. Wilson*, 2 Harr. (Del.) 443; *Cornish v. Strutton*, 8 B. Mon. 586. In *White v. M'Cann*, 1 Ir. C. L. Rep. 217, Blackburne, Ch. J., says: "There is no authority or position that the accidental destruction of premises amounts to permissive waste, or to a tort, on the part of a tenant." In *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65, it was held that, in the absence of an express covenant to repair, a tenant is not answerable for accidental damages, nor is he bound to rebuild if the buildings are accidentally destroyed by fire or otherwise. The case of *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621, cited by plaintiff's counsel in support of his position, is in harmony with this

doctrine. The language quoted from the opinion, "If the house was torn down after she left the premises, and neither by her direction or permission, she is responsible,"—although only a *dictum*, and used by way of illustration in charging the jury, implies that in case the tenant negligently leaves or abandons the premises, and the house is torn down by a stranger, the tenant is liable. In the case of *White v. Wagner*, 4 Harr. & J. 373, 7 Am. Dec. 674, cited by plaintiff's counsel, the court held that a lessee was responsible where the house was destroyed by a mob, on the ground that as the lessee "did of his own authority, without the consent of the plaintiff, divert the house to a totally different and much more dangerous purpose, well aware of the risk which the property would thereby have to encounter, on principles of law and justice, as between himself and the plaintiff he becomes responsible." It will at once be seen that the decision of that case was based upon the misconduct of the tenant in diverting the house to an improper and unauthorized use, and therefore that it is not an authority in support of the broad doctrine contended for by the plaintiff's counsel. Indeed, it is fair to infer, from certain language used by the court, that if the defendant had continued to use the house for the purposes for which it was let, and it had been destroyed by a mob, the defendant would not have been held liable. Moreover, the decision, even on the ground upon which it was put, was by a divided court. Finally, then, as to the plaintiff's contention aforesaid regarding the liability of the life tenant simply as such, without reference to the language of the devise in question, we are of opinion that it is untenable.

We now come to the plaintiff's main contention, which is that the acceptance of the devise by the life tenant imposed upon her the liability to repair to the same extent as though she had accepted a lease of the premises containing an absolute covenant to repair. The defendant's contention, on the contrary, is that the language of the devise relied on by plaintiff adds nothing to the obligation of the life tenant to keep up the estate and commit no waste, and that the only promise that can properly be implied is the promise which is to be implied on the part of every life tenant, namely, that no waste shall be committed. This he concedes was clearly the duty of the life tenant, being made so by R. I. Gen. Laws, chap. 268, wherein the method of recovery for such violation is prescribed to be an action of waste. The position taken by plaintiff's counsel, that where, in a lease, there is an express and unqualified covenant on the part of the tenant to repair the premises, he is bound to do so, even though they be destroyed by fire or accident, seems to be well supported by authority. Taylor, Land. & T. 8th ed. § 357, and cases cited; Smith, Land. & T. Am. notes, 258, 259; *Phillips v. Stevens*, 16 Mass. 238; *Tilden v. Tilden*, 13 Gray, 109; *Cook v. Champlain Transp. Co.* 1 Denio, 91; *Scott v. Scott*, 18 Gratt. 165; *Abby v. Billups*, 35 Miss. 631; *David v. Ryan*, 47 Iowa. 642; *McIntosh v. 44 L. R. A.*

Lown, 49 Barb. 550; *Hoy v. Holt*, 91 Pa. 88, 36 Am. Rep. 659. These cases seem to proceed upon the principle that, although a man may be excused from a duty imposed upon him by law, if he is disabled from performing it without any fault of his own, and he has no remedy over, yet when, by his own contract, he creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it in the contract. See note to *Walton v. Waterhouse*, 2 Saund. 422. It is doubtless competent for a man to assume whatever liability he may see fit in connection with the occupancy of real estate. He may agree absolutely to deliver the possession of the premises to the owner at the end of the term in like good condition in every respect as they were at the date of the lease, or he may agree to pay rent for the entire term, without providing for any abatement or exception in case the premises are rendered untenable by fire or other casualty, and thereby bind himself to fulfil the covenant to the letter. And, if the bargain turns out to be a hard one for him, he has no legal ground of complaint, for it was his own free and voluntary act. He might have limited his liability to pay rent only so long as the premises were tenantable, or have made an exception in case they were destroyed by fire or other unavoidable casualty, as is almost always done. But, if he does not, his liability is absolute. Now, whether this principle is to be extended by analogy to include a case where there was no express covenant or agreement to repair, but only an implied agreement growing out of the acceptance of a devise, is the question which we are called upon to decide.

Counsel for plaintiff has cited numerous authorities to the effect that, where a devisee or legatee accepts the gift of the testator, he thereby obligates himself to perform the condition attached to the devise or bequest. That such is the law there can be no doubt. A testator may attach such conditions to his gift as he sees fit, and he who accepts it must also accept and assume the burdens attached thereto, as in this way only can the intention of the testator be accomplished. This doctrine has been carried to the extent of holding the devisee personally liable, without any express promise, for all the debts of the testator, in a case where all of the real and personal estate was given to the donee, he to pay said debts. *Gridley v. Gridley*, 24 N. Y. 130. See also *Messenger v. Andrews*, 4 Russ. Ch. 478; *Wheeler v. Lester*, 1 Bradf. 293; *Ditch v. Sennott*, 117 Ill. 362; *Woonsocket Inst. for Sav. v. Ballou*, 16 R. I. 351, 1 L. R. A. 555. But these and similar cases, in so holding, only go to the extent of saying, in effect, that the intent of the testator in making the gift with the condition or burden attached must be carried out by the donee or devisee who accepts it. *Veazey v. Whitehouse*, 10 N. H. 409. In the case at bar, the duty which the testator devolved upon the life tenant was to keep the premises in repair, and this duty was assumed by her in accepting the devise. Now, what is the

natural and ordinary meaning and import of the language used by the testator, "she to keep the same in repair?" that is, what would ordinarily be understood by the use of that language when used in a will in connection with a devise of real estate? Simply this, we think: That the devisee is to take such care of the estate as a prudent and diligent person would take of his own absolute property; that is, such care as good husbandry may require, which would, of course, include proper repairs. And in accepting the devise the life tenant impliedly promised to exercise that degree of care and prudence in the management and use thereof. But to take the language aforesaid out of its setting, and give it the force and effect which it would have when used in an absolute and unqualified covenant to repair by the tenant in a lease, would be to give it an artificial and technical meaning never contemplated by the deviser, and to impose a burden which the life tenant never supposed, or had any reason to suppose, she was assuming by accepting the devise. The brief of plaintiff's counsel shows that he has been very diligent in examining the law pertaining to the duties and obligations of life tenants, covering a period of two centuries and more; but he cites no authority which goes to the extent of holding generally that the mere acceptance by a life tenant of a devise of real estate, containing a direction to keep in repair, imposes upon him the duty to rebuild in case the buildings upon the land are accidentally destroyed by fire. And as a devise like the one in question is, and always has been, very common in wills, and, moreover, as life tenants would seldom voluntarily assume the burden of rebuilding premises destroyed by fire or other accident, unless the same would be for their benefit, or unless compelled by law to do so, the very fact that no case can be found in this country where the court has declared that the duty to rebuild is the same as that devolved upon a tenant by his unqualified covenant to repair, when incorporated in a lease, is pretty good evidence that such has never been considered to be the law. The case cited by plaintiff's counsel which comes nearest to supporting the doctrine contended for is the English case of *Re Skingley*, 3 Macn.

& G. 221. That was a case where, after the dwelling house was destroyed by fire, the chancellor, upon the petition of the remainderman, ordered the guardian of the life tenant, who was a lunatic, to rebuild the house; that is, he was to use so much of the lunatic's estate, over and above the amount received for insurance on the building, as was necessary to rebuild the house. It appears, however, that the petition was supported by certain of the next of kin of the lunatic himself, on the ground that it would be for his interest to rebuild, rather than to incur the risk of the absolute forfeiture of the premises under the law of waste. It is fairly to be inferred from the case, taken as a whole, that it was considered to be for the best interest of the lunatic that his estate should defray so much of the expense of rebuilding as represented the difference between the insurance and the cost of rebuilding. Moreover, it was a proceeding in chancery, and not an action at law. We do not think, therefore, that it is decisive of the question before us. We therefore decide that said Margaret Grogan was not under obligation to rebuild the house which was destroyed by fire, by virtue of the provision contained in the devise aforesaid.

But the plaintiff further contends that, apart from the life tenant's agreement to repair, a sound public policy would require that the money received by a life tenant on account of a loss by fire should be used in rebuilding, and, if not so used, then should be paid over to the remainderman. If a policy is issued to a life tenant for the full value of the fee, and this amount is recovered by him, he certainly ought to be held to be a trustee for the remainderman as to the excess of the amount received over the value of his life interest. *Welsh v. London Assur. Corp.* 151 Pa. 607. See also *Brough v. Higgins*, 2 Gratt. 409, and *Graham v. Roberts*, 43 N. C. (8 Ired. Eq.) 99. In the case at bar, however, the declaration does not allege that the policy covered anything more than the life tenant's interest in the building which was destroyed by fire, and, if it did not, she was clearly entitled to such insurance in full.

Demurrer sustained.

TEXAS SUPREME COURT.

Robert C. STORRIE
v.
HOUSTON CITY STREET RAILWAY
COMPANY *et al.*

(.....Tex.....)

1. A legislative grant to municipal corporations of the right to improve

NOTE.—As to liability of railroad property to street assessments, see *Kuehner v. Freeport* (Ill.) 17 L. R. A. 774; *Mt. Pleasant v. Baltimore & O. R. Co.* (Pa.) 11 L. R. A. 520; *Detroit, G. H. & M. R. Co. v. Grand Rapids* (Mich.) 28 L. R. A. 798; *Chicago, M. & St. P.* 44 L. R. A.

public highways at the cost of adjacent property supposed to be benefited thereby is not prohibited by Const. 1895, art. 8, § 48, providing that the legislature shall not levy taxes or impose burdens upon the people except to raise revenue sufficient for the economical administration of the government, as that refers to taxes and burdens imposed by the legislature itself with a view to the administration of the state government.

2. An enlargement of the liability of

R. Co. v. Milwaukee (Wis.) 28 L. R. A. 249; *Lake Shore & M. S. R. Co. v. Grand Rapids* (Mich.) 29 L. R. A. 195; *Philadelphia, McCann, v. Philadelphia & R. R. Co.* (Pa.) 34 L. R. A. 564.

a street-railway company for paving a street is not unconstitutional, where the company's rights were acquired subject to Const. 1895, art. 1, § 17, providing that all privileges and franchises shall be subject to legislative control, and that there shall be no irrevocable or uncontrollable grant of special privileges or immunities.

3. A street-railway company is included in the general procedure provided by the Houston city charter, §§ 23a et seq., for the enforcement of assessments for street paving, although some of the provisions are strictly applicable only to abutting property, since the charter expressly creates a liability of the street-railway company to assessment, and there is no distinct procedure provided for enforcing it.

(June 13, 1898.)

CROSS WRITS of error to review a judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District reversing a judgment of the District Court for Harris County in favor of plaintiff in an action brought to enforce payment of certain street-improvement certificates; the plaintiff appealing from so much of the decree as reduced the rate of interest; and defendant appealing from so much as held it liable for the payment of the certificates. *Reversed on plaintiff's appeal.*

The facts are stated in the opinion.

Messrs. Ewing & Ring, for plaintiff:

Since the street-railway company was clearly made liable for its proportion of the cost (charter, § 23a); and since all the charter prerequisites or jurisdictional conditions to letting of the contract for and performance of the work were indisputably applicable to the street-railway company (charter, §§ 23b, 23c); and since a proper assessment of the cost was made by the city council, according to the measure of liability prescribed by the charter,—the sequent is, that the street-railway company was liable for such cost, in the manner and by the measure prescribed by the certificates, the street railroad being a "tract of land" within the meaning of the provisions relating to division of instalments and issuance of certificates (charter, §§ 23c and f).

Sutherland, Stat. Constr. § 216; *Black. Law Dict. verb. Utile*, p. 12, *verb. Abut*, and pp. 685, 1180; *Kuehner v. Freeport*, 143 Ill. 104, 17 L. R. A. 774; *Charter of City of Houston*, §§ 23a, 23b, 23c, 23d, 23f, *Special Laws*, 22d Leg. 1891, pp. 79-86; *Adams v. Fisher*, 63 Tex. 657; *Brenham v. Brenham Water Co.* 67 Tex. 553; 12 Am. & Eng. Enc. Law, p. 655; *Monmouth County Freeholders v. Red Bank & H. Turnp. Co.* 18 N. J. Eq. 91; *People, Dunkirk & F. R. Co., v. Castity*, 46 N. Y. 46; *Welty, Assessments*, §§ 200, 202; *North Beach & M. R. Co.'s Appeal*, 32 Cal. 312; *Purifoy v. Lamar*, 112 Ala. 123; *New Haven v. Fair Haven & W. R. Co.* 38 Conn. 422, 9 Am. Rep. 399; *Cooley, Taxn.* p. 651, note 1.

The provision of the charter (§ 23a) in relation to collection and credit of a portion of the cost from street railways, by its express language and the reason of the thing, applies only to those companies whose incip-

ient occupancy of the street is after its improvement; hence, the claim of liability only to the city might, with equal show of reason, be made by any abutting lotowner. Besides, the cost of the portion of the streets in question occupied by the street-railway company was not charged to abutting lotowners, and was hence, in effect, credited by deduction, and since the issuance of the certificates by the city to Storrie operated, in effect, an equitable assignment of the demand, it does not lie in the mouth of the street railway, in any view, to complain.

Houston City Charter, § 23a, *Special Laws*, 22d Leg. 1891, pp. 79, 80; *Fairbanks v. Sargent*, 117 N. Y. 320, 6 L. R. A. 477; *Harris County v. Campbell*, 68 Tex. 22.

It is competent for the legislature, from high motives of public policy, as in the case of revenue taxes, to exempt certain classes of property, such as homesteads, without affecting the validity of assessments on other property.

Storrie v. Cortes, 90 Tex. 283, 35 L. R. A. 666; *Connor v. Paris*, 87 Tex. 37; *Western U. Teleg. Co. v. State*, 62 Tex. 633; *Union Cent. L. Ins. Co. v. Chowning*, 86 Tex. 654, 24 L. R. A. 504; *Cooley, Taxn.* 171, 202; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 41 L. ed. 1069.

The improvement lien being laid upon the property itself, in the exercise of the sovereign right of taxation, for the public benefit, was essentially paramount to any individual interest, absolute or qualified, and hence was superior to the qualified interest of the mortgage, the improvement act being substantially in force when the mortgage was given.

Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist. Comrs. 134 Ill. 384, 10 L. R. A. 285; *Provident Inst. for Sav. v. Jersey City*, 113 U. S. 506, 28 L. ed. 1102; *Houston City Charter*, 1889, *Special Laws*, 21st Leg. p. 100; *Elliott, Roads & Streets*, p. 433; *Violet v. Alexandria*, 92 Va. 567, 31 L. R. A. 382.

The property liable was described by the charter, and the description given was therefore ample, *ratione materiae*.

The street-railway company, by failing to object or take steps to enjoin, after due personal notice of the rolls, is now estopped to urge any of such objections.

Houston City Charter, §§ 23c, 23d, *Special Laws*, 22d Leg. 1891, pp. 82, 83; *Flevelin v. Proetzel*, 80 Tex. 191; *Welty, Assessments*, §§ 312, 313; *Dyer v. Parrott*, 60 Cal. 552; *Fehler v. Gosnell*, 99 Ky. 380; *Clinton v. Portland*, 26 Or. 410; *Nelson v. Saginaw*, 106 Mich. 659; *Buckman v. Landers*, 111 Cal. 347; *Potter v. Black*, 15 Wash. 189; *Harney v. Benson*, 113 Cal. 314; *State v. Norton*, 63 Minn. 497.

Messrs. Lanier, Kirby, & Martin, for defendants:

There was no authority in law for making a roll of ownership as against the property in the street of the Houston City Street Railway Company.

Houston City Charter, § 23a, *Acts* 1891.

The action of the city council in approving the roll with the pretended name of the street-railway company thereon, it having no

lots, blocks, or other tract of land mentioned thereon or abutting on the streets paved, and because the name of the company was not given on such roll, nor the amount of its liability in such a way as to know the extent of the same, and the issuance of the pretended certificates sued on in this cause by the mayor, he being unauthorized, were each and all absolute nullities.

Dill. Mun. Corp. §§ 55, 60, 373.

There is no such thing as an equitable transfer of a claim owing to a government.

If there can be such equitable transfer, the transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor.

Christinas v. Russell, 14 Wall. 69, 20 L. ed. 762; *Rogers v. Hosack*, 18 Wend. 334; *Hoyt v. Story*, 3 Barb. 263; *Dickenson v. Phillips*, 1 Barb. 461; *Clayton v. Fawcett*, 2 Leigh, 19; *Hopkins v. Beebe*, 26 Pa. 85; *Hall v. Jackson*, 20 Plck. 194; 3 Pom. Eq. Jur. § 1290; *Trist v. Child*, 21 Wall. 441, 22 L. ed. 623; *Wright v. Ellison*, 1 Wall. 16, 17 L. ed. 555; 1 Jones, Liens, §§ 51, 52.

The notice published in the newspaper simply gave in substance the resolution, and instead of informing the street-railway company that its property was sought to be charged with the cost of paving, operated the reverse of this by informing it that the entire cost of paving was to be borne by the abutting landowners, except street intersections, which were to be paid for by the city.

There being no sufficient notice the entire contract, in so far as the street railway is concerned, is absolutely void, the proceedings not being due process of law.

Adams v. Fisher, 63 Tex. 658.

The district court erred in overruling the general demurrer of the defendants.

Chicago, B. & Q. R. Co. v. South Park Comrs. 11 Ill. App. 562, 107 Ill. 105; *O'Reilly v. Kingston*, 114 N. Y. 449; *Koons v. Lucas*, 52 Iowa, 181; *Kuehner v. Freeport*, 143 Ill. 92, 17 L. R. A. 774; *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666; *Taylor v. Boyd*, 63 Tex. 533; *Texas Transp. Co. v. Boyd*, 67 Tex. 153; 25 Am. & Eng. Enc. Law, pp. 516-527; 2 Dill. Mun. Corp. 4th ed. § 761; 24 Am. & Eng. Enc. Law, pp. 71, 72.

The principle of assessments for local improvements is the real or supposed benefit resulting from the improvement to the property on which the specific charge is laid.

Taylor v. Boyd, 63 Tex. 533; *Texas Transp. Co. v. Boyd*, 67 Tex. 153; *Kuehner v. Freeport*, 143 Ill. 92, 17 L. R. A. 774.

The property assessed must be real, and not personal.

25 Am. & Eng. Enc. Law, pp. 516-527; 2 Dill. Mun. Corp. 4th ed. § 761; *Chicago, B. & Q. R. Co. v. South Park Comrs.* 11 Ill. App. 562.

The right of way of a railroad company across a street can in no proper sense of the term be classed as property abutting on the street.

Chicago v. Baer, 41 Ill. 306; *Page v. Chicago*, 60 Ill. 441; *Parmelee v. Chicago*, 60 Ill. 267; *Guild v. Chicago*, 82 Ill. 473; *Chicago City R. Co. v. Chicago*, 90 Ill. 573, 32 44 L. R. A.

Am. Rep. 54; *O'Reilly v. Kingston*, 114 N. Y. 449; *Koons v. Lucas*, 52 Iowa, 181.

The district erred in holding the alleged paving certificates valid, and in assessing 10 per cent interest on the amount of principal sued for, and in decreeing that the judgment should bear 10 per cent interest from its date.

The certificates provide that they shall bear 8 per cent interest from their date on the principal, and 10 per cent after maturity. They describe no property. The charter describes no way by which a contractor can collect for such paving.

Violet v. Alexandria, 92 Va. 561, 31 L. R. A. 382; *Anderson v. Post* (Tenn. Ch. App.) 38 S. W. 283.

The district court erred in holding that the lien of plaintiff Storrie against the property of the Houston City Street-Railway Company is not subordinate to the lien of the defendants, the American Loan & Trust Company, and the purchasers of the property of the Houston City Street-Railway Company, and in enforcing said alleged lien of the plaintiff against said property.

Bibbins v. Clark, 90 Iowa, 230, 29 L. R. A. 278; *Pittsburgh's Appeal*, 40 Pa. 455; *Sullivan v. Clifton*, 55 N. J. L. 324, 20 L. R. A. 719; *Higgins v. Bordages*, 88 Tex. 458; *Atina Ins. Co. v. Bank of Wilcox*, 48 Neb. 544; *Waco v. Prather*, 90 Tex. 80; *Fleweller v. Proetz*, 80 Tex. 191; *Chapman v. First Nat. Bank*, 98 Ala. 528, 22 L. R. A. 78; *Fletcher v. Kelly*, 88 Iowa, 475, 21 L. R. A. 347; *Rankin v. Scott*, 12 Wheat. 177, 6 L. ed. 592; *Howard v. Milwaukee & St. P. R. Co.* 101 U. S. 837, 25 L. ed. 1081; *Cincinnati City v. Morgan*, 3 Wall. 275, 18 L. ed. 146; *Wabash & E. Canal Co. v. Beers*, 2 Black, 448, 17 L. ed. 327; *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 7 L. ed. 189.

Messrs. Hume & Kleberg and Hutehesson, Campbell, & Myer also for defendants.

Brown, J., delivered the opinion of the court:

This suit was instituted October 23, 1894, by Robert C. Storrie against the Houston City Street-Railway Company and the American Loan & Trust Company of Omaha, Nebraska, and subsequently John H. Kirby, as receiver of the said street-railway company, was made a party to the suit. The object of the suit was to recover from the street-railway company the costs of paving the streets named in the petition between the rails of the said railroad and 6 inches on each side thereof, which paving was done by Storrie under a contract with the city of Houston, and for which he received improvement certificates, upon which the suit was instituted. The petition, among other things, alleged that the plaintiff became contractor under the proper proceedings had by the city council under the charter of the city, and performed the work, receiving from the city the certificates mentioned in the petition; and that the amounts of the certificates were the cost of the work done in grading and paving the portions of the street occupied by and used by the defendant for railroad purposes.—that is, the space between its tracks and:

6 inches over. From the statement made by the court of civil appeals we state the following facts necessary to the decision of questions raised in this court:

Prior to November 5, 1883, the city of Houston was chartered by a special law, and on that date, by ordinance duly adopted, granted to the Houston City Street-Railway Company the right to lay its tracks on the streets of the city, to continue for thirty years. On October 23, 1890, that ordinance was amended so as to authorize the street-railway company to use electric power in propelling its cars, in consideration of which the company was to pay for paving the streets for 6 inches outside of its rails on each side of the track, in addition to the requirements of the charter of the city by which it was to pay for paving the space between the rails. The company accepted the terms of the ordinance, and operated its cars by electricity. On September 20, 1890, the street-railway company gave a deed of trust upon its property and franchises to the American Loan & Trust Company of Omaha, Nebraska, to secure the bonds of the said railway company. During the pendency of this suit the loan and trust company brought a suit in the United States circuit court at Galveston against the railway company to foreclose the deed of trust, and during the pendency of that suit John H. Kirby was appointed receiver. The city of Houston was not a party to the suit in the United States circuit court. The mortgage was by the United States circuit court foreclosed, and the property sold under the decree of that court, A. H. Hayward being the purchaser at that sale. In accordance with the requirements of the charter, the city council of Houston passed proper resolutions by the requisite vote for improving the streets in question, and entered into a contract with plaintiff, Storrie, in such manner that if the property of the street-railway company was included within the terms of the contract the company is liable for the costs of making the improvement under that contract, and a lien existed upon the property and franchises by virtue of the certificates issued against the said company to the contractor. It is uncontroverted that the contractor, Storrie, did the work at the instance of the city of Houston, and that the certificates sued upon were issued by the city against the railway company and represent the cost of the work done upon the streets between the rails of the said railway company and 6 inches beyond such rail, and that the work was finished when the certificates were issued. One third of the lands, lots, and blocks fronting the streets improved by the city were and are homesteads. Upon trial in the district court before the judge a judgment was rendered in favor of the plaintiff against the street-railway company for the amount of the certificates, with interest thereon at 8 per cent, and against the other parties and the street-railway company, foreclosing the lien upon the said street railway and its franchises, which judgment the court of civil appeals reversed, and rendered judgment against the railway company for

the amount of the claim with 6 per cent interest instead of 8 per cent. The court foreclosed \$18,277.94 of the judgment and the costs of the district court upon the property of the railway company as described in the petition against all of the defendants, and directed an order of sale to be issued thereon. Both parties presented to this court applications for writs of error, which were granted. The application of Storrie was granted for cause, but the application of the street-car company, the loan and trust company, and J. H. Kirby was granted because Storrie's application had been allowed, and it was desired to have the whole case before this court.

The petition of the street-car company, the loan and trust company, and Kirby presents quite a number of objections to the judgments of the district court and the court of civil appeals, which we have carefully examined, and find no error committed against them requiring a reversal of the judgment. We will, however, briefly state our views upon two of the questions presented by that application. It is contended (1) that the contract between the city of Houston and the contractor, Storrie, bound the abutting property owners to pay for the entire work of paving the streets; (2) that as to the loan and trust company the portion of the charter of the city of Houston which authorized the assessment in question is in violation of § 48, art. 3, of the Constitution of 1895 of the state of Texas. In conformity to the requirements of its charter the city of Houston took all the steps necessary to reach the point of making a contract for the pavement of the streets. The law required that the necessity for such improvement should be declared by the city through a two-thirds vote of the whole number of aldermen elected; and in compliance with that requirement of the charter the city council, by the necessary vote, declared it to be necessary to pave specified portions of a number of streets, which were designated in three separate resolutions. In each resolution the following was embraced: "That the cost of constructing said improvements, except as to street intersections, together with the cost of collection, shall be wholly defrayed by the owner or owners of the lot or lots, block or blocks, or tract of land when not laid out into lots and blocks, abutting upon the said portions of said streets to be improved, as provided for in §§ 23a *et seq.* of the charter of the city of Houston; and said improvements shall be paid for in five annual instalments." Storrie entered into a contract with the city of Houston to pave the streets named, making the resolutions a part of the contract. It will be observed that the resolution above quoted refers to § 23a of the charter of the city as fixing the manner in which the improvement named shall be paid for. Section 23a, after providing for the manner of reaching the making of a contract for street improvements, contains these clauses: "And the costs of all such improvements shall be a tax and charge against the person or persons owning such lots, blocks, or tracts of

land at the time such tax or any portion thereof shall become due as to such lots, blocks, and tracts of land and a lien and encumbrance upon the land itself, and said tax against the property owner may be collected and the lien upon the property foreclosed in any court having jurisdiction: . . . provided nothing in this act shall be construed to prevent the city council from constructing sewers and drains or making street improvements in whole or in part at the expense of the city should it be deemed advisable so to do. . . . Any railroad or street railway company shall be liable for the costs of grading, paving, or otherwise improving the portion of the street or intersection used or occupied by such railway company, and such costs shall be a lien upon the property and franchises of the company. The portion of a street occupied by any railroad or street-railway company shall be deemed to mean all that portion of the same between the rails of all tracks laid and extending 6 inches beyond the outer edge of the rails of such road, and including the space between the double tracks and between the main track, side tracks, or turnouts." Construing the language of the resolution and that of § 23a of the charter just quoted together, it means that the street-railway company should pay for all the pavement upon such streets lying between the rails of its tracks and between its different tracks, side tracks, and turnouts, and that the remainder should be paid for by the owners of the property abutting upon the said streets on each side. Under the charter the city might have paid for a portion or all of the work itself, or, as it has done in this case, require the street-car company and the abutting owners to pay the entire cost of the work. The word "wholly," as used in the resolution above copied, does not refer to, nor mean, the entire surface of the street, but means the entire cost of that portion which was to be paid for by the property owners. The city council had no authority to make a contract by which the abutting property owners would be charged with the costs of paving the entire surface of the street when it was occupied in part by a street railway, and it will be presumed that the language used was intended to bind the parties in accordance with the terms of the law which by the reference to § 23a was made a part of the contract itself. On behalf of the street-car company counsel urge with earnestness and much force that the charter of the city of Houston, so far as it authorizes the city council to make improvements upon the streets at the cost of the abutting property owners, is violative of the following section of our state Constitution: "The legislature shall not have the right to levy taxes or impose burdens upon the people, except to raise revenue sufficient for the economical administration of the government, in which may be included the following purposes: The payment of all interest upon the bonded debt of the state. The erection and repairs of public buildings. The benefit of the sinking fund, which shall not be more than 2 per centum of the public debt; and

for the payment of the present floating debt of the state, including matured bonds, for the payment of which the sinking fund is inadequate. The support of public schools, in which shall be included colleges and universities established by the state, and the maintenance and support of the Agricultural and Mechanical College of Texas, the payment of the costs of assessing and collecting the revenue; and the payment of all officers, agents, and employees of the state government, and all incidental expenses connected therewith. The support of the blind asylum, the deaf and dumb asylum and the insane asylum, the state cemetery and the public grounds of the state. The enforcement of quarantine regulations on the coast of Texas. The protection of the frontier." Const. 1895, art. 3, § 48. Article 3 of the Constitution of 1895 prescribes the organization of the legislature of the state, the qualification of its members and the like, the proceedings by which its business is to be transacted, and expresses certain requirements and limitations in the exercise of legislative functions. Section 48, above quoted, falls under the subdivision of article 3, designated in the Constitution as "Requirements and Limitations." The requirements express the commands of the people to the legislature to pass laws to accomplish certain purposes which the people determined upon as part of the policy of the state; for example, we quote the following sections: "Sec. 46. The legislature shall, at its first session after the adoption of this Constitution, enact effective vagrant laws. Sec. 47. The legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this state, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other states." These sections, with many others, show that the convention had in mind a number of topics upon which they were not willing to trust the legislature to exercise its own judgment as to whether it should legislate or not, but commanded that in these instances laws shall be passed to accomplish the purposes named. This part of the Constitution also embraces sections which prohibit the legislature from doing certain acts. Some of these are prohibitions against the doing of things by the legislature itself, and others prohibit that body from conferring authority upon municipal corporations to do the things named therein. Section 48 embodies a prohibition against the exercise of the taxing power by the legislature except for certain purposes named. The language, "the legislature shall not have the right to levy taxes or impose burdens upon the people," etc., denies to the legislative department the right to exercise this power itself, and does not refer to any action by the legislature which would confer such authority upon a municipal corporation. It limits the exercise of that power by the legislature to raise revenue for the administration of the state government, as distinguished from the administration of municipal government. The view that this section refers to "levying taxes and impos-

ing burdens" by the legislature, and to such burdens as are imposed with a view to the administration of the state government, is strongly supported by the character of the objects enumerated for which the revenue may be raised, all of which pertain to the administration of the state government, and none of which could be committed to local municipal control.

The following sections illustrate the care with which the framers of the Constitution guarded the people against what experience had shown to be hurtful policies on the part of municipal governments.

"Sec. 52. The legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the state to lend its credit or to grant public money or thing of value in aid of or to any individual, association, or corporation whatsoever; or to become a stockholder in such corporation, association, or company.

"Sec. 53. The legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee, or allowance to a public officer, agent, servant, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the state, under any agreement or contract made without authority of law."

The authority of counties, cities, and towns to levy taxes is carefully prescribed and limited by our Constitution, and the particularity with which the convention expressed in the Constitution those limitations upon the power of the legislature to confer authority upon counties, towns, and cities justifies the conclusion that it was not intended by the use of the general language employed in § 48 above quoted to prohibit the legislature from conferring upon municipal corporations the power to improve streets at the expense of the property owners. The conclusion is irresistible that in adopting § 48 of article 3, the convention did not intend to take from the legislature the well-recognized power to grant to municipal corporations the right to improve public highways at the cost of the adjacent property which is supposed to be benefited thereby. The court of civil appeals reversed the judgment of the district court, and foreclosed the lien of the plaintiff, Storrie, upon the property of the street-railway company for the cost of paving between the rails of the street railroad, and reduced the interest from 8 per cent as prescribed in the charter of the city to 6 per cent. The amount of recovery is reduced and a lien denied for the cost of paving outside the rails. Section 23a of the charter of the city of Houston provides, in substance, that any street-railway company which occupies a part of a street when it is determined to pave or otherwise improve it shall be liable for the cost of such paving "between the rails of all tracks laid and extending 6 inches beyond the outer edge of the rails of such road, and including the space between the double

tracks and between the main track, side tracks, and turnouts." The claim of Storrie was for the cost of paving the street to the extent specified in the charter, and he is entitled to a lien upon the property for the whole cost of such pavement, unless the proposition can be sustained that as to the loan and trust company the statute is unconstitutional, so far as it adds to the liability of the railroad over and above what was authorized by the law at the time its mortgage was executed.

Section 17, art. 1, of the Constitution of 1895 of the state contains this provision: "No irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof." This provision of the Constitution was in force at the time the street-railway company acquired its right in the streets of Houston and before the mortgage of the trust company was executed. The rights of both the street-railway company and the mortgage company were acquired subject to the control of the legislature upon this question. The legislature had the right to enact the law of 1891, amending the charter of Houston, by which the liability of the street-car company for the cost of paving the street was enlarged. That act does not violate the Constitution of this state nor of the United States. *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898, 73 Iowa, 367; *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist. Comrs.* 134 Ill. 384, 10 L. R. A. 285; 2 Elliott, Railroads, § 780. Mr. Elliott, in his work on Railroads, section above cited, speaking of the liens of such assessments, says: "These liens are purely statutory, and their existence, force, and extent depend upon the terms of the statute creating them. Such liens are ordinarily superior to all liens except general taxes, and the authority of the legislature to make them such is firmly established. The assessments being made on the theory that the property is benefited and enhanced in value in a sum equal to the amount of the assessment, no injury can result to other lienholders, such as mortgagees, mechanic lienholders, and the like." The Code of the state of Iowa contained the following section: "The articles of incorporation, by-laws, rules, and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be, at any time, altered, abridged, or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good." Code 1873, § 1090. The Sioux City Street-Railway Company organized as a corporation under the general laws of that state, and the city of Sioux City, by an ordinance regularly adopted by its council, conferred upon that company the right to locate, construct, and operate a street

railway upon and along certain streets of the city on terms stated in the ordinance, among which was that the said street-railway company "shall pave or macadamize in the time and manner directed the space between the rails," etc. Under this ordinance the street railway was constructed. Afterwards the legislature of Iowa passed an act granting additional powers to cities of the first class with reference to improvement of streets, etc., in which was contained the following provision: "All railway companies and street-railway companies in cities of the first class as provided in § 1 of this act shall be required to pave or repave between the rails and 1 foot outside of their rail at their own expense and cost." Laws 1884, p. 22, § 6. Subsequently the city paved the streets, and the street-railway company paid for the cost of paving between the rails, but resisted the claim for the cost of paving outside of the rails. The supreme court of the state sustained the claim of the city, and the case was removed to the Supreme Court of the United States, which affirmed the judgment of the state court. Mr. Justice Blatchford delivered the opinion of the court, in which he very carefully examined and discussed the constitutional question raised by the street-railway company, and in the course of that discussion said: "The company took its franchise subject to such legislation as the state might enact. This is plain from the provision of § 1090 of the Code [of 1873]. The company took its charter subject to the provisions of that section. The general assembly deemed it necessary for the public good to require street railways to pay for the paving of 1 foot outside of the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was not in the power of the city, by any contract with the company, to deprive the legislature of the power of taxing the company. . . . Under § 1090 of the Iowa Code, the legislature had the power, not only to repeal and amend the articles of incorporation of the company, but to impose any conditions upon the enjoyment of its franchise which the general assembly might deem necessary for the public good. The reservation of this power was a condition of the grant. The city council could make no arrangement with the company which would not be subject, under that section, to the superior power of the general assembly. . . . No question can arise as to the impairment of the obligation of a contract when the company accepted all of its corporate powers subject to the reserve power of the state to modify its charter, and to impose additional burdens upon the enjoyment of its franchise." 138 U. S. 108, 34 L. ed. 902. Not considering the fact that the street-car company entered into the contract with the city by which it agreed to pay for the extra 6 inches, it could not resist the claim of the plaintiff in this case for the cost of paving the 6 inches outside of the rails, because the legislature had the right, under the Constitution, to impose this additional burden upon its property. We 44 T. R. A.

cannot understand how the loan and trust company, which claims under a mortgage from the street-car company, could acquire a right superior to that which the mortgagor had. We know of no principle of law which would accord protection to a lien upon property when that protection would not be given to the owner. We think there can be no doubt, under the authorities cited, and especially under the case of *Sioux City Street R. Co. v. Sioux City*, that the statute in question was valid, and, if the street-car company is liable to the plaintiff for the cost of paving the extra 6 inches, the claim must be enforced for the cost of paving to the full extent claimed against all of the defendants. Section 23a of the charter of Houston, as amended in the year 1891, empowers the city council, by a vote of two thirds of the members elected, to declare the necessity for paving or otherwise improving any street of the city. The city has the power to make such improvement at its own cost, or partly at the cost of the city and partly at the cost of the property owners abutting upon such street and of any street-railway company which may occupy any portion of the street to be improved, except that the city is required to pay for the paving of the intersections of streets. It is unnecessary for us to follow the different steps required to be taken before a contract could be made for such improvement, because there is no question in this case depending upon the proper performance of such acts. The contest begins with the construction of the contract, which we have already disposed of.

The contract having been made with Storie, § 23c of the charter required that the city engineer should from time to time prepare a roll or rolls "showing the number of lots, blocks, or tracts of land, when not divided into lots and blocks, fronting on the street, alley, avenue, or highway to be improved; . . . the name or names of the owner or owners of such lot or part of lot, block, or tract of land, if known to the city engineer, and if unknown to him it shall be so stated; the number of feet frontage of such lot, part of lot, block, or tract of land fronting on the portion of the street to be improved; . . . and the proportional cost to such lot, part of lot, block, or tract of land and the total cost as ascertained and calculated by the city engineer of such improvements necessary to be borne by each, and to be paid by each owner of such property described in such roll." The city engineer was required to certify to the correctness of the roll, when it was to be submitted to the board of public works for their examination; and, after being examined by the city attorney, the law required the roll to be deposited with the secretary of the city, whose duty it was to publish a notice that the roll was placed with him, in some newspaper for four days, and to give notice to each person whose name was placed upon the roll of the fact by mailing a copy of the notice to him at his postoffice address, if known. After the expiration of ten days from the first publication of that notice, the

city council was required to approve the roll, and each owner of property whose name was upon it had the right to file a petition with the city council asking a correction of any errors committed in the assessment made against him or in the description of his property. If the city council decided adversely to the claim of the owner, he could apply within five days from the time of the approval of the roll to any court having jurisdiction for a writ of injunction to prevent the enforcement of the assessment against him, but, failing to make such application, or to procure such writ, he would be concluded by the action of the city council, except for fraud and collusion of which he was not aware, and had no opportunity to ascertain. Section 23e provides that after the rolls have been approved, if not otherwise directed by the city council, the sum assessed against each separate tract of land shall be divided by the city secretary into as many instalments as possible, not exceeding ten; no instalment to be less than \$10; adding the interest for each year on the entire amount of nondue instalments to the one falling due for that year; the first instalment to become due five days after the approval of the roll of ownership; one of the remaining instalments to become due on the same day of the month in each year thereafter until all should mature. The entire amount assessed against each tract of land would bear interest at the rate of 8 per cent per annum until maturity, each instalment to bear interest at the rate of 10 per cent per annum after maturity. A failure to pay any instalment of principal or interest when due "within sixty days of the time when suit shall have been entered on the same" would give to the party entitled to collect the indebtedness the right to declare all subsequent instalments to be due. The owner of the property is accorded the right at any time to pay the whole of the assessment to the holder of the certificate or to the city assessor and collector, who must notify the holder of the certificate or certificates, which would operate as a full discharge. Section 23f empowers the secretary of the city, on the fifth day after the roll has been approved, to issue improvement certificates for the sum assessed against each property owner, for the amounts specified on the improvement roll, showing the number of lot or lots, block, or description of the property upon which said sum of money is a lien, the name of the person mentioned in said roll as the owner, and that such sum of money is a tax against the owner, and a lien upon the property therein described. It was held by the court of civil appeals that the law did not require the street-railway property to be placed upon the roll of ownership, and from this conclusion the further conclusion is reached that the certificates of indebtedness were improperly issued against it, and that the statutory rate of interest does not apply to that company. It is true that the street-car company is not mentioned by name among the items of property required to be placed upon the roll of ownership, and a part of the description which is 44 L. R. A.

required to be given could not be made to apply to it. The descriptive matter required to be entered upon the roll applies fully to lots and blocks abutting on such streets, but the numbers do not apply to lands which abut upon the street, and not divided into blocks and lots. Likewise the street-railway property neither fronts upon the street nor has it numbers like lots and blocks, but it could be described upon the roll with the name of the owner, and the amount assessed against it. We do not think it correct to hold that, because all of the description is not applicable to the property in question, it cannot be properly placed upon the roll. Our statute requires that in making the assessment of lands for taxes the statement shall set forth the name of the owner, the abstract number, the number of the survey, the name of the original grantee, and the number of the certificate. It has been held that to omit the abstract or certificate number renders the assessment void, unless there is shown some good reason for such omission. *Morgan v. Smith*, 70 Tex. 641. Many surveys in Texas have no certificate number, and could not be described as required by the statutes; yet, if the description which is applicable be placed in the statement, it certainly would not be void for want of that which could not be applied to the subject.

It is claimed by counsel for Storrie that the words "tracts of land" can be properly construed to embrace the easement which the street-railway company had in the streets, and the proposition we find well supported by good authority, but prefer to place our decision upon the broader basis that the intention of the legislature in enacting the law shall govern, although it may appear to conflict with some of the language used in expressing that intention. *Sutherland*, Stat. Constr. §§ 218, 246; *Endlich*, Interpretation of Statutes, § 72; *Womack v. Womack*, 17 Tex. 1; *Stone v. Hill*, 72 Tex. 540; *Russell v. Farquhar*, 55 Tex. 359; *Molnery v. Galveston*, 58 Tex. 340; *Queen Ins. Co. v. State*, 86 Tex. 268, 22 L. R. A. 483; *Halbert v. San Saba Springs Land & Live Stock Assn.* 89 Tex. 230. Mr. Sutherland, in his work on Statutory Construction (§ 218), says: "It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained, and its general intent, a key is found to all its intricacies;—general words may be restrained to it, and those of narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such intention." In the case of *Queen Ins. Co. v. State*, above cited, the question was whether the law then under consideration declared the acts mentioned by it to be unlawful so as to constitute an offense. In determining that point the court said: "It is true that, while trusts are defined in the 1st section, nowhere, either in that or any other section, are they expressly declared unlawful. The following sections pro-

vide forfeitures for corporations and punishment for persons who 'violate any of the provisions' of the act, but they do not designate what shall constitute a violation of its provisions in any direct terms. Confining ourselves to the letter of the law, there is a clear hiatus—a lack of connection in its provisions. . . . There is no express declaration that trusts were unlawful—the acts which are declared to constitute a trust are not expressly made punishable, nor is any act expressly declared to be a violation of the provisions of the statute; yet the language is sufficient, we think, to manifest unmistakably the intention of the legislature to punish as offenses some of the acts defined in the first section; and it is but reasonable to conclude that the purpose was to subject them all to a like punishment. The intention of the legislature is the aim of statutory construction, and where, though not expressed, it is clearly manifested by implication from the language used, we cannot say that it should not have effect. That which is not expressed in words may be 'plainly imported' by implication." In the statute under examination there is no language which would exclude the railway property from the roll, but, like the trust law, if tested by the strict letter of the charter, there is a "hiatus," while the context clearly shows an intention to include it.

The question presented in the case of *Womack v. Womack*, above cited, was whether a law changing the time of holding district court took effect upon its passage according to the general rule then in force, or was suspended until the expiration of the time for holding the court in certain counties of that district. By its plain terms the law would have gone into effect at once, which would make void a judgment of the district court rendered at a term authorized by the old law. Judge Lipscomb used the following language: "In construing this act it is important to inquire what was the main and primary object the legislature had in view in its enactment. Taking in view the provision in our Constitution requiring the district court to be held twice a year in each county it seems to me manifest that the intention and main and primary object in view was prospective, and to fix the time when the courts were to be held in each of the counties, commencing in the year succeeding this act; that is to say, the year 1856." The court held that the legislature did not intend to produce the consequences which would flow from the letter of the law, and the intention prevailed over the language used. In the case of *Russell v. Farquhar* the supreme court, speaking through Chief Justice Moore, announced the general doctrine in the following forcible language: "If courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they are couched, it might well be admitted that appellant's objection to the evidence was well taken. But such is not the case. To be thus controlled, as has often been held, would be for the courts in a blind effort to refrain from an interference with legislative author-

ity by their failure to apply well-established rules of construction to, in fact, abrogate their own power, and usurp that of the legislature, and cause the law to be held directly the contrary of that which the legislature had in fact intended to enact. While it is for the legislature to make the law, it is the duty of the courts to 'try out the right intentment' of statutes upon which they are called to pass, and by their proper construction to ascertain and enforce them according to their true intent, for it is this intent which constitutes, and is, in fact, the law, and not the mere verbiage, used by inadvertence or otherwise, by the legislature to express its intent, and to follow which would pervert that intent." Seeking the intention of the legislature in the enactment of the law under consideration, we must look to the general scheme whereby the city of Houston was empowered to pave its streets at the cost of the property owners. As a general rule, the property to be charged would consist of lots and blocks and tracts of land not divided into lots and blocks fronting upon the streets, but on streets which were partly occupied by street railways that property would be likewise charged with the cost of the improvement. The scheme was to charge all of this property with the cost of constructing the pavement upon the different streets mentioned. The liability of the abutting property was different from that of the railway, and the liability of each was separately defined. The procedure for ascertaining the liability was alike applicable to both, and was provided for in general terms, all of which were applicable to a part of the property; but some were inapplicable to a part of it. One purpose of enacting the law was to provide the means by which the city could ascertain what would be the amount of charges against each individual and piece of property liable for the cost of the work, and to issue certificates of indebtedness against such persons and property with which to pay the contractor for the work to be done, thereby avoiding the creation of a municipal debt. The roll of ownership furnished this means for determining that question, and the issues of certificates would enable the city to make advantageous contracts for the work, because the certificates would not be subject to be contested for cause existing before they were issued. The advantage to the citizen or property owner in being placed upon the roll of property was that before the work was commenced he had the right to call upon the city council to examine the roll, and correct any wrong to him. The owner whose name was upon the roll was entitled to discharge his indebtedness in five instalments, and was guaranteed the right at any time to discharge the whole indebtedness by depositing the money with the assessor and collector of the city. Under the construction placed upon the law by the court of civil appeals the street-railway company would be denied these privileges, and would be required to pay cash for the work done at the time of its completion. On the other hand, by this construction the

street-railway company may be in default on the payment of the sum due from it, and contest the claim for any length of time, paying only 6 per cent interest, while the abutting property owner who is in default is by the statute required to pay from the time of such default 10 per cent interest. There are many other inconsistencies which would arise by holding that the street-railway company is not included in the general procedure provided for the enforcement of such claims. The discriminations and inconsistencies would work such injustice, and tend so much to thwart the main purpose of the legislature in enacting the law, as to make it unreasonable to suppose that the legislature, with any intelligent idea of the thing to be accomplished, would have enacted such a statute. We can see no sound reason for so radical a difference in the provisions made for adjusting the rights of private citizens and corporations, and without reason for it we must believe that it was not

intended. If the legislature had intended that the street railway should pay cash, and be subject to different rules from those prescribed for other property owners, it could so easily have so enacted that the absence of such provision strongly supports our conclusion that it was the intention to place all property charged with the burden of making improvements upon equality in all respects, and that the street-railway company must be held to be included in all of the provisions that apply to the abutting property owners. The court of civil appeals erred in reversing the judgment of the district court, and in rendering judgment for 6 per cent instead of 8, and in reducing the amount of the demand for which the lien was foreclosed.

It is therefore ordered that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the District Court be affirmed.

Rehearing denied.

WISCONSIN SUPREME COURT.

Julia A. HOOPER, *Respt.*,
v.

Moses HOOPER, *Appt.*

(.....Wis.....)

1. An allowance of alimony by the trial court will not be disturbed unless manifestly unjust.
2. The permanent alimony granted to a woman on divorce need not be limited to an allowance payable at stated periods sufficient for her support, but the allowance of a gross sum out of the husband's estate in addition to a monthly allowance is within the power of the court, under Rev. Stat. § 2364, authorizing such alimony as the court shall deem just and reasonable, regarding the husband's ability to pay, the special estate of the wife, and all the circumstances of the case.

(April 4, 1899.)

APPEAL by defendant from a judgment of the Circuit Court for Waupaca County awarding alimony in a divorce proceeding. *Affirmed.*

Statement by **Marshall, J.:**

Plaintiff was sixty and defendant sixty-one years of age at the time of the trial. They had lived together as man and wife about twenty years, during which time plaintiff helped to rear to ages of maturity five children of defendant by his first wife, who were from four to seventeen years of

age at the time of the second marriage. When such second marriage took place defendant was worth about \$40,000 and plaintiff not anything. During a few years preceding the trial defendant gave his children property aggregating \$20,000 in value, and was worth, when the case was decided, \$80,000, yielding a yearly income of about \$4,200, and he had in addition a large law practice. In addition to wearing apparel and personal property, when the cause was decided plaintiff was possessed of \$500 given to her by defendant, \$950 bequeathed to her by an aunt, and about \$700 accumulated by keeping boarders subsequent to February, 1895, when the separation between the parties took place. In addition she had a claim against defendant for \$500 on account of a marriage gift. The divorce was granted upon two grounds, either being adequate, and one free from any circumstance of excuse or palliation, in the conduct of plaintiff. There was awarded to plaintiff out of defendant's property, as her separate estate, \$7,000, and \$100 per month during her life, in lieu of dower rights in defendant's real property, and in full discharge of all plaintiff's rights therein, and all claims upon defendant's estate. Judgment was rendered accordingly.

Mr. C. D. Cleveland, with **Mr. Moses Hooper**, in *propria persona*, for appellant:

Professional income should not be taken into account. Defendant is sixty-four years old. He ought to be at liberty to die without leaving his estate in the hands of his children, burdened with a charge based upon professional income.

Defendant is under no obligation, even in health, to work to provide for plaintiff beyond comfortable support, there being prop-

NOTE.—For division of property or grant of permanent alimony to wife in case of divorce, see also *Powell v. Campbell* (Nev.) 2 L. R. A. 615; *Doolittle v. Doolittle* (Iowa) 6 L. R. A. 187; *Jones v. Jones* (Ala.) 18 L. R. A. 95. 44 L. R. A.

erty enough to support both without work; if either is pleased to work it should be to her or his sole benefit.

2 Bishop, Marr. Div. & Sep. §§ 892, 893, 1016.

The property held by defendant, and most of that held by plaintiff, is the fruit of defendant's earning and saving before the marriage.

Gifts when in proportion to the estate cannot be taken into account in action for divorce.

2 Bishop, Marr. Div. & Sep. § 903.

The facts in this case are such that the smallest ratio of estate should be awarded to plaintiff, conditioned only that it is sufficient for proper support.

Courts give the wife a share of the husband's income as high in some cases as one half, and as low as one seventh.

2 Bishop, Marr. Div. & Sep. § 1033; *Garner v. Garner*, 38 Ind. 139; *Hedrick v. Hedrick*, 28 Ind. 291; *Draper v. Draper*, 68 Ill. 17; *Bush v. Bush*, 37 Ind. 164; *Blake v. Blake*, 75 Wis. 339; *Campbell v. Campbell*, 37 Wis. 206; *Williams v. Williams*, 36 Wis. 362; *Burr v. Burr*, 7 Hill, 207; *Richmond v. Richmond*, 2 N. J. Eq. 90; *Williams v. Williams*, 6 S. D. 284; *Sleeper v. Sleeper*, 65 Hun, 454; *Reed v. Reed*, 86 Mich. 600; *Thiesing v. Thiesing*, 16 Ky. L. Rep. 115; *Edwards v. Edwards*, 84 Ala. 361; 2 Am. & Eng. Enc. Law, 2d ed. note 3, p. 121; *Potts v. Potts*, 68 Mich. 492; *Wilde v. Wilde*, 37 Neb. 891; *Von Glahn v. Von Glahn*, 46 Ill. 134; *Leach v. Leach*, 46 Kan. 724; *Johnson v. Johnson*, 36 Ill. App. 152; *Hardy v. Hardy*, 25 N. Y. S. R. 832; *Doolittle v. Doolittle*, 78 Iowa, 691, 6 L. R. A. 187.

Where the wife has contributed to the cause of separation or divorce, the court should make an allowance of a less sum than otherwise.

2 Am. & Eng. Enc. Law, 2d ed. p. 127; *Zuver v. Zuver*, 36 Iowa, 190; *Buerfening v. Buerfening*, 23 Minn. 563; *Peckford v. Peckford*, 1 Paige, 274.

Messrs. Quarles, Spence, & Quarles, for respondent:

Defendant's professional income should be considered.

Campbell v. Campbell, 37 Wis. 206; *Pauly v. Pauly*, 69 Wis. 419; 2 Nelson, Div. & Sep. § 912; Bishop, Marr. Div. & Sep. § 1035.

The amount of permanent alimony to be awarded is largely influenced by the *delictum* of either party.

Pauly v. Pauly, 69 Wis. 422; *Burr v. Burr*, 7 Hill, 207; *Richmond v. Richmond*, 2 N. J. Eq. 90; *Williams v. Williams*, 36 Wis. 362; *Moul v. Moul*, 30 Wis. 205; *Cole v. Cole*, 27 Wis. 531; *Hopkins v. Hopkins*, 39 Wis. 167; *Thomas v. Thomas*, 41 Wis. 234; *Blake v. Blake*, 75 Wis. 344; *Campbell v. Campbell*, 37 Wis. 223; *Harran v. Harran*, 85 Wis. 299; *McChesney v. McChesney*, 91 Wis. 269.

Under peculiar circumstances more than one half has been awarded to the wife.

Donovan v. Donovan, 20 Wis. 587; *Webster v. Webster*, 64 Wis. 438; *Thompson v. Thompson*, 73 Wis. 84.

The usual allowance is between one third and one half.

44 L. R. A.

2 Bishop, Marr. & Div. §§ 463, 464; *Williams v. Williams*, 36 Wis. 362; *Varney v. Varney*, 58 Wis. 22; 2 Am. & Eng. Enc. Law, 2d ed. p. 121; *Gercke v. Gercke*, 100 Mo. 237; *Jeter v. Jeter*, 36 Ala. 392.

Marshall, J., delivered the opinion of the court:

Appellant's complaint seems to be wholly of the award of a gross sum of money as part of the permanent alimony. The monthly allowance of \$100, it is suggested, may be materially increased, if thought best, without complaint from appellant, if the decree giving plaintiff an estate of her own out of appellant's property be reversed. We have with care, searched appellant's brief in vain for some good reason or the citation of some authority to support his claim. It is quite novel. It is, as we understand it, that in such a case no provision should be made for a divorced wife other than an allowance payable at stated periods, by the former husband, sufficient for her support. That was the old doctrine of the ecclesiastical courts when alimony meant an allowance for the support of a wife while living apart from her husband under a sentence of judicial separation, the relations of husband and wife in some respects still existing between the parties, the sentence being subject to termination and full marriage relations substantially subject to resumption at the will of the parties. Then no duty was recognized to support a fully-divorced wife. No reason whatever exists now for such a rule. Under our statutes alimony may go with a divorce dissolving the bonds of matrimony and restoring the parties to their original situation of being strangers to each other, so far as concerns marriage relations in any sense, as well as with a divorce from bed and board. The power of the court, where the circumstances, in the discretion of the trial court, seem to demand or justify it, is as ample to allow a sum of money payable in gross as alimony, as one payable in instalments or a monthly allowance. There can be no doubt about that. In *Williams v. Williams*, 36 Wis. 362, it is said that it is quite as competent for the court to assign to the wife absolutely a specific portion of the husband's estate or to order the payment of a gross sum of money as to award an annual allowance. Section 2364, Rev. Stat. provides that "the court may further adjudge to the wife such alimony out of the estate of the husband for her support and maintenance . . . as it shall deem just and reasonable, . . . having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties, and all the circumstances of the case." Thus the manner in which the wife's allowance shall be secured to her is left entirely to the court to be exercised as justice seems to require, having regard to the particular facts of each case. So the question of whether the right judgment for alimony was rendered here comes down to whether proper judicial discretion was exercised in administering the statute;

and on that subject the rule is that the decision of the trial court will not be disturbed unless manifestly unjust.

It is not only permissible to make an allowance to a divorced wife payable in gross, but in many, and in the judgment of some courts, in most, cases, it is the best method of settling the pecuniary relations of the parties. The trouble and unhappiness often resulting from keeping up some sort of relation of debtor and creditor between parties who are, legally, strangers to each other, yet so embittered by previous marital relations as to render embarrassing and exceedingly unpleasant any communication of one with the other even as to strictly business matters, is well known to all persons of average experience in life. The divorced husband often feels that the obligation to pay a sum of money at stated periods to his former wife is an unjust burden and one to be avoided if possible, which feeling ordinarily grows more intense as time continues. The divorced wife is generally made to feel that she stands in a position of a mere pensioner, living from day to day on forced contributions grudgingly made by one who looks upon her as an unjust encumbrance. In that way the wrong to the wife caused by breaking up her home is made to bear unnecessarily harshly upon and disquiet her subsequent life. Observations along this line were made in *Williams v. Williams*, resulting in a conclusion that where there is an absolute divorce it is advisable to end all relations between the parties, leaving them entirely independent of each other, if that can be practically done; that such unhappy controversies as this should be ended in such a way as to dissolve all financial relations as effectually as all marriage relations, leaving nothing that will unnecessarily mar the subsequent life of the parties.

The learned trial court proceeded on the line indicated in *Williams v. Williams*, and with wise comprehension of the needs of the situation solved it in such a way as to leave plaintiff practically independent of appellant. That situation was as follows: A wife sixty years of age who had occupied a high social position as the companion of a man about her own age, for some twenty years; a man possessed of property of the value of \$80,000 at his own figures, and of a large income therefrom, as well as from professional business; no stain was on the life of the wife palliating the act constituting one of the causes entitling plaintiff to a divorce; no fault of the wife appeared which, in law and good morals, the husband was not in duty bound to condone, and which, if he had condoned, instead of transgressing the obligations of marriage in a way that the wife could not overlook and was not called upon by any law or duty to do so, they might have continued to live together as husband and wife down to the end of their joint lives. In that situation the court said that the matrimonial bonds should be dissolved and the divorced wife, so far as consistent with certainty of future support, should be made independent of her divorced husband. To accomplish that he awarded

her, as and for a separate estate, a little less than one seventh of appellant's property, taking his own figures for the value, and further allowed her a monthly instalment amounting to about the same proportion of appellant's income, considering that derived from his property and a fair income from his business as well. It was further provided that such monthly instalments should be secured upon appellant's property so as to reduce to the minimum the danger of difficulty or unpleasantness to plaintiff in respect to collecting her income. It is useless to try to test the justness of that determination by any rule, because there is none that can be applied. Precedents are helpful, of course, but no two cases are alike. It is often said in a general way that an allowance from a moiety to a third or less of the husband's income or estate is proper, according to circumstances. The age of the parties is to be taken into consideration, their social station, their previous life, their health, their family, the responsibilities of the respective parties after the separation as to the care and support of children, the circumstances leading up to such separation, the fault which destroyed the home, the guilty party, the palliating circumstances, if any, the length of time the parties lived together, the amount and character of the husband's property, his earning capacity and that of the wife as well, and all the circumstances that in justice bear in any way upon the situation. Testing the judgment appealed from in that way, we are constrained to say that, while the learned circuit judge who tried the case amply provided for the future needs of plaintiff, he dealt so liberally with appellant that he has not only no reason to complain, but should rather feel supreme satisfaction in reflecting over the result. The plaintiff is made substantially independent of appellant at a cost to him of from one sixth to one seventh of his estate and income, and he is entirely freed from obligations to plaintiff, with whom he does not desire and has no right to live as her husband. He goes free and has the great bulk of his property and the income therefrom and his future earnings as well, aside from the amount to be paid to his former wife, freed of any claim by her, so that he may dispose of the same as he sees fit. It is not true by any means that in such circumstances the allowance to the wife should be limited to just enough for her support and that payable as she needs it, as appellant seems to urge. There is no reason for such a rule and no authority for it that has been called to our attention, and none that we are able to find. Plaintiff was entitled to support from appellant in a way consistent with his wealth and station. Besides that, she possessed an inchoate interest in all his real estate and was one of his heirs presumptive, all of which has been taken from her, and the protection to which she was entitled under the marriage contract as well, and in lieu of that she has received the alimony complained of. In *Williams v. Williams* there was one child nineteen years of age, the husband worth \$20,000 at a rather high valuation of mostly unproductive real

estate, a homestead and household effects worth some less than \$2,000, and personal property about sufficient to pay his debts, many of which were pressing him. He had no certain income. On such facts this court rendered judgment allowing to the divorced wife \$3,000 besides the homestead and household furniture; a far more liberal allowance, as appears, than the one made in the decree appealed from. If precedents are to be relied upon as controlling, *Williams v. Williams*, which has never been criticised, is sufficient for this case.

More has already been said than was really required or would have been said but for the earnestness with which appellant contends that injustice has been done to him. However hard he may have tried to look at the situation in which he was placed with an unbiased mind, he evidently has not been able to do that successfully. To us no reason whatever is perceived for complaint by him of the judgment appealed from.

Some minor questions are mentioned and discussed in appellant's brief, which have been considered. They are not of sufficient significance, however, to effect the decision on this appeal.

The judgment of the Circuit Court is affirmed.

Russell CASE, *Respt.*,
v.

Frederick HOFFMAN *et al.*, *Appts.*

(100 Wis. 314.)

1. On vacating a judgment which was void because the qualified members of the court were equally divided, the court, instead of entering judgment, may order a reargument, if it sees fit to do so.
2. A decision on a former appeal is the law of the case so far as it is applicable to the facts established on the second trial.
3. The findings of the trial court on conflicting evidence will not be disturbed unless they are clearly against the preponderance of the evidence.
4. One whose water rights have been injured by diverting a watercourse by a canal constructed across his land without his consent may make a valid contract for the continuance of the canal and a supply of water therefrom.
5. The location of a canal, and the open enjoyment of rights and privileges appurtenant thereto, constitute notice of such rights to subsequent purchasers of property affected thereby.
6. The owner of a canal, who acquires it with notice of the rights of other persons to have a certain quantity of water supplied from it, for which a dam or bulkhead in the canal is required, must maintain such dam or bulkhead as long as he continues to use the canal.
7. The owner of a canal, which has become a substitute for a natural watercourse, although he acquires it with notice of certain rights and privileges of

other persons thereon which are open, visible, and notorious, which require the maintenance by him, so long as he uses the canal, of a dam or bulkhead to furnish them water from the canal, can free himself from this obligation by the abandonment of his use of the canal.

8. A covenant by a vendee to repair a ditch which has become a substitute for a natural watercourse cannot be invoked by third persons who may profit incidentally by its enforcement.

(Winslow and Pinney, J.J., dissent.)

(September 28, 1897.)

APPEAL by defendants from a judgment of the Circuit Court for Jackson County in favor of plaintiff in a proceeding to enjoin the diversion of a watercourse. *Reversed in part.*

The case was stated by Newman, J., after the former hearing as follows:

This is an action in equity to restrain the defendants from diverting the course of a ditch or alleged watercourse from the plaintiff's lands, and to enforce the performance by the defendants of an alleged contract to maintain the ditch in its present location on plaintiff's land, for the benefit of plaintiff's cranberry marsh. The parties are all owners of land on a large marsh, many miles in extent, and covering the greater part of a government township of land. The marsh is generally nearly level, but dips to the east and to the south, but more to the east than to the south. The land is adapted to the culture of cranberries, and is valuable for that purpose, but is of little worth for any other purpose. The surface of the marsh is principally covered by a growth of moss, several inches in depth, with some grass and other vegetation, above a layer of peat of considerable but varying thickness, and all resting on a substratum of sand. The marsh is, in considerable part, made and fed by springs which arise towards the northeastern part of the township, and flow, in channels, into and form a small lake, of some 40 acres in area, called "Big Lake." The waters of the lake flow out, through depressions in its low banks, to the east and to the south. One such depression to the southeast bears some resemblance to a natural channel of a watercourse, for a short distance from the lake, where the apparent banks subside into and are lost in the general surface of the marsh. The plaintiff's lands lie to the southeast of the lake, a distance of something over 2 miles. This depression, or natural channel from the lake, is lost and disappears about 2 miles above plaintiff's land. The waters disappear from sight beneath the moss and vegetation, if not beneath the surface of the marsh, to reappear at a distance of a mile or more below the plaintiff's land, where they are gathered together, and form a distinct watercourse, which is known as the "West Branch of Beaver Creek." In this distance, of three miles or more, intervening the points where the supposed channel from Big Lake disappears, and the point where the "West

NOTE.—For former decision in this case, see *Case v. Hoffman* (Wis.) 20 L. R. A. 40, 44 L. R. A.

Branch" becomes a definite stream, there is nothing which resembles the "well-defined and substantial existence" of a watercourse. There is no channel with bed and banks. At most seasons of the year, there is no appearance of water above the vegetation. At times of melting snow and great rains, water spreads over a great part of the marsh for several miles in breadth, not only over the plaintiff's lands, but over the lands of adjoining proprietors, to the north and to the south of him. This water does not flow from or across the marsh in any defined current or channel, but stands in depressions, until it disappears by evaporation or percolation. In such places the vegetation is killed, but the surface of the marsh is not broken by a water channel, nor do these places have, in any respect, the appearance of a continuous channel of a watercourse. They are widely dispersed over the surface of the marsh, and not in such relation to each other as to indicate a continuous channel across the marsh. They were designated by some of the surveyors as "pot holes." Some of these "pot holes" were upon the plaintiff's land, some were to the north of it, some were to the south of it. There were no more distinct evidences of the existence of a watercourse across the plaintiff's lands than upon the lands of adjoining proprietors to the north or to the south, while the general dip of the marsh would seem to indicate that the larger part of the water would, in natural conditions, pass to the north.

In the years 1880 and 1881, Messrs. D. A. and C. A. Goodyear dug a ditch through a part of this marsh, above the plaintiff's lands, extending to Big Lake. The primary object of this ditch was to enable the Goodyears to float pine sawlogs to their saw-mill, which was situated near the southeastern part of the marsh. In 1883, the legislature, by chapter 271 of that year, sanctioned the digging of the ditch, and gave a franchise to maintain it for a period of ten years. The ditch was of sufficient magnitude to successfully float logs to the mill. In its course the ditch ran through a corner of land belonging to the plaintiff. In times of freshet it gathered more water than would be contained by its banks. It would then overflow, to the damage of adjoining owners of the marsh. It became convenient to the Goodyears to accommodate this overflow by a lateral ditch across the land of the plaintiff. In October, 1885, they made an oral agreement with the plaintiff, whereby they agreed to permit the plaintiff to take water for his cranberry culture from the principal ditch, in consideration of his permission to dig the lateral ditch upon his land. This agreement was not reduced to writing until February 21, 1891, when the Goodyears gave the plaintiff a statement, in writing, that such an agreement had been made, and the substance of its provisions. The plaintiff's privilege and the consideration are stated as follows: "Russell Case was to be permitted to have the privilege of using such amount of water from the said logging ditch as might be necessary for his use upon his said premises in the cultivating and raising

of cranberries, whenever the same might be needed for such purpose. The consideration for the said privilege of using such water was the permission, granted by said Russell Case to said D. A. and C. A. Goodyear, to enter upon his said land, and to construct a ditch through and over the same; the said ditch to be used as an outlet in times of high water, for the safety of certain dams, . . . and to prevent overflow on the adjacent cranberry marshes." The Goodyears constructed the contemplated ditch, and the plaintiff used water from the logging ditch until near the time of the commencement of the action. The Goodyears used the ditch for the floating of logs to their mill until the supply of logs was exhausted, in 1888. In October, 1889, they sold the ditch to the defendant Hoffman, who bought it with the design to use it to supply water for the irrigation of cranberry lands on the marsh belonging to him and the other defendants. The other defendants had some interest in the purchase of the ditch. Hoffman agreed with the Goodyears to keep the ditch in repair, to furnish water to irrigate Goodyears' cranberry lands, and to save and keep the Goodyears "free and harmless from all cost, liability, or damage on account of said ditch, or the construction, maintenance, and repair thereof, or for any want of repair thereof." There was a succession of dry seasons, which made a supply of water for the irrigation of cranberry lands in that neighborhood very desirable. The defendants deemed it to be to the advantage of their cranberry interests on the marsh to change the course of the ditch where it crossed the plaintiff's land. There was some claim that he took more water from the ditch than he was entitled to. In 1891 they commenced the digging of a new ditch across the lands of the defendant Stickney, above the plaintiff's land, with the intention to divert the ditch entirely from the plaintiff's land. This action was then brought to restrain the defendants from making the proposed change in the course and location of the ditch, and to compel the defendants to maintain and keep it in repair in its old location, so as to furnish the plaintiff with so much water as should be needed for the use of his cranberry marsh. The trial court gave judgment, whereby it permanently enjoined the defendants from changing the course and location of the ditch, and directed them to maintain and keep the ditch in repair, so that the plaintiff could perpetually draw therefrom a supply of water for his cranberry land. From this judgment the defendants appeal.

Messrs. Bushnell, Rogers, & Hall for appellants.

Messrs. La Follette, Harper, Roe, & Zimmerman, for respondent:

The facts establish a natural watercourse.

Hinkle v. Avery, 88 Iowa, 47; *Rummell v. Lamb*, 100 Mich. 424; *Lux v. Haggin*, 69 Cal. 255; *Bunting v. Hicks*, 7 Reports, 293; *Shields v. Arndt* (N. J. Eq.) 4 Lead. Cas. Am. Law of Real Prop. 309, and notes.

Even if the water does not technically

constitute a watercourse, the plaintiff could still enjoin the defendants from diverting the same from his land.

The rule applicable to surface water is not applied where the water was a benefit and not an injury.

Abbott v. Kansas City, St. J. & C. B. R. Co. 83 Mo. 272, 53 Am. Rep. 581; *O'Brien v. St. Paul*, 25 Minn. 335, 33 Am. Rep. 470; *Chesley v. King*, 74 Me. 174, 43 Am. Rep. 569; *Washb. Easements & Servitudes*, 49; *Sucett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *McClure v. Red Wing*, 28 Minn. 186; *Pettigrew v. Evansville*, 25 Wis. 229, 3 Am. Rep. 50; *Hoyt v. Hudson*, 27 Wis. 659, 9 Am. Rep. 473.

The Goodyear contract was one that a court of equity will enforce.

Morse v. Copeland, 2 Gray, 302; *Van Ohlen v. Van Ohlen*, 56 Ill. 529; *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497; *Coffman v. Robbins*, 8 Or. 278; *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 142; *Olmstead v. Abbott*, 61 Vt. 281; *Newcomb v. Royce*, 42 Neb. 323; *Bunting v. Hicks*, 7 Reports, 293.

Bardeen, J., delivered the opinion of the court:

The facts upon which this litigation is founded are sufficiently stated in the opinions heretofore written in this case. This case made its first appearance in this court in 1893, on an appeal from an order sustaining a demurrer to the complaint, and is reported in 84 Wis. 438, 20 L. R. A. 40. The decision in the court below was made by the late Justice Newman, who was then presiding at the circuit. The order of the circuit court was reversed, and the cause remanded for further proceedings according to law. Issue was joined by proper answers, testimony was taken, and findings and judgment were entered for plaintiff. From this judgment, part of the defendants, feeling aggrieved, took this appeal. The case was argued at the January term for 1897, and on September 28 of that year a decision was announced, by a divided court (Justice Newman casting the deciding vote and writing the opinion), reversing the judgment of the court below. A timely motion for a rehearing was made, and subsequently a motion to vacate the judgment so entered was submitted, the grounds of which sufficiently appear in the opinion of Mr. Justice Winslow, reported herewith.* The former judgment was vacated, and a reargument of the case ordered. Additional briefs have been submitted, and the court has again been favored with a restatement of the claims of the respective parties from able counsel. The case now comes for final determination upon the merits. The plaintiff insists that a judgment of affirmance should be entered, because when the case was first heard the justices who were qualified to hear it were equally divided as to the merits of the case, and a judgment of affirmance, under the rule,

should have been entered. It is needless to say that such judgment was not entered. The judgment that was entered was void. It stood, however, as the judgment of the court until it was vacated, which was at a subsequent term; and when so vacated this court had the power either to enter judgment, or to order a reargument. It saw fit to do the latter, and the case stands precisely as if no judgment had in fact been entered,—to be determined according to the light afforded the court by the new argument, and the additional opportunity for reflection and consideration of the matters involved.

At the outset one thing must be noted, and that is, so far as applicable to the facts established on the trial, the decision first rendered upon the demurrer must be considered the law of this case. Whether good law or bad law, it is, and must remain, the law by which this court must be guided in all its future action in this case. We shall not indulge in any hair-splitting refinements, or in any effort to discover a double interpretation to be given the former decision. The issue raised by the demurrer, giving the language of the complaint its usual and ordinary interpretation, was whether it described a watercourse to and over plaintiff's land. The facts were set out in detail, and the court considered them in the light most favorable to the defendants' present contention. Upon such consideration it was then decided that a watercourse was described, "although it showed that the stream spread over wide reaches of marsh and swamp lands, and percolated the soil in many and most places" between its source and the place where it was again collected into a well-defined stream. Whether this determination is supported by authority, or whether it is "absurd or inconsequential," it is not our present purpose to inquire. It is the law of this case, in plain and unmistakable language, and by which we must be governed.

By reference to the findings of the trial court, we find that he has followed with great fidelity the facts set out in the complaint. He finds that under natural conditions the stream had its source in certain living springs, which discharge their waters, by definite and clearly-marked channels, into Big Lake, and thence southeast, though not by a continuous surface channel, but with a definite and clearly-marked flow, across other lands, and on and past plaintiff's lands, and into the West Branch of Beaver creek, and that in so doing the water spread out in places, and flowed over and through the moss and peat, and in many places made for itself bed, banks, and channels, some of which still exist, and was of such volume, when confined to a narrow channel like the canal in question, as to be capable of floating saw logs. His findings, so far as the source, direction, and volume of the stream are concerned, support the allegations of the complaint, and in some of the main particulars are even stronger than alleged therein. His findings in these respects are most earnestly challenged as not being supported by the evidence, and as being contrary to the real

*That opinion is omitted from this report because it dealt solely with the question of the disqualification of Justice Newman, and throws no light on the principal question involved in the case. [Ed.]

weight of the evidence. The earnestness of this contention has induced te court to examine with the most painstaking care and thoroughness the great mass of testimony preserved in the printed record, and to consult the many maps and exhibits in the case, which are claimed to possess helpful value. This examination leads to the disclosure that as to very many of the main facts the evidence is in irreconcilable conflict. A finding either way upon many of the disputed questions would find support in the evidence submitted. Such sharp conflicts, such positive contradictions, emphasize the necessity of the appellate court adopting the rule of not disturbing the findings of the trial court unless they are clearly against the preponderance of the evidence. The trial judge possesses many advantages of judging the credibility of witnesses. He becomes invested with many facts, circumstances, and details on the trial that cannot be transmitted to us; and when it is evident that he has reviewed the case with care, and that he has sought, as seems in this case to have been done, to carefully and impartially distinguish the true from the false, his conclusions ought not lightly to be brushed aside. We find this to be a case where the situation of the trial judge must have been very helpful in arriving at a conclusion. A careful review of the evidence in detail convinces us that the findings of the court below ought not to be disturbed. It would serve no useful purpose to discuss the evidence at length. The opinion of Mr. Justice Marshall, filed at the former hearing, contains a sufficiently ample discussion of the evidence to support the conclusion we have reached.* The findings of the court in re-

gard to the so-called Goodyear contract cannot be successfully impeached. There can be no doubt but that such a contract was made, that it was founded upon a valuable consideration, and that, so far as the plaintiff's use of the water from the canal is concerned, his rights were open, visible, and notorious. The findings seem to be strictly in accord with the great weight of the evidence and with all the probabilities of the case. At the time the defendant Hoffman made his alleged purchase of the Goodyear interest in the canal, he found this contract so far executed that the lateral waste-water ditch had been dug to the eastward, and plaintiff had tapped the main canal, and was in the enjoyment of a supply of water therefrom for the purpose of cranberry cultivation. The main canal had been dug across plaintiff's land without his consent, and the great volume of the water that came to his land naturally had been diverted to the south. In times of high water, large quantities of logs and debris escaped from the canal, and were deposited upon plaintiff's land. The plaintiff had made a claim for damages by reason thereof. He then agreed to permit the canal to remain where it had been constructed and to forego the claim for damages; and the Goodyears built the waste-water ditch to the eastward, and from which the plaintiff was to receive so much water as was reasonably necessary for his cranberry culture. As between the Goodyears and the plaintiff, it was a valid and binding contract, and, as we think, enforceable in equity. The location of the canal, and plaintiff's open enjoyment of the rights and privileges appurtenant thereto, was notice to Hoffman of the plaintiff's rights; and he

*As follows:

It remains to be seen whether the facts alleged in the complaint, held to constitute a cause of action, were found to exist by the trial court, and, if so, whether such findings can be disturbed as against the clear preponderance of the evidence. If these questions are resolved in plaintiff's favor, he is entitled to such relief as will protect his rights as a riparian proprietor, as against the defendants, who insist on diverting the water from the alleged watercourse, so as to prevent its reaching his land.

We now turn to the findings of fact filed by the learned circuit judge, and read in regard to the alleged watercourse, as follows: "The source and flow of water . . . in a state of nature was . . . as follows: . . . Beaver creek . . . had its source or origin in certain living springs located in section 8 in said town. These springs discharge their waters at all seasons of the year by definite and clearly-marked channels, in which a common stream, several feet in width, varying in depth, but always with a fixed channel, with bed and banks and steadily flowing stream, and water running in a southeasterly direction, a distance of some 40 or more rods, into the lake known as Big Lake. . . . At the south end of Big Lake the waters were discharged by a channel or outlet to the southeast, and thence, though not by a continuous surface channel, but with a definite and clearly marked flow, in a southeasterly direction through portions of sections 9, 16, and 15, the north half and southeast quarter of section 22, the south half of 23, and the southwest quarter and the southeast quarter of sec-

tion 24, and thence easterly into Beaver creek. This stream from its source to where it flowed into Beaver creek was called the West Branch of Beaver creek, and though under natural conditions the water spread out in places and flowed over and through the peat and moss between sections 8 and 24, it, in many places along its course, made for itself channels with bed and banks, some of which channels still exist in sections 15, 19, 22, and 23." See finding III. "At the southeast of Big Lake the waters thereof flowed out for some distance through a well-defined outlet of said lake, with bed and banks, and from thence through a portion of section 9 and sections 15, 16, 22, 23, and 24 to Beaver creek. . . . From Big Lake down to the continuous channel of the west branch of Beaver creek in sections 23 and 24 the water, under natural conditions, did not flow along and in a continuous channel throughout the entire distance, but through the larger part of the distance spread out over the surface and beneath the surface, and ran through the moss and peat in a general southeasterly direction, as above indicated. The volume and current thereof were sufficient, however, to plainly mark its direction and flow, and in places, some of which were on the lands of the plaintiff, to make for itself channels, as above stated, establishing conclusively that the waters flowing out of Big Lake naturally came to and flowed over plaintiff's land in section 22, and from thence to the east, where it was again collected in a natural stream with continuous and permanent bed and banks. Had the soil through which it ran been free from moss and peat, which for the most part covered

was likewise chargeable with notice that the waters of a natural stream had been diverted from their usual course, and that it was impossible to restore the flow to its former course. With these conditions before him at the time of his purchase of the Goodyear interests, he took the same with the duties and obligations imposed upon his grantors, so far as they were disclosed by the situation. The attempt to alter the conditions, and to divert the flow of water entirely from plaintiff's land, was therefore wrongful, and without right or authority.

The plaintiff was entitled to the flow that came from Big Lake in a state of nature, and that right continued, notwithstanding the waters had been gathered into a channel, and diverted from their original course. With a view of settling the controversy forever between the parties, the court found the plaintiff entitled to receive such an amount of water as would flow through an orifice 6 by 10 inches in a sluice box in the canal, under a minimum head of two-tenths of a foot, which he finds is less than came to his lands in a state of nature. The evi-

it, the water would have made along its entire course a continuous and well-defined channel with bed and banks." Finding IV.

It would seem that argument is unnecessary to demonstrate that the facts thus found are precisely those which this court said in the former decision are the essential elements of a watercourse, and that to encumber this opinion with argument in that regard would be a mere work of supererogation. The learned circuit judge obviously followed the decision with scrupulous care. The language of the complaint and of the decision of this court, as to its sufficiency, are copied substantially into the findings. In the light of this, having from the evidence traced the water from its source to where it flowed out of Big Lake to the southeast and spread over and disappeared in the marsh, and found from the evidence that it flowed on from such point of disappearance in most or all places through the moss and peat and under the surface to where it assumed the shape of a visible stream below plaintiff's land, and that the conditions shown by the evidence demonstrated conclusively that the water which formed a visible, flowing stream below plaintiff's land was the same water that flowed out of Big Lake to the southeast, the trial court could not come to any other legal conclusion than that the watercourse was continuous from its source to and across plaintiff's land. It only remains to be seen whether the findings of fact are against the clear preponderance of the evidence, for if not, certainly, by a rule as firmly established as any in our jurisprudence, they cannot be disturbed, and plaintiff is entitled to substantial relief, as it is conceded that if the facts establish an ancient watercourse, the canal has taken its place.

A brief review of the evidence will amply sustain respondent's claim that the findings cannot be disturbed under the rule above referred to, and demonstrates clearly that no other conclusion could reasonably have been reached. There is evidence in abundance that before the building of the canal, in times of high water, there was a perceptible surface flow through substantially the whole distance from the lake to plaintiff's land, and that when the canal was dug it was located with reference to the inflow of water from the lake, as indicated by water flowing upon the surface in many places. Professor Conover, one of the surveyors, testified to the existence of depressions indicating the flow of water all the way to plaintiff's land; that he followed such depressions down from the lake and examined the indications closely; that the water which flowed out of the lake to the southeast and then spread out over the marsh flowed southeast too, and the greater part passed over plaintiff's land; and that the canal entirely intercepted the natural flow, so plaintiff could not receive any of the water except by way of such canal. In respect to the depressions showing the natural channel he said

that some of them were as long as 300 feet or perhaps longer, with sharp-cut edges along which grass lay, just as though a current had swept it there; that near the north line of Mr. Case's land there was a channel 300 or 400 feet long. Samuel F. Crabbe, another engineer, who spent a large amount of time upon the land, testified, in effect, that there were plain channel markings all the way to plaintiff's land; that he found channels on such land leading towards Beaver creek, some of them very marked, all leading in the same general direction; that there was one very marked channel reaching nearly across a 40; that this channel had very definite banks, and that there was considerable water in it; that he followed the channels along to Beaver creek; that the indications were plain that the water which flowed out of Big Lake to the southeast flowed through the swamp and marsh, where indicated by channel markings, into Beaver creek to the south and east of plaintiff's land. There is a large amount of other evidence in the record of the same general character, and evidence from several persons who were familiar with the country before the construction of the canal, to the effect that there was then an unmistakable flow of water from the lake to plaintiff's land. Mr. Brooks testified that he visited the country as early as 1873; that the inlet at the lake was then 2 or 3 rods wide; that the water was running out of the lake to the southeast in a considerable body the widest channel being as wide as 12 feet; that in 1875 he was on the ground again and followed the open channel half a mile and traced it substantially to plaintiff's land; that he could then follow the channel by walking in the water; and that in 1876 he again traced the water over the same course. Mr. G. W. Hancock testified that in 1882 he traced the watercourse from the lake down to and across plaintiff's land. Mr. Rhodes, who helped dig the canal, testified that when they were digging the main water supply came from ahead, from toward the lake, and that they had difficulty at times, by reason of the peat at the bottom of the ditch rising up; that when they got near to the lake the flow of water was very strong. Evidence of like character to that specially mentioned, altogether making a very strong case, appears in the record, fully warranting the trial court in finding that it establishes conclusively that before the canal was dug the water flowing out of Big Lake naturally came to and flowed over plaintiff's land in section 22, and to the east of it, where it was collected into a natural running stream, with continuous and permanent bed and banks, and that the building of the canal gathered the water into and caused it to go by way of such canal, and interfered with and so changed the natural flow that if the flow be now interfered with by way of such canal, to the extent of such interference, it will take the water that was formerly wont to flow to and over plaintiff's land.

dence fully sustains this finding if, indeed, it does not show that he was entitled to more water than was awarded him.

The court's findings establish the fact that the canal in question became a substitute for a natural watercourse, and that plaintiff was entitled to receive therefrom so much water as was reasonably necessary for cranberry cultivation on his land, under the limitations stated. He required the plaintiff to construct and maintain a waste gate on his land, as an outlet in times of flood. He enjoined upon the defendants the duty to restore the waters to the canal as originally constructed, and to build and maintain a dam or bulkhead to hold back the water adjudged to the plaintiff. To this extent the court would seem to have been justified by plain principles of equity. But he goes further, and adjudges that the defendants, "their heirs, grantees, or assigns, shall perpetually keep such canal in such condition of repair that the quantity of water hereinbefore found to be due the plaintiff may at all times be received by him in the manner stated," and, in case of their failure so to do, then plaintiff might repair the same at their expense. The plaintiff's rights in the premises are based upon the fact that water came to his land naturally, and that the canal has become and is a natural watercourse. In a state of nature, the water came to him *en masse* and uncontrolled. Being delivered to him at this time by means of the canal, he is possessed of much greater advantages of control over it. It thereby becomes much more available for his use than formerly, and this fact must have weight with a court of equity, when considering the mutual obligations of the parties. Such being the foundation of the plaintiff's rights, and the fact being admitted that the manner in which the water is now delivered to plaintiff from above is an advantage to him over the old way, it is not exactly clear to us why defendants should be charged with the perpetual maintenance of this "natural watercourse" above the plaintiff's land. Certainly the defendants ought to be required to restore the canal to the condition it was in before their unlawful interference, and to keep up the canal on his lands as heretofore suggested. They should also be restrained from in any way interfering with or diverting the flow of water from Big Lake through this canal. The fact that the waters from the Bear Bluff canal had been turned into it gave defendants no right to divert all the waters that came down the main channel. The court saw fit to apportion the waters between the parties on a basis deemed just and equitable and that finding cannot be disturbed. The defendants seek to carry water to the southward, in order to improve and cultivate their own lands. To do so, and not to interfere with the water rights of plaintiff, it was necessary that the bulkhead should be constructed on plaintiff's land. Therefore it seems but just that defendants should be required to maintain the same so long as they continue to receive water from this source.

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As successors to the Goodyear interests, the defendants were only chargeable with such notice of the plaintiff's rights as the actual situation presented. So far as we can discover, there is no evidence that defendants had actual knowledge of the terms of the contract between the Goodyears and plaintiff. Finding plaintiff in the actual enjoyment of certain rights and privileges in the canal, which were open, visible, and notorious, the defendants, in equity, were bound to respect those rights as they appeared, and to make due inquiry as to their duration and extent. There is nothing in the Goodyears' contract with him that compelled them to a perpetual maintenance of this canal. Nor, as we understand it, does the proof show that defendants are the owners of all the land through which the canal flows before it reaches the plaintiff's land. The Goodyear franchise (Laws 1883, chap. 271), by its terms, gave them the power to handle, own, and control the canal for the term of ten years from the passage of that act. At the expiration of that time the right to collect tolls for floating timbers thereon ceased. There was no implied obligation to keep up and maintain the ditch on their part after the expiration of this period. Hoffman succeeded to the rights of the Goodyears in October, 1889. By the instrument of assignment, Hoffman took the "rights, franchises, privileges, obligations, and duties conferred, granted, and imposed" on them by virtue of the act of 1883; and he also agreed with them "to keep and maintain in proper repair, and keep repaired, said ditch or canal," to save the Goodyears harmless from all liability, and to furnish them with water to irrigate their cranberry lands contiguous to said canal. This covenant to repair the ditch was personal to the Goodyears, and cannot be invoked to sustain the judgment. The plaintiff might profit incidentally by its enforcement, but he can compel its enforcement only so far as it affected his rights, of which the grantees of the Goodyears were bound to take notice. The plaintiff's right to perpetually take water from the canal being based upon the theory that it has become a natural watercourse to his land, such right cannot be amplified to the extent of casting the burden of its perpetual maintenance upon those who desire to make use of such water as flows past him to the south. Undoubtedly the enjoyment of the water flowing past plaintiff's land will necessitate the maintenance of the canal above, and to that extent plaintiff will receive incidental benefits; but there is nothing in the situation that we can discover that will prevent defendants from abandoning their privileges. They ought not to be permitted in any way to divert the water or lessen its flow from Big Lake. So long as they seek to continue the use and enjoyment of the water in the canal below plaintiff's lands, they should be compelled to maintain the dam or bulkhead as adjudged by the court; but, should they desire to abandon such use, then they should be freed from any obligation to maintain the canal at any point. In so far as the judg-

ment imposes the burden on defendants to perpetually maintain the bulkhead on plaintiff's land, and the canal above the same, it cannot be sustained. The judgment should require defendants to restore the water to the channel as it flowed before their unlawful interference, and they should be restrained from in any way interfering with or diverting the flow of water from Big Lake. They should also be required to build the bulkhead on plaintiff's land as adjudged by the court and to maintain the same so long as they continue to use the water flowing past said land. No obligation in favor of plaintiff should be imposed on them to maintain the canal above his land.

That part of the judgment which is contrary to this opinion is reversed, and the judgment in all other respects is affirmed, and the cause is remanded for further proceedings in accordance with this opinion. No costs are allowed to either party, except that the respondent shall pay the fees of the clerk of this court.

Winalow, J., dissenting:

I do not intend to add materially to the literature of this unfortunate case, but simply wish to record my dissent from the principal conclusions which have now been reached by the majority of the court. In my opinion, there is no satisfactory evidence in the case which sustains the findings of the trial

court upon the main question of an ancient watercourse. Granting, as I cheerfully do, that the decision upon the demurrer to the complaint is the law of this case, I still do not think that a watercourse was shown within that decision. The evidence shows, to my mind, simply a vast marsh, miles in extent, into which waters from Big Lake oozed, and surface waters collected, permeating the soil, and became practically stagnant and lifeless; forming a vast expanse of bog, moss, and slime. Out of this swamp, also, waters oozed at other places towards the east; but to say that it was a watercourse is, to my mind, simply a contradiction of terms. By the same reasoning there is scarcely a marsh in the state which could not be converted into a watercourse and the owners subjected to all the duties and limitations which devolve upon the owners of the banks of a watercourse. Nor can I subscribe to the idea that the oral contract with Goodyear fastened a perpetual servitude for all time upon the lands which Goodyear owned in whosoever hands they might come, to furnish water to the plaintiff through the artificial canal. Hence, I think this judgment should be reversed *in toto*. I am authorized to state that Pinney, J., concurs in these views.

Petition for rehearing on behalf of defendants dismissed September 20, 1898.

SOUTH CAROLINA SUPREME COURT.

Isaac BROWN, Admr., etc., of Lawrence Brown, Deceased, *Appt.*,
v.

ORANGEBURG COUNTY, *Respt.*

(.....S. C.....)

The liability of a county "in all cases of lynching when death ensues," under Const. art. 6, § 6, is not limited to cases in which the persons lynched were prisoners or in custody of the court, although the provision contains the words "without regard to the conduct of the officers," as these mean that this liability is without reference to other provisions respecting the lynching of prisoners.

(April 20, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Orangeburg County in favor of defendant in an action brought to hold defendant liable for the lynching of plaintiff's intestate. *Reversed.*

The complaint alleged that on or about January 3, 1897, Lawrence Brown was arrested on the charge of arson, but was released and discharged from custody. That on the night of January 5, a body of men

whose names were unknown to plaintiff, unlawfully assembled with the sole purpose of taking the law into their own hands, and in pursuance thereof they did forcibly and violently apprehend the said Brown, and hang him by the neck to a post at the crossing of the South Carolina & Georgia Railroad, and shoot him until he was dead.

Further facts appear in the opinion.

Messrs. Raysor & Summers, for appellant:

The constitutional and statutory principle here involved while of recent origin in this state, is not new. It was one of the laws of Canute, the Dane, subsequently recognized by his Saxon successors, from whom comes the common law, when any person was killed, and the slayer escaped, the ville should pay forty marks for his death, and if it could not be raised in the ville, then the hundred should pay it.

Similar statutes for the protection of human life from the unrestrained, the overmastering passion of the mob have been enacted in other states, notably in Alabama, Kansas, and Ohio.

Atchison v. Twine, 9 Kan. 356; *Dale County v. Gunter*, 46 Ala. 118; *Luke v. Calhoun County*, 52 Ala. 115.

These statutes have invariably been held constitutional, and if the second section of our act is broader than the constitutional provision, for the reason that it is an independent section, and includes within its

NOTE.—As to liability of municipalities for property destroyed by mob, see *Glanfortone v. New Orleans* (C. C. E. D. La.) 24 L. R. A. 592.

As to liability for killing of human being by a mob, see *New Orleans v. Abagnatto* (C. C. A. 5th C.) 26 L. R. A. 329.
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See also 45 L. R. A. 848.

terms all cases of lynching, it should be sustained.

Darlington v. New York, 31 N. Y. 164, 88 Am. Dec. 267; *Hagerstown v. Sehner*, 37 Md. 180; *Chadbourn v. New Castle*, 48 N. H. 197; *Folsom Bros. v. New Orleans*, 28 La. Ann. 936; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; *Orr v. Brooklyn*, 36 N. Y. 661.

The constitutional provision and the statute under consideration are both remedial and penal. They are remedial so far as they provide for compensation to the legal representative of the person who has been lynched, and penal so far only as they throw the burden of that compensation upon the county within whose borders the lynching occurred.

Allegheny County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670.

Being remedial they are to be construed liberally, to carry out the purposes of the enactment, suppress the mischief, and advance the remedy contemplated by the Constitution and the statute.

Endlich, Interpretation of Statutes, § 108, p. 142.

Lynching being the mischief to be remedied, the Constitution and the statute must be so construed as to suppress the mischief.

Underhill v. Manchester, 45 N. H. 214; *Gianfortone v. New Orleans*, 61 Fed. Rep. 64, 24 L. R. A. 600.

Where a provision in a Constitution general in its language is followed by a proviso, the proviso is to be construed as taking no case out of the provision that does not fairly fall within the terms of the proviso, the latter being understood as carrying out of the provision only specified exceptions, within the words as well as within the reason of the former.

Endlich, Interpretation of Statutes, § 526, p. 742; *Potter v. Third Nat. Bank*, 102 U. S. 163, 26 L. ed. 111.

The office of a proviso is also to make clearer the meaning, and prevent any misinterpretation that might exist, if cases which the legislature did not mean to include were brought within the statute.

Endlich, Interpretation of Statutes, § 184; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. ed. 80; *Boon v. Juliet*, 2 Ill. 258; *Ihmsen v. Monongahela Nav. Co.* 32 Pa. 153.

The greatest deference is shown by the courts to the interpretation put upon the Constitution by the legislature, in the enactment of laws and other practical applications of constitutional provisions to the legislative business.

Endlich, Interpretation of Statutes, § 527; *Moers v. Reading*, 21 Pa. 188; *Bingham v. Miller*, 17 Ohio, 445, 49 Am. Dec. 471; *Johnson v. Joliet & C. R. Co.* 23 Ill. 207; *Howell v. State*, 71 Ga. 224, 51 Am. Rep. 259; *Baltimore v. State*, 15 Md. 376; *People, Livesay, v. Wright*, 6 Colo. 92.

The history of the enactment and its title may also be resorted to in its construction.

State v. Stephenson, 2 Bail. L. 334; *Garrick v. Florida C. & P. R. Co.* 53 S. C. 448.

Mr. J. B. McLauchlin also for appellant.

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Mr. William C. Wolfe, for respondent:

There can be no action against the county unless expressly authorized by statute.

All v. Barnwell County, 29 S. C. 161.

The Constitution and act must be construed together.

Endlich, Interpretation of Statutes, 35, 57, 178, 181, 515; Bishop, Written Laws, 89; *Esbridge v. State*, 25 Ala. 30; *Banger's Appeal*, 109 Pa. 79; Co. Litt. 381a; *United States v. Bassett*, 2 Story, 389.

Intention must be sought regardless of division into sections or groups.

Endlich, Interpretation of Statutes, § 70, p. 258.

This is a penal statute, and must be strictly construed.

Endlich, Interpretation of Statutes, 331, 453.

The presumption is against any change in existing law.

Endlich, Interpretation of Statutes, 127.

Messrs. Henry H. Brunson and Charles G. Dantaler also for respondent.

Gary, A. J., delivered the opinion of the court:

The principal question raised by the appeal is whether the presiding judge was in error in directing the jury to find a verdict in favor of the defendant on the ground that § 6, art. 6, of the Constitution, and the act of the legislature entitled "An Act to Prevent Lynching in This State" (Acts 1896, p. 213), conferred upon the plaintiff no right to recover damages against the defendant, as the person lynched was not a prisoner.

Section 6, art. 6, of the Constitution is as follows: "In case of any prisoner lawfully in the charge, custody, or control of any officer, state, county, or municipal, being seized and taken from said officer through his negligence, permission, or connivance, by a mob or other unlawful assemblage of persons, and at their hands suffering bodily violence or death, the said officer shall be deemed guilty of a misdemeanor, and upon true bill found, shall be deposed from his office pending his trial, and upon conviction shall forfeit his office, and shall, unless pardoned by the governor, be ineligible to hold any office of trust or profit within this state. It shall be the duty of the prosecuting attorney within whose circuit or county the offense may be committed to forthwith institute a prosecution against said officer, who shall be tried in such county in the same circuit, other than the one in which the offense was committed, as the attorney general may elect. The fees and mileage of all material witnesses, both for the state and the defense, shall be paid by the state treasurer in such manner as may be provided by law; provided, in all cases of lynching when death ensues, the county where such lynching takes place shall, without regard to the conduct of the officers, be liable in exemplary damages of not less than \$2,000 to the legal representatives of the person lynched: provided, further, that any county against which a judgment has been obtained for damages in any case of lynching shall have the right to recover the amount of said judgment from the parties engaged in

said lynching in any court of competent jurisdiction." The act of the legislature is as follows:

"Sec. 1. That in the case of any prisoner lawfully in the charge, custody, or control of any officer, state, county, or municipal, being seized and taken from said officer through his negligence, permission, or connivance, by a mob or other unlawful assemblage of persons, and at their hands suffering bodily violence or death, the said officer shall be deemed guilty of a misdemeanor, and upon true bill found shall be deposed from his office pending his trial, and upon conviction shall forfeit his office, and shall, unless pardoned by the governor, be ineligible to hold any office of trust or profit within this state. It shall be the duty of the prosecuting attorney within whose circuit or county the offense may be committed to forthwith institute a prosecution against said officer, who shall be tried in such county in the same circuit, other than the one in which the offense was committed, as the attorney general may elect. The fees and mileage of all material witnesses, both for the state and the defense, shall be paid by the state treasurer on a certificate issued by the clerk and signed by the presiding judge, showing the amount of said fee due the witness.

"Sec. 2. In all cases of lynching when death ensues the county where such lynching takes place shall, without regard to the conduct of the officers, be liable in exemplary damages of not less than \$2,000, to be recovered by action instituted in any court of competent jurisdiction by the legal representatives of the person lynched, and they are hereby authorized to institute such action for the recovery of such exemplary damages. A county against which a judgment has been obtained for damages in any case of lynching shall have the right to recover the amount of said judgment from the parties engaged in said lynching in any court of competent jurisdiction, and is hereby authorized to institute such action." Acts 1896, p. 213.

The intention of the Constitution was to prevent the crime of lynching in two ways: (1) By visiting upon the officers of the law the penalties therein mentioned, when a prisoner lawfully in their custody was lynched by a mob through their negligence, permission, or connivance; and (2) to induce the co-operation of the taxpayers in preventing the lynching, in order that their county might not become liable to the penalty by way of exemplary damages, of not less than \$2,000, to the legal representatives of the person lynched. The lynching of a prisoner, and of one not in the custody of the law as such, is murder, in both cases. It would therefore at least seem strange if the fram-

ers of the Constitution were careful to provide, in the organic law of the state, a remedy for preventing the lynching of a prisoner, and remained silent as to the remedy in all other cases of lynching. The constitutional provision, however, is not confined to the lynching of prisoners. The words, "without regard to the conduct of the officers," when considered in connection with the evil which the Constitution intended to remedy, must be construed to mean, "without reference to what has been said in regard to the conduct of the officers," or, in other words, without reference to other provisions of the section. They were inserted for the purpose of showing that the proviso was to be construed independently, and without regard to what preceded it. The word "provided" is omitted in the act, and this fact shows that the legislature gave to the words, "without regard to the conduct of the officers," the construction which this court has placed upon them. It must be remembered that many of those who were members of the constitutional convention were likewise members of the general assembly when said act was passed. While, of course, a construction placed upon the Constitution by the legislative branch of the government would not be binding upon the courts, still in this case it is well worthy of consideration. The act intended to make the county liable for damages in those cases only which fall within the provisions of the Constitution, and it has correctly construed the Constitution to make a county liable for damages when the person lynched was not in the custody of the law as a prisoner. This renders unnecessary the consideration of the interesting question whether the legislature did not have the power, independently of the constitutional provision, to pass the act hereinbefore mentioned. It has been held that statutes making a community liable for damages in cases of lynching, and giving a right of recovery to the legal representatives of the person lynched, are valid, on the ground that the main purpose is to impose a penalty on the community, which is given to the legal representatives, not because they have been damaged, but because the legislature sees fit thus to dispose of the penalty. Such statutes are salutary, as their effect is to render protection to human life, and make communities law-abiding. But, as we have said, our conclusion renders unnecessary a consideration of this question.

It is not necessary to consider the exceptions in detail, as our views dispose of the main question in the case.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case remanded for a new trial.

KANSAS SUPREME COURT.

William CARUTHERS, *Plff. in Err.*,
v.

KANSAS CITY, FORT SCOTT, & MEM-
PHIS RAILROAD COMPANY.

(59 Kan. 629.)

*In the case of a lease made by one railroad company to another under the statute authorizing leases between railroad companies, the lessor company is not liable to third persons for injuries resulting from the negligent operation of the leased line by the lessee company, where the lease is general in its terms, and confers upon the lessee company "the exclusive right to run and operate its trains of cars over and upon the track of the lessor company," without reserving to the latter any right of control over the operation of the road by the former.

(October 8, 1898.)

ERROR to the District Court for Bourbon County to review a judgment in favor of defendant in an action brought to recover

*Headnote by DOSTER, Ch. J.

NOTE.—*Liability of lessor of railroad for injuries caused by negligence of another company using the road under a lease, license, or other contract.*

- I. General principles as to.
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I. General principles as to.

The grant of a franchise giving the right to build, own, and operate a railway carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others, and where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise was granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railroad and franchise will be liable. *Pennsylvania Co. v. Ellett*, 132 Ill. 654.

And when injury results from the negligent

damages for personal injuries for which defendant was alleged to have been responsible. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. D. Hill and W. R. Biddle for plaintiff in error.

Messrs. Wallace Pratt, James Black, Ed. C. Gates, and Charles W. Blair, for defendant in error:

Any railway company organized under the laws of this state may lease the road and appurtenances of any other railway company when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting the lease.

Atchison, T. & S. F. R. Co. v. Fletcher, 35 Kan. 236.

Where the statute authorizes the lease, the lessee assumes, during the existence of the lease, all the duties and obligations of the lessor, and, from the time it enters into the possession of the road, becomes solely liable for all injuries resulting from its management unless it is operating the road in the name of the lessor.

or unlawful operation of a railroad, whether by the corporation to which the franchise is granted, or by another corporation, or other corporations which the proprietary company authorizes or permits to use its tracks, the company owning the railroad tracks and franchises is liable therefor as well as the one by which the damage was done. *Chicago & E. R. Co. v. Meech*, 163 Ill. 305.

The public may look for indemnity for injury resulting from the wrongful or unlawful operation of the railroad to the corporation to which it granted the franchise, thus delegating a portion of the public service to it, and for this purpose the company whom it permits to use its tracks, and its servants and employees will be regarded as the servants and agents of the owner company. *Pennsylvania Co. v. Ellett*, 132 Ill. 654.

A railroad company is a quasi-public corporation which cannot by its own voluntary contract or collusion surrender its functions and responsibilities to agents or trustees of its own selection,—especially if they live outside the state and beyond the reach of its process. *Naglee v. Alexandria & F. R. Co.* 83 Va. 707.

And a railroad company has no power to relieve itself from liability arising under the laws of the state made for the purpose of compelling railroad companies to discharge their duties to the public faithfully and impartially by placing its road under the management and control of other persons. *Woodhouse v. Rio Grande R. Co.* 67 Tex. 416.

And the fact that a locomotive and cars by which an injury is done through negligence are being operated at the time by third persons under a contract with the owner of the road, does not release it from liability therefor. *Illinois C. R. Co. v. Finnigan*, 21 Ill. 646.

A railroad company cannot absolve itself from the performance of duties imposed upon it by law, or relieve itself from liability for the wrongful acts or omission of duty of persons operating its road, by transferring its corporate powers to them or permitting them to operate its road as owners of its capital stock. *Choll-*

Wood, Railway Law, § 490; *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608; *Mahoney v. Atlantic & St. L. R. Co.* 63 Me. 68; *Philadelphia & E. R. Co. v. Anderson*, 94 Pa. 351, 39 Am. Rep. 787; *Haff v. Minneapolis & St. L. R. Co.* 14 Fed. Rep. 558; *Hutchinson, Carr.* 2d ed. § 515b; 2 *Elliott, Railroads*, § 468; *Patterson, Railway Accident Law*, §§ 130-132; *Ditchett v. Spuyten Duyvil & P. M. R. Co.* 67 N. Y. 425.

If a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect. But in these cases the damage must be done while he is actually employed in the master's service.

1 Bl. Com. p. 431.

The liability of one person for damages resulting from the act of another, either of negligence or misfeasance, on the principle of *respondent superior*, is confined to the relation of master and servant and principal and agent, and cannot be extended to cover independent contracts when that relation is not created.

Wood, Master & Servant, § 281; *Speed v. Atlantic & P. R. Co.* 71 Mo. 303; *Cincinnati v. Stone*, 5 Ohio St. 38; *Clark v. Fry*, 8 Ohio St. 359, 72 Am. Dec. 590.

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work.

Powell v. Virginia Constr. Co. 88 Tenn. 692; *Miller v. Minnesota & N. W. R. Co.* 76 Iowa, 655.

A railroad company is not responsible for negligence in the operation of an engine, when, at the time of the accident, the engine and crew by which it was operated were rented to, and under the control of, another company.

Byrne v. Kansas City, Ft. S. & M. R. Co. 22 U. S. App. 220, 61 Fed. Rep. 605, 9 C. C. A. 666, 24 L. R. A. 693; *Donovan v. Laing, W. & D. Constr. Syndicate* [1893] 1 Q. B. 629; *Kansas C. R. Co. v. Fitzsimmons*, 18 Kan. 34; *Schicartz v. Gilmore*, 45 Ill. 455.

ette v. Omaha & R. Valley R. Co. 26 Neb. 159, 4 L. R. A. 135.

And railroad companies cannot, by means of any contract for the operation of their lines of transportation or the management and control of their tracks and right of way, relieve themselves from liability for violations of contracts or the public law, or for torts committed by their lessees or the parties with whom they specially contract. *Cogswell v. West Street & N. E. Electric R. Co.* 5 Wash. 46; *Palmer v. Utah & N. R. Co.* 2 Idaho, 350.

Every railroad company is liable for the acts of all persons to whom it confides the management and control of its road as fully as though operated under the immediate control of the agencies provided by its charter. *International & G. N. R. Co. v. Moody*, 71 Tex. 614; *Woodhouse v. Rio Grande R. Co.* 67 Tex. 416.

Where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road to which the law has intrusted the franchise is liable for any injury done as though the company owning the road were itself running the cars. *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678.

The reason for holding a railroad company responsible for the performance of all the duties and obligations imposed upon it by its charter or the general laws of the state while it is being operated by another does not rest upon the narrow ground alone that the latter is in the exercise of a franchise which belongs to the former, and in so acting is to be held as the servant or agent of the owner corporation, but is also based upon the grant of its charter, in consideration of which the corporation undertakes the performance of duties and obligations toward the public, and it is a matter of public policy that it should not be relieved from their performance without the consent of the legislature. *Balsley v. St. Louis, A. & T. H. R. Co.* 119 Ill. 68, 59 Am. Rep. 784.

II. Under railway leases.

a. The general rule.

A railroad company receives its charter from the state, conferring certain franchises, rights, and privileges upon consideration that it will perform the duties and fulfil the ob-

ligations which it at the same time incurs, and the fact that it chooses to perform such duties and fulfil such obligations through another as lessee or otherwise cannot release it from the obligations assumed by the acceptance of its charter. *National Bank v. Atlanta & C. Air Line R. Co.* 25 S. C. 216.

And a railway corporation cannot escape the performance of any duty or obligation imposed upon it by its charter or the general laws of the state by a voluntary surrender of its road into the hands of lessees. *Harmon v. Columbia & G. R. Co.* 28 S. C. 401; *National Bank v. Atlanta & C. Air Line R. Co.* 25 S. C. 216; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291; *Atty. Gen. v. Erie & K. R. Co.* 55 Mich. 15; *McCoy v. Kansas City, St. J. & C. B. R. Co.* 36 Mo. App. 445; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214; *East Line & R. River R. Co. v. Lee*, 71 Tex. 538; *International & G. N. R. Co. v. Kuehn*, 70 Tex. 582; *Galveston, H. & S. A. R. Co. v. Daniels*, 9 Tex. Civ. App. 253; *Cogswell v. West Street & N. E. Electric R. Co.* 5 Wash. 46; *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, 21 L. ed. 675.

And the rule is the same whether the liability claimed was *ex delicto* or *ex contractu*. *National Bank v. Atlanta & C. Air Line R. Co.* 25 S. C. 216.

The operation of a railroad by a lessee does not change the relations of the original company to the public. *A. Backus Jr. & Sons v. Detroit W. Transit & Junction R. Co.* 71 Mich. 645.

And a railroad company leasing its road is liable to a third person for an injury caused him by the negligence of the lessee in the operation of the road. *Benton v. North Carolina R. Co.* 122 N. C. 1007; *Kinney v. North Carolina R. Co.* 122 N. C. 961; *Denver, M. & A. R. Co. v. Cowgill*, 44 Kan. 325; *Price v. Barnard*, 65 Mo. App. 649; *Southern R. Co. v. Bouknight*, 25 U. S. App. 415, 70 Fed. Rep. 442, 17 C. C. A. 181, 30 L. R. A. 823.

And this is so especially where the power to lease is not expressly given. *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291.

A railroad company which under the lease of another road is conducting it wholly in the interests of the lessor occupies the position mere-

92 Am. Dec. 227; *Smith v. St. Louis & S. F. R. Co.* 85 Mo. 418, 55 Am. Rep. 380.

When a lease of one railroad is made to another without authority from statute law, the same is *ultra vires* and void, and both parties are responsible for torts or other injuries committed on the road. The lessor company, under a lease authorized by statute, is liable for injuries caused by its own negligence in matters connected with the building of the road, such as failing to fence, or to provide good cattle guards as required by statute, or other like matters connected with the first construction of the road. But it is not so liable for the torts of a legally authorized lessee in the operation of the road, as this is a matter in which the lessor could have no control.

Kansas C. R. Co. v. Fitzsimmons, 18 Kan. 34; *Kansas City, Ft. S. & G. R. Co. v. Ewing*, 23 Kan. 273; *Kansas P. R. Co. v. Wood*, 24 Kan. 619; *St. Louis, W. & W. R. Co. v. Curl*, 28 Kan. 622; *Denver, M. & A. R. Co. v. Cowgill*, 44 Kan. 328; *Wichita & C. R. Co. v. Gibbs*, 47 Kan. 276.

ly of operating agent, rendering the lessor liable for injuries from the negligence of the lessee. *Southern R. Co. v. Bouknight*, 25 U. S. App. 415, 70 Fed. Rep. 442, 17 C. C. A. 181, 30 L. R. A. 823.

And a railroad company chartered by the state cannot without legislative authority by lease or any other contract or arrangement turn over to another company its road and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road, or evade any duty it may owe the general public. *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 366, 23 L. R. A. 758; *Ricketts v. Chesapeake & O. R. Co.* 33 W. Va. 433, 7 L. R. A. 354; *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591; *Coggin v. Central R. Co.* 62 Ga. 685; *Nugent v. Boston, C. & M. R. Co.* 80 Me. 62; *Quested v. Newburyport & A. Horse R. Co.* 127 Mass. 204; *Freeman v. Minneapolis & St. L. R. Co.* 28 Minn. 443; *Lakin v. Willamette Valley & C. R. Co.* 13 Or. 436, 57 Am. Rep. 25; *International & G. N. R. Co. v. Underwood*, 67 Tex. 589; *Central & M. R. Co. v. Morris*, 68 Tex. 59; *East Line & R. River R. Co. v. Rushing*, 69 Tex. 308; *International & G. N. R. Co. v. Eckford*, 71 Tex. 274; *International & G. N. R. Co. v. Moody*, 71 Tex. 614; *East Line & R. River R. Co. v. Culbertson*, 72 Tex. 375, 3 L. R. A. 567; *Hayes v. Northern P. R. Co.* 46 U. S. App. 41, 74 Fed. Rep. 279, 20 C. C. A. 52.

Where a railroad company leases its line without authority of law such lease is void, and it will continue liable for all the negligence of the lessee affecting the public, the latter being treated as operating the road as a mere agent of the lessor. *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. Rep. 165; *Heron v. St. Paul, M. & M. R. Co.* 68 Minn. 542; *Van Steuben v. Central R. Co.* 178 Pa. 367, 34 L. R. A. 577; *International & G. N. R. Co. v. Underwood*, 67 Tex. 589; *East Line & R. River R. Co. v. Culbertson*, 72 Tex. 375, 3 L. R. A. 567; *Abbott v. Johnstown, G. & K. Horse R. Co.* 80 N. Y. 27, 36 Am. Rep. 572.

And where one railroad leases its line to another, and the lease is not ratified by the state, which has not consented to the transfer of the franchise or relieved the owner from responsibility as such, the lease is only binding upon the parties as between themselves, but is of no effect as to a third person receiving personal in-

Doster, Ch. J., delivered the opinion of the court:

This was an action for damages for bodily injuries negligently inflicted by the plaintiff in error upon the line of the Ft. Scott, Southeastern, & Memphis Railway many years ago. The facts were presented to the court below in an agreed statement and in other documentary forms. Summarized, they are that the Ft. Scott, Southeastern, & Memphis Railway Company and the Missouri River, Ft. Scott, & Gulf Railroad Company were Kansas corporations, the first named of which leased its line to the one last named under the following instrument:

This agreement, made this 9th day of December, A. D. 1874, by and between the Fort Scott, Southeastern, & Memphis Railway Company, party of the first part, and the Missouri River, Fort Scott, & Gulf Railroad Company, party of the second part, both being corporations existing under the laws of the state of Kansas, witnesseth: Whereas, the said party of the first part

juries at the hands of a lessee, his rights being the same as if no such contract had been made or attempted. *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. Rep. 202.

The owner of a railroad by virtue of its charter assumes the obligation to perform certain duties for the public in carrying freight and passengers and in observing the statutory precautions for the protection of the public from danger in the operation of its railroad; and when by leasing its road it unlawfully shifts to another company the burden of the discharge of its duties, any loss resulting to any member of the public from a failure by the lessee to discharge them may be made the basis of a claim for damages against the lessor company. *Hukill v. Maysville & B. S. R. Co.* 72 Fed. Rep. 745.

A railway company cannot by a lease without the consent of the state escape responsibility for the act of a lessee, and thus shift the burdens and responsibilities it took upon itself by accepting the charter at the hands of the state or by organizing under the general law. *Brown v. Hannibal & St. J. R. Co.* 27 Mo. App. 394.

It cannot without special statutory authority alienate its franchises or property acquired under the right of eminent domain or essential to the performance of its duty to the public, so as to relieve itself from such duty, either by sale, mortgage, or lease. *Singleton v. Southwestern R. Co.* 70 Ga. 464, 48 Am. Rep. 574.

And this is so even if it surrenders possession to the lessee; the lessee is liable for its negligent acts, but so also is the lessor to the same extent that a principal is liable for a trespass committed by an agent in the line of his employment. *Von Steuben v. Central R. Co.* 4 Pa. Dist. R. 153.

And where the road and rolling stock of a railway are owned by one company and leased to another without special authority from the state, both companies would be liable for an injury inflicted by an engine on animals running at large, the one because of its actual operation of the road, and the other because it could not without permission of the legislature transfer its franchise, even temporarily, so as to release itself from liability for the acts and defaults of the lessee. *International & G. N. R. Co. v. Dunham*, 68 Tex. 231.

A transfer by a railroad company of its line

has constructed and is the owner of a railroad track commencing at a point on the main line of the railroad now owned and operated by the said party of the second part about half way between the town of Godfrey and the city of Fort Scott, in the county of Bourbon, and the state of Kansas, and extending from thence in a general southeasterly direction about $6\frac{1}{2}$ miles through the vicinity of the coal banks in the said county of Bourbon; and whereas, said party of the first part has no rolling stock, and is desirous that the said party of the second part shall furnish the necessary rolling stock and operate said road: Now, therefore, in consideration of the covenants and agreements hereinafter contained on the part of said party of the second part to be performed, said party of the first part hereby covenants and agrees that it will maintain in good order its track, and give to said party of the second part for the term of ten years from and after the date of this con-

tract, unless said contract shall be sooner terminated, the exclusive right to run and operate its trains of cars over and upon said railroad track of the said party of the first part, free of charge, but for the purpose only of carrying the coal supplied to the said party of the first part for shipment to any point on the line or beyond the northern terminus of the railroad of the said party of the second part. And the said party of the second part further agrees that it will not build, cause to be built, or in any manner whatever encourage the building of, any other railroad track within the distance of 7 miles of the point where the track of the said party of the first part commences. And the said party of the second part agrees further that it will, with its own locomotive power and cars, transport, without unnecessary delay, for a period of ten years, unless the contract shall be sooner terminated, all coal that may be supplied to the said party of the first part for shipment over its line

of road to another company is not a transfer of the legal ownership which will relieve it from liability for negligent acts of the transferee, where the instrument of transfer is in most of its provisions a lease, and there are no direct words indicating a transfer of ownership or tending to show that the owner expected to relieve itself from the duties and liabilities imposed by its franchise. *Driscoll v. Norwich & W. R. Co.* 65 Conn. 230.

Neither a steam nor a street railroad corporation can make a valid transfer by way of lease or otherwise of its franchise or its railroad and the bulk of its property so as to relieve itself of the burdens imposed upon it by law or by its charter, without the consent of the state. *Braslin v. Somerville Horse R. Co.* 145 Mass. 64.

So, in *Norton v. North Carolina R. Co.* 122 N. C. 910, a recovery was allowed against the owner of a railroad for injuries received by the plaintiff through the negligence of the lessee thereof, but the case turned upon other grounds, and the question of the liability of the lessor for the negligence of the lessee was not discussed.

And in *McCoy v. Kansas City, St. J. & C. B. R. Co.* 36 Mo. App. 445, cases between individuals where such liability was held not to exist were distinguished upon the ground that they had no application to a railroad corporation which had received its charter from the state and by acceptance thereof had taken upon itself burdens and responsibilities which it cannot shift without the consent of the state.

So, it has been held that a railroad company can be held responsible in punitive damages for any malicious, oppressive, or reckless act of a lessee of the road resulting in injury to a third person, and the question whether the trainmen of the lessee were reckless, malicious, or oppressive is properly left to the jury. *Hart v. Charlotte, C. & A. R. Co.* 33 S. C. 427, 10 L. R. A. 794.

b. Application to particular subjects.

The duty of a railroad company to keep its road and switches on it in a safe and proper condition for use is of a public character, and is due to every person who is lawfully upon the road, and one which it cannot dispose of by leasing the road to another. *Sawyer v. Rutland & B. R. Co.* 27 Vt. 370. 44 L. R. A.

And the owner of a railroad and the franchises thereof is liable for injury to a passenger on a train operated by a lessee, growing out of the fact that a switch was not properly constructed and maintained or was not properly locked or otherwise secured, whether this was the result of the neglect of the employees of the owner or those of the lessee of the road. *Peoria & R. I. R. Co. v. Lane*, 83 Ill. 448.

So, a railroad company leasing its road to another railroad company without legislative consent is liable for injuries to persons caused by negligent defects in its tracks at a highway crossing, though the lessee company had entered upon the control and management of the road. *Freeman v. Minneapolis & St. L. R. Co.* 28 Minn. 443.

And a railroad company cannot exonerate itself from liability for an assault committed on a passenger on its road by a trainman by proving that the portion of the road on which the assault occurred had been leased to and was being operated by another corporation. *Ricketts v. Chesapeake & O. R. Co.* 33 W. Va. 433, 7 L. R. A. 354.

So, a railroad company chartered by the state does not by leasing its road to another company relieve itself from liability for an injury to a passenger caused by a failure to provide sufficient coaches to receive and accommodate passengers. *Bonknight v. Charlotte, C. & A. R. Co.* 41 S. C. 415.

And it cannot escape liability to one who was injured from failure to provide sufficient coaches to accommodate passengers, upon the ground that the injury occurred beyond its line, where it had leased its line, and though the place where the injury occurred was beyond the line owned by it previous to such leasing it had had the privilege of going over that place from the proper authorities, and its lessee had continued to exercise that privilege without break. *Ibid.*

And a railroad company cannot lease its corporate property and franchises so as to be relieved from liability for damages to a shipment of hogs due to overcrowding, while the road was being run by the lessee. *Ohio & M. R. Co. v. Dunbar* 20 Ill. 623, 71 Am. Dec. 291.

So, where cotton is received and receipted for by the agents of a lessor railroad operated by a lessee, the contract will be regarded as having been made directly with the lessor, and it will be held liable for failure to deliver goods thereunder, though the road is operated at the time

of railroad from any loading station on the line thereof to Kansas City in the state of Missouri, at the rate of sixteen dollars (\$16) per car load of 12 tons each, and for rates as low to any point on the line north of Fort Scott, or at and beyond the northern terminus of the railroad of the said party of the second part, as shall be given or allowed to any other person or corporation without the consent of the said party of the first part (excepting, however, two contracts now in force), from the city of Fort Scott or any other station south of Fort Scott to any point north on the line or beyond the northern terminus of its railroad. And it is further stipulated and agreed that if the said party of the first part shall hereafter extend its railroad track to the state line between Kansas and Missouri, or to a greater distance than $6\frac{1}{2}$ miles from the point where the same shall intersect the railroad of the said party of the second part, then and in that case the said party of the second part

will operate the same, and shall be entitled to receive, and the said party of the first part agrees to pay, the sum of \$1 per car load in addition to the price herein agreed to be paid for all coal transported by the said party of the second part for each and every 5 miles, and every part thereof, the same is transported over the line of road so extended. And it is further agreed by and between the parties hereto that for the transportation of all freight other than coal, and all passengers, from the city of Fort Scott to the terminus of the 6 miles of road now built by said party of the first part, and from such terminus to the city of Fort Scott, the said party of the second part shall collect and receive the entire freight moneys and fares, 50 per cent of which said party of the first part shall be entitled to receive, and said party of the second part hereby agrees to pay. And it is further expressly agreed that in the event that business along the line of said road of the party of the first part, other than the

by the lessee. *National Bank v. Atlanta & C. Air Line R. Co.* 25 S. C. 216.

And a railroad company owning a railroad and having the profit of the franchise may be held primarily responsible for loss by fire originating from a locomotive running on such road with its consent in the transaction of business for the accommodation of which its franchise was procured, though it had leased its franchise. *Ingersoll v. Stockbridge & P. R. Co.* 8 Allen, 438.

And the fact that a railroad company has leased a part of its road to another company, which is a corporation of another state whose road connects with it, does not relieve the former company from liability for the loss of goods delivered to it to be carried over its road, occurring upon the part leased. *Langley v. Boston & M. R. Co.* 10 Gray, 103.

So, a depot company cannot so lease or transfer its interest under its franchise as to rid itself of liability to a person injured from its improper use. *A. Backus Jr. & Sons v. Detroit W. Transit & Junction R. Co.* 71 Mich. 645.

And the lessor of a railroad cannot escape liability for an injury caused in its operation by the lessee upon the theory that its tracks are upon its private grounds and for its own convenience, and that the same rule must be applied as would apply to the track of a private individual extending into his lumber yard or the like, where it was authorized by law to acquire land for right of way by purchase and condemnation and to make connections with other railroads, and it was clothed with ample power to control its management and operation, whether by itself or others. *Pennsylvania Co. v. Ellett*, 132 Ill. 654.

So, the owner of a railroad which has leased the same is not relieved from liability for injuries done thereon by the transfer of possession thereof to a receiver by a decree of a court of competent jurisdiction, unless the possession of the receiver is exclusive and the servants of the road are wholly employed and controlled by him. *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, 21 L. ed. 675.

And a railroad company cannot escape liability for the negligent injury to property committed by trains on its line on the ground that it had leased its railroad to another company, which latter company had under an order of the United States circuit court been put into the hands of receivers who were operating such road 44 L. R. A.

at the time of such injury. *Parr v. Spartanburg, U. & C. R. Co.* 43 S. C. 197.

So, a railroad company subject to the provisions of the act to regulate commerce cannot, by leasing its road, free itself from liability for practices made illegal by that statute. *Independent Refiners' Assn. v. Western N. Y. & P. R. Co.* 6 Intern. Com. Rep. 378.

And a corporation of one state whose stock is owned by a corporation of another state, by which the road is managed, and which appoints the officers and agents and furnishes the rolling stock, the directors of the former company being selected by the latter company and qualified by a transfer of one or more shares of stock to them before an election, which they return on vacating their office, and which makes annual statements to the legislature, in which its gross receipts for the year are nominally divided among the companies, is liable for the infringement of a patent right respecting the cars used thereon. *New York & M. Line R. Co. v. Winans*, 17 How. 31, 15 L. ed. 27.

e. Authority to lease; construction.

Authority to lease is conferred by statute in most of the states. These statutes generally confer power in plain and direct terms, and have consequently given rise to but little judicial construction. It would seem, however, that the power must be clearly and plainly conferred, and that statutes conferring it are to be strictly construed.

Thus, where the power to sell or lease is not expressly conferred upon a railway corporation, it will not arise from implication so as to relieve it from liability for torts of a lessee. *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. Rep. 165.

In the above case *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 446, 21 L. ed. 675, *supra*, II. b, was distinguished upon the ground that it did not appear in that case that the lease had been made by authority of law, and it appeared that the road was operated by one of the owners in its name, and that the person injured held a ticket of the lessor company, and the question of the effect of legislative authority to make a lease upon the liability of the lessor was not discussed.

So, the ordinary clause in a railway charter authorizing state corporations to contract with other transportation companies for the mutual

carrying of coal, should be sufficient to induce the party of the first part to desire to operate its said road, then the said party of the first part shall have the right to cancel and annul this contract, first giving sixty days' written notice of its intention so to do and paying to the said party of the second part all moneys due it for freight advances or otherwise. It is also further agreed that, in the event of the annulling of this contract and operation of the said road by the said party of the first part, it shall have a right of way for its trains over the track of the said party of the second part between the point of intersection of the two roads and the city of Fort Scott, upon such terms as may be reasonable and usual, and as may be agreed upon between the parties; and, in case the parties are unable to agree upon such terms, then each may choose a referee, who, in the event of disagreement, may select a third, to fix such terms, and their decision shall be binding upon both the parties

transfer of goods and passengers over each other's road confers no authority to a railroad to lease its road and franchisees. *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950.

And act of Congress of July 4, 1884, giving a railroad company the right to build its road through the lands of the Indian Nations upon condition that it bind itself, its successors and assigns, to refrain from certain acts, that being the only mention made of the word "assigns," does not give authority to lease its road. *Briscoe v. Southern Kansas R. Co.* 40 Fed. Rep. 273.

And Texas Const. art. 10, § 5, providing that no railroad corporation or the lessees of such corporation shall consolidate with any other having a parallel or competing line, is restrictive upon the power of such corporations, and cannot be construed as a grant of authority to lease so as to release the lessor of a railroad from liability for failure to perform its charter obligations. *Central & M. R. Co. v. Morris*, 68 Tex. 59.

And New York act of 1864, requiring a lessee to perform certain acts, and specifying, among other lessees, other railroad companies and person or persons, does not confer power to lease a railroad to a person or individual, but is applicable only when such power has been obtained. *Abbott v. Johnstown, G. & K. Horse R. Co.* 80 N. Y. 27, 36 Am. Rep. 572.

So, a statute providing for the leasing of continuous lines refers to corporations of the state unless an express intent appears that it shall be applied to other corporations. *Van Steuben v. Central R. Co.* 178 Pa. 367, 34 L. R. A. 577.

And the charter of a railroad and the laws of a state under which it exists, giving it power to lease its road, do not give it the right to exercise such power beyond the limits of the state. *Briscoe v. Southern Kansas R. Co.* 40 Fed. Rep. 273.

And Minn. Gen. Stat. 1878, chap. 34, § 69, providing that any railroad corporation may lease or purchase any part of any railroad constructed by any other corporation whose lines of road are continuous or connected with its own, the title to which is devoted to providing how corporations empowered to take private property for public use, and how railroad corporations, may be incorporated, and to the regulation of such corporations, and defining their powers and duties, refers to corporations of the state, and does not authorize the leasing of a railroad in the state by a railroad company of 44 L. R. A.

hereto. In witness whereof, the said parties have caused these presents to be subscribed, the party of the first part by its president and the party of the second part by its general manager, and have caused their respective corporate seals to be hereunto affixed on the day and year first above written.

Fort Scott, Southeastern & Memphis
Railway Company.

By its President, B. P. McDonald.
Missouri River, Fort Scott, & Gulf
Railroad Company,

By Geo. H. Nettleton, General Manager.

The injuries to the plaintiff in error occurred through the negligence of the employees of the above-named lessee company in the operation of the leased line. Subsequently the Ft. Scott, Southeastern, & Memphis Railway Company was consolidated with other companies into the Kansas City, Ft. Scott, & Memphis Railroad Company, the defendant in error. What became of the Missouri River,

another state. *Freeman v. Minneapolis & St. L. R. Co.* 28 Minn. 443.

And where a railroad company chartered by the state permits a foreign railroad corporation to operate a part of its road in the state under a verbal agreement, and the two railroads form a continuous line through and beyond the limits of the state, the domestic company will be liable for injuries sustained on that portion of its road so operated by the foreign company. *Ricketts v. Chesapeake & O. R. Co.* 33 W. Va. 433, 7 L. R. A. 354.

And see also, on the subject of leasing to foreign corporations, *Nagle v. Alexandria & F. R. Co.* 83 Va. 707, *supra*, I., and *Langley v. Boston & M. R. Co.* 10 Gray, 103, *supra*, II. b.

So, the lease of a railroad will not be deemed to have been authorized by Pa. Acts 1861, P. L. 140, 1870, P. L. 31, authorizing such lease where the roads are connected either directly or by intervening lines forming a continuous route or routes for the transportation of persons and property, so as to relieve the lessor company from liability for the acts of the lessee, where nothing in the lease shows, and it is not plain, that the roads of the lessor and lessee were connected either directly or by an intervening line. *Van Steuben v. Central R. Co.* 178 Pa. 367, 34 L. R. A. 577.

This note is confined to the question of the liability of the lessor or licensor of a railroad for the wrongful acts of the lessee or licensee, and is not intended to include the question of the power to lease. The question of power is touched incidentally only, as bearing upon the question of liability, and as it appeared incidentally in liability cases.

d. Effect of authority.

1. Conflict of opinion.

The question whether the leasing of a railroad under a mere statutory authority to lease will relieve the lessor from liability for wrongs of the lessee in the operation of the road, or whether, in order to accomplish that object, it is also necessary that the statute should contain an express exemption from liability, has given rise to much conflict of judicial opinion. The more general rule, however, would seem to be that bare authority to lease would be sufficient to release from liability for wrongs of the lessee in the operation of the road, but not for such as arose from defects in the origi-

Ft. Scott, & Gulf Railroad Company is immaterial. Under the statutes of this state the new or consolidated company became liable for the obligations of the old or constituent companies. *Berry v. Kansas City, Ft. S. & M. R. Co.* 52 Kan. 760. For reasons not necessary to explain, the liability of the Ft. Scott, Southeastern, & Memphis Railway Company to the plaintiff in error was not barred by the statute of limitations at the time of the consolidation; nor is the liability of the consolidated company barred, if it ever existed. Did it ever exist? The determination of this question depends upon the interpretation of the lease above quoted, and the effect to be given the statute which authorized it to be made. If, under the statute and the lease, the injury inflicted upon the plaintiff in error was wholly the act of the lessee company, it alone was liable. If, on the other hand, the injury was wholly or in part the act of the lessor company, it was liable, and its liability has descended upon

nal construction. But the rule that a special statutory exemption is necessary is ably supported and tenaciously adhered to.

2. Rule requiring special statutory exemption.

The rule adopted by some of the states, among which are North Carolina, South Carolina, Ohio, and Nebraska, is that however many leases or subleases of a railroad may have been made, the law attaches to the actual exercise of the privilege of carrying passengers and freight the compensatory obligation to the public to use ordinary care for the safety of both the persons and property so transferred. But the carrier who simply substitutes, with the consent of the state, another in his place, cannot establish his own right of exemption from responsibility for the wrongs of the substitute, unless he can show, not only explicit authority to lease the property, but also to rid himself of the responsibility. *Logan v. North Carolina R. Co.* 116 N. C. 940.

Under this rule legislative consent to the leasing of a railroad is not alone sufficient to release the owner from its obligations to the public, and will not, without more, release it from liability for the torts committed by the lessee. *Singleton v. Southwestern R. Co.* 70 Ga. 464, 48 Am. Rep. 574.

In the above case, *Jones v. Georgia Southern R. Co.* 66 Ga. 558, *infra*, VII., was distinguished upon the ground that the case at bar arose, not between the lessee company and one of its servants, but between the owner of the railroad operated by the lessee company in its name, and the public, in the exercise of one of its most important franchises—the transportation of passengers.

Exemption from liability on the part of a lessor of a railroad for damages for acts of the lessee is not necessarily implied from a lease made with legislative authority, giving the lessee the exclusive control and possession of the road. *Heron v. St. Paul, M. & M. R. Co.* 68 Minn. 542.

And a lease of a railroad, though duly authorized by law, will not release the railroad company from liability for a failure to discharge its charter obligations, unless the law giving the power to make the lease contains a provision to that effect. *Central & M. R. Co. v. Morris*, 68 Tex. 59.

And a railroad company cannot by leasing its property absolve itself from liability for an in-

jury to a person caused by the negligence of the lessee in the operation of the road, unless such exemption is expressly authorized by legislative authority. *Driscoll v. Norwich & W. R. Co.* 65 Conn. 230.

The original obligation of a railroad company to the public cannot be discharged by a transfer of its franchises to another company except by legislative enactment, consenting to and authorizing such transfer and exempting it from liability, and mere legislative consent without release from the obligations to the public is not sufficient. *Chollette v. Omaha & R. Valley R. Co.* 26 Neb. 159, 4 L. R. A. 135.

So, the consent of the state that a railroad company might lease its road is not a consent to the surrender of any of the rights of the public in and to or connected with the charter of such railroad company, where it is not expressed in the law permitting the lease. *Fisher v. Baltimore & O. & C. O. R. Cos.* 3 Ohio N. P. 283.

And a charter of a railway company authorizing it to farm out or lease its road to another company, and the fact that a railroad has done so, do not exempt it from responsibility for negligent acts of the lessee by which cattle are killed, in the absence of any positive granting of such exemption. *Harmon v. Columbia & G. R. Co.* 28 S. C. 401.

And the lessor of a railroad cannot be said to have performed the public duty owed by it under its charter where it permits its lessee to use locomotive engines which are neither safe nor suitable for guarding against fire. *Fisher v. Baltimore & O. & C. O. R. Cos.* 3 Ohio N. P. 283.

And the liability of a railroad corporation for injuries by the wrongful acts of a lessee or other person done in the exercise by its permission of any of its franchises is not limited to wrongs done by them while in the performance of acts which they would have had no right to perform except under the charter of the company sought to be made liable. *Balsley v. St. Louis, A. & T. R. Co.* 119 Ill. 68, 59 Am. Rep. 784.

There is no distinction between the liability of a lessor of a railroad for an injury sustained by reason of some omission of duty resting upon the lessor,—as, for example, for a defective condition of the track or of a bridge existing at the time of the lease,—and an injury arising from negligence of the lessee's servants in running the trains. *Harmon v. Columbia & G. R. Co.* 28 S. C. 401.

be conceded; and when, in pursuance to the authority conferred, an instrument of lease is executed, such instrument must be construed, we think, as like instruments between other corporations or between private individuals. If the authority to lease is general the lease may be general in its terms, and without conditions, except such as the parties choose to insert. If the authority to lease be general, the lessor may put the lessee wholly and fully in the possession of its roadbed and other property for the purpose of exclusive operation by the latter. In the case of the lease in question this was done. Upon the lessee was conferred "the exclusive right to run and operate its trains of cars over and upon the track of the party of the first part." Nowhere in the instrument is there any language limiting this full and complete cession of authority, but there is elsewhere in it language which, by strong implication, confirms and strengthens the general grant.

So, the rule of liability has been arrived at through the construction placed upon the peculiar language of some of the statutes authorizing the lease in some of the cases.

Thus, Iowa Code, §§ 1278, 1307, making lessees of railroads liable to the same extent as the corporation, merely supplies a cumulative remedy, and does not release the owner of the road from liability for its operation. *Bower v. Burlington & S. W. R. Co.* 42 Iowa, 546.

And Iowa Code, § 1300, with reference to railroads, providing that any such corporation may sell or lease its railroad property and franchises or make joint running arrangements with any corporation owning or operating any connecting railroad, and the corporation operating the railway of another shall in all respects be liable in the same manner and to the same extent as though such railway belonged to it, does not discharge the lessor company from any of its corporate duties or liabilities, but simply imposes an additional liability upon the lessee while operating it. *Chicago & N. W. R. Co. v. Crane*, 113 U. S. 424, 28 L. ed. 1064.

And the effect of Mass. Stat. 1873, chap. 49, providing that a railroad may lease its road and franchises and contract with any responsible parties for the operation of its road, but such lease or contract shall not release or exempt said company from any duties and liabilities or restrictions to which it would otherwise be subject, is that the railroad company has the same liability to persons injured in the operation and management of the road while the lease is in force which it would have had if the injury had been sustained while the company was itself managing its road. *Quested v. Newburyport & A. Horse R. Co.* 127 Mass. 204.

So, the owner of a railroad is liable, under Illinois railroad and warehouse act, § 38, providing that it shall be the duty of all railroad corporations to keep their right of way clear from dead grass, dry weeds, or other dangerous combustible material, imposing a penalty for violation thereof, for damage caused by fire communicated by the negligent act of the employees of a lessee of the road. *Pittsburg, C. & St. L. R. Co. v. Campbell*, 86 Ill. 443.

And a railroad company which has leased its road to another company is liable under the state statute for the destruction of property by fire through the neglect of the lessee company to keep its right of way clear from dead grass, dried weeds, etc., though the legislature may have conferred upon the lessee company all the

In pursuance to this instrument the lessor company put the lessee company in the exclusive possession and operation of its roadbed, and in the exclusive discharge of its franchise as a public carrier. While thus in possession and operation of the leased road, and in the discharge of the lessor's franchise, the lessee committed the tort in question through the agency of its own train of cars negligently operated by its own employees. Upon what just legal principle, therefore, can the lessor be held liable for the wrong thus wholly committed by another, and which it was powerless to prevent. At common law the lessor is not liable for the tenant's negligence in the use of the leased premises resulting in injuries to another, unless a right of control in such respect is reserved. *Wood, Land & T.* § 539. If, therefore, the question were determinable upon principles pertaining to lessors and lessees as individuals, the plaintiff in error could have no cause of complaint. It is asserted,

powers of the lessor, where there was no express exemption from liability. *Balsley v. St. Louis, A. & T. H. R. Co.* 119 Ill. 68, 59 Am. Rep. 784.

So, a railroad company which has leased its road is nevertheless liable, under Me. Rev. Stat. 1857, chap. 51, § 38, providing that when a building or other property is injured by fire communicated by an engine used upon its track by the lessee, the corporation using it is responsible for such injury, where the statute authorizing the lease expressly provides that nothing in such lease shall exonerate the lessor from any duty or liability imposed by its charter, or any general law of the state. *Bean v. Atlantic & St. L. R. Co.* 63 Me. 293.

And under Me. Stat. 1853, chap. 150, § 1, authorizing railroad companies to lease their roads, and providing that nothing contained in such act or any lease or contract entered into under it should exonerate the company or stockholders thereof from any duties or liabilities the owner of the road assumed by the acceptance of its charter or which were afterwards rightfully imposed upon it by the laws of the state, such duties were, at least for the purposes of a remedy, to remain and continue to be obligatory upon it in the same manner and to the same extent as if the lease had not been executed, and the possession and management transferred to lessees, and such liability is not restricted to such claims as arise from duties with relation to the structure of the road, or from neglect properly to construct and fence it, as distinguished from duties arising from its management and operation. *Stearns v. Atlantic & St. L. R. Co.* 46 Me. 85.

So, the facts that an act enabling a railroad corporation to lease its road calls for a responsible lessee, and that such lessee is liable for injuries caused by his negligent management, do not release the lessor from liability for injuries caused by the operation or management of the road during the life of the lease. *Quested v. Newburyport & A. Horse R. Co.* 127 Mass. 204.

And a street-railway company empowered to construct a street railroad, and made liable for any loss or injury sustained from its carelessness or negligence in the management or construction of its road, which transfers a part thereof to another street railroad company under an agreement that the second company is to stand in the place of the first so far as the road is concerned, taking the lease subject to all the conditions, restrictions, duties, and liabilities

however, that the lessor company, having taken upon itself the obligation to operate a railroad, could not, even under the authority to lease, so far abdicate its franchise as to escape responsibility for injuries to third persons occurring incident to the performance of the duty by its substituted agency, the lessee company; that in order to do so, a legislative exemption must be expressed, and that the mere authority to lease does not imply the necessary exemption. The plaintiff in error is mistaken. The exemption need not be expressed. It may be implied, and a general authority to lease is sufficient to raise the implication. To hold otherwise it would have to be that the lessee company was not a lessee, but was a mere agent of the lessor; and, indeed, counsel for plaintiff in error would have it thought that such was the case. The statute, however, only authorizes the making of leases, not contracts of agency. The instruments authorized by it are designated as "leases," and

when an agreement between two railroad companies is expressed in terms fit and apt to create the relation of lessor and lessee it will be held to be what the statute authorizes,—a lease. When a lease is made, what reason can exist for not attaching to it the ordinary common-law consequences of such contracts,—liability of the lessee to third persons for the negligent use of the leased premises, and nonliability of the lessor when no right of control over the lessee has been reserved? The demands of public policy are satisfied, and the rights of third persons secured by the imposition upon the lessee of all liability incident to the exercise of the franchise by it, and the demands of what the common law in such cases esteems to be just are likewise secured by exempting the lessor from liability. With the exception of the cases of *Logan v. North Carolina R. Co.* 116 N. C. 940, and *Harmon v. Columbia & G. R. Co.* 28 S. C. 401, all the authorities are opposed to the contention of plaintiff in error.

ties imposed upon the owner, and agreeing to defend all suits against it, which lease and assignment are ratified and confirmed and declared valid by statute, and all acts done thereunder declared legal, is not thereby exonerated from all responsibility to persons injured upon that part of the railroad which was leased, as such act, though a sanction to the contract, contains nothing by way of exoneration from the primary responsibility of the lessor. *Braslin v. Somerville Horse R. Co.* 145 Mass. 64.

So, a corporation chartered by Congress is a corporation of another state within the meaning of Mo. act March 24, 1870, providing that a corporation of that state leasing its road to a corporation of another state shall remain liable as if it operated the road itself. *Smith v. Pacific R. Co.* 61 Mo. 17.

But an action against a railroad company which had leased its road to a corporation of another state, for damages caused by the negligence of the employees of the lessee road, can only be maintained in Missouri under Rev. Stat. 1879, § 790, providing that the lessor company shall remain liable as if it operated the road itself, and in such case the negligence of the lessee company, and that the lessor company had leased its road to that company, must be alleged and proved. *Main v. Hannibal & St. J. R. Co.* 18 Mo. App. 388.

3. Rule that general authority to lease is sufficient.

Upon the other hand, the authorities of a greater number of the states have adopted the rule that where there is express authority for a particular railroad to lease all its franchises to another company, or where there is general statutory authority by which railroad corporations may lease to other roads, a railroad may execute such a lease, and if made without the reservation of any control over the operation of the road by the lessee, it is exempt from liability for torts committed by the lessee. *Von Steuben v. Central R. Co.* 4 Pa. Dist. R. 153; *Briscoe v. Southern Kansas R. Co.* 40 Fed. Rep. 273; and see *CARUTHERS V. KANSAS CITY, FT. S. & M. R. Co.*

And that where one railroad company is authorized by law to contract or lease its road to another company, it is not responsible for the torts committed by the other company in the running of its trains or the management of the road. *Lakin v. Willamette Valley & C. R. Co.* 13 Or. 436, 57 Am. Rep. 25; *Miller v. New* 44 L. R. A.

York, L. & W. R. Co. 125 N. Y. 118; *Briscoe v. Southern Kansas R. Co.* 40 Fed. Rep. 273.

But to absolve the lessor from liability the lease must be authorized by legislative authority. *Briscoe v. Southern Kansas R. Co.* 40 Fed. Rep. 273.

Under this rule, the lease of a railroad under due authority of law effects a transfer of rights and liabilities in its management, so that the corporation owning the railroad is discharged from responsibility for the lessee's torts. *Missouri P. R. Co. v. Watts*, 63 Tex. 549.

And where the state consents to the leasing of a railroad, the responsibility for the future management and operation of the road is exclusively imposed upon the lessee as the lawful substitute of the company owning the road, being liable for all its torts and contracts, though the lessor was not specially exempted. *Arrow-smith v. Nashville & D. R. Co.* 57 Fed. Rep. 165.

Thus, the owner of a railroad cannot be held liable for an injury to a brakeman on a train which is being operated by and under the control of another company under a contract giving it such management and control, where there is an express statute authorizing such agreement. *Phillips v. Northern R. Co.* 62 Hun, 233.

A railroad company which has leased its road under due authority of law is not liable for injuries inflicted by the lessee company upon its own agents or servants in operating the road. *Virginia Midland R. Co. v. Washington*, 86 Va. 620, 7 L. R. A. 344.

And a contract between two railroad companies by which the railway of the one was leased to the other at a compensation of a certain per cent of the gross receipts under which the road was to be operated, and was in its movements to be under the control of the lessee company alone, does not render the lessor liable for an injury to a third person in the operation of the road, the lessee only being liable. *Phillips v. Northern R. Co.* 62 Hun, 233.

And where, under legislative authority, one railroad company leases its road to another granting the exclusive control and possession, and the lessee, also under legislative authority, grants to another company which owns and operates a road at the place in question, the right to run its trains over such road, retaining the possession and control of the road, the first lessor is not liable for damages caused by sparks and fire thrown by passing engines into combustible material which was negligently permitted

The case of *Heron v. St. Paul, M. & M. R. Co.* 68 Minn. 542, is so instructive upon this question that we quote from it at length: "We shall consider first the liability of the St. Paul, Minneapolis, & Manitoba Railway Company. There is a conflict of authorities upon the question whether a company which leases its railroad to another company under authority of law is liable for the negligence of the lessee in operating the road under the lease. Some courts hold that the lessor is liable unless the statute which grants the right to lease expressly exempts the lessor from liability; that there can never be an exoneration from liability by implication; while others hold that the lessor is exonerated from liability for the negligence of the lessee in operating the road where the lease is authorized, although the statute authorizing it does not contain any express provision relieving it from liability. In our opinion, upon both principle and authority, the latter is the better doctrine. It is unnecessary

to review the authorities on the subject, as most of them will be found collated in the text-books. See 2 Elliott, Railroads, §§ 467 *et seq.* The reasons in support of this position are well and forcibly stated by Judge Elliott, as follows: 'It must be assumed, that in granting the authority to execute a lease the legislature had in mind former statutes as well as the established rules of the common law. When power to execute a lease is conferred upon a corporation, the legislature must, in the absence of countervailing language, be deemed to intend to authorize the execution of such an instrument as the established law regards as a lease. The law enters as a silent factor into every contract, and hence of every lease it is an important element. The legal effect of a lease is to transfer for a prescribed period of time the possession and control of the property to the lessee. In authorizing the execution of a lease, the legislature grants the right to execute and carry into effect

to accumulate and remain on the right of way. *Heron v. St. Paul, M. & M. R. Co.* 68 Minn. 542.

So, a railroad company is not responsible for the act of an engineer and fireman in running an engine which it has rented to a bridge company using it as a switch engine on a bridge used by several other railroad companies at a specified rental, besides the payment of the expenses of running it and the wages of the engineer and fireman, though they are carried on the pay-roll of the lessor railroad company. *Nason v. Kansas City, Ft. S. & M. R. Co.* 22 U. S. App. 220; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 61 Fed. Rep. 605, 9 C. C. A. 666, 24 L. R. A. 693.

And a railroad company sued for failure to maintain proper cattle guards at designated points is entitled to defend on the ground that the road was in the hands of a lessee, though no pleading was filed by it. *Denver, M. & A. R. Co. v. Cowgill*, 44 Kan. 325.

And a contract between a domestic railroad corporation and a foreign railway corporation by which the foreign corporation was allowed to run its coal trains over the road of the domestic company, the domestic company to keep the tracks in order and furnish facilities for procuring water and fuel, is lawful under N. Y. Laws 1890, chap. 565, § 79, as amended by Laws 1893, chap. 484, providing that any railroad corporation or any corporation owning or operating a railroad within the state may contract with any other corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract, and the lessor in such contract cannot be held liable for an injury inflicted upon a person by a train of the lessee company through the negligence of the persons in charge. *Cain v. Syracuse, B. & N. Y. R. Co.* 27 App. Div. 376.

In the above case, *Abbott v. Johnstown, G. & K. Horse R. Co.* 80 N. Y. 27, 36 Am. Rep. 572, *supra*, II. a, was distinguished upon the ground that the point upon which that case turned was that the statute did not expressly authorize the railroad corporation to lease its railroad to an individual, and that therefore the company was without excuse for the negligent use by its lessee of its corporate right and privileges.

So, the fact that a locomotive engine from which fire was communicated to neighboring property was not among the specific property originally leased by the owner of the road to 44 L. R. A.

the lessee under whose operation the injury occurred, does not relieve the owner from liability therefor. *Stearns v. Atlantic & St. L. R. Co.* 46 Me. 117.

But although a railroad company may lease its road to, and allow it to be operated by, another company, thereby making itself responsible for acts done upon the road which is leased, neither company loses its identity, and where the two operate a continuous line, any tort committed by the one or the other on a part belonging to the one or the other should be so alleged and proved,—especially where both roads are constructed through territory of the same county. *Central R. Co. v. Brinson*, 64 Ga. 475.

4. Necessity of entire control by lessee.

A railroad company leasing its road and corporate franchises to another is exempt from liability for negligence in the operation of the road by the lessee if the lease was made under legislative authority and no control was reserved by the lessor, but, if the lessor continued even in partial control and management of its road, it would be liable. *Scitwak v. Philadelphia & B. R. Co.* 4 Pa. Dist. R. 339. And see *CARUTHERS v. KANSAS CITY, FT. S. & M. R. Co.*

And a company owning a railroad upon which a personal injury is inflicted upon a passenger is not responsible therefor where another company has at the time the exclusive control and management of the road, and the locomotive by which the injury is done is being operated by the employees of the latter company. *Harper v. Newport News & M. Valley R. Co.* 90 Ky. 359.

But where the owner of a railroad leases the same, and the lessee surrenders all control and custody over the cars and engines, and commits them to the exclusive charge of the lessor, responsibility for a negligent injury to a third person by running a train of cars over a hand-car on which he is riding will rest with the lessor and not with the lessee, notwithstanding that it owns the cars; but if the employees of both companies are engaged and co-operating in running the cars, and jointly controlling them, both the lessor and lessee will be liable. *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347.

So, a railroad company, existing under a charter making railroad corporations liable for all damages sustained by any person in consequence of any neglect of any of their agents, and subjecting railroad corporations to liability for injuries occasioned by the negligence or carelessness of any person employed in conducting

such an instrument as divests the lessor of possession and control, and places it in the lessee to the exclusion of the lessor. The possession of the one party is excluded, and that of the other is made complete, by legislative sanction. . . . It cannot be doubted that a statute conferring general authority to sell means a complete and effective sale, and upon the same principle it must be concluded that the power to lease, unless qualified and limited by statute, is a power to make a complete and effective lease. A complete and effective lease certainly vests the right of possession, control, and management in the lessee, since no other effect can be assigned such a lease without a direct and palpable violation of long and well-established principles of law. . . . In granting authority to lease, the legislature empowers the lessor company to transfer the duty of operating the road to the lessee, and in doing what the legislature authorizes no rule of public policy is violated. . . .

their trains, is not liable for an injury sustained by a passenger on a train on its road run by a lessee having the whole care, direction, and control of the road at the time of the injury, where the injury was caused by the misconduct and positive wrong of the agents and servants of the lessee as distinguished from negligence or carelessness. *Mahoney v. Atlantic & St. L. R. Co.* 63 Me. 68.

In the above case, *Whitney v. Atlantic & St. L. R. Co.* 44 Me. 367, *infra*, IX., and *Stearns v. Atlantic & St. L. R. Co.* 46 Me. 117, *supra*, II. a, 2, were distinguished on the ground that the decisions in those cases were expressly placed upon the ground that the act of the legislature authorizing the lease did not exonerate the lessors from liabilities expressly imposed upon them by their charters or the statutes of the state.

And *Langley v. Boston & M. R. Co.* 10 Gray, 103, *supra*, II. b, was distinguished upon the ground that the lease in that case was executed without, while the lease in the present case was executed with, the sanction of legislative authority, and that while in that case one party alone undertook to change the contract, in this one both parties assented to the change.

So, a company owning a railroad which gives to another company the right to construct a track on the side of its roadbed for the purpose of forming a connection between the roads of the two companies, such connecting track passing over a bridge previously constructed by the lessee company over which foot passengers had been permitted to pass, is not liable in damages to one who passed over such bridge at night and fell through the same between the rails of the connecting track by reason of an imperfect covering, where the defect was created solely by the licensee company in the construction of such connecting track, and it had the sole ownership, control, possession, and use thereof, though the licensor company had a reversionary interest. *Gwathney v. Little Miami R. Co.* 12 Ohio St. 92.

And the questions whether an agreement between two railway companies by which one gives the other the right to lay its rails on the side of its roadbed, and to have the exclusive use of the same for the purpose of making connection between the roads belonging to the two companies, placed the construction and use of the connecting track under the sole control of the licensee company so as to relieve the licensor company from responsibility for a nuisance thereon, and whether that company in fact 44 L. R. A.

The courts which assert the theory mentioned [that there must be an express exemption from liability in order to exonerate the lessor] tacitly assume that in granting authority to lease the legislature granted something less than an authority to lease. We believe that the only theory that can be defended on principle is that in granting authority to execute a lease the legislature conferred authority to execute an effective instrument, with all the qualities and incidents with which the law invests a lease. If this be true, then the lease does not transfer possession and control from the one party to the other for the term of the lease, and the rights and obligations of the parties are such, and such only, as the law annexes to the relation of lessor and lessee.' 2 Elliott, R. R. § 469. The learned author is speaking, as we understand him, solely with reference to negligence of the lessee in the operation of the road, and not attributable to a breach of any public duty of the lessor com-

created the nuisance and had the sole possession and use of that track, are to be ascertained by the jury from the evidence. *Ibid.*

But where two railroad companies operate trains on the same track, one being the owner and the other the lessee, the liability of each under Iowa Laws 1862, chap. 169, for stock injured by its own trains is not affected by the fact that by the terms of the lease the lessor had the right to fix the timetable, and that the lessee's trains were operated in subrogation thereto, and the lessor was obliged to keep up repairs. *Clary v. Iowa Midland R. Co.* 37 Iowa, 344.

As to control by lessee, see also *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, *supra*, III.

5. Limited to injuries in operation of road.

Under this rule, the lessor of a railroad which it was authorized to lease and over the management of which it had no control cannot be made liable for injuries resulting to individuals from the negligent management or operation of the railroad as distinguished from duties absolutely imposed by law upon the owner. *Hayes v. Northern P. R. Co.* 46 U. S. App. 41, 74 Fed. Rep. 279, 20 C. C. A. 52.

An authorized lease without any exemption clause absolves the lessor from torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road over which the lessor could have no control; but for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself from legal responsibility. *Nugent v. Boston, C. & M. R. Co.* 80 Me. 62.

In the above case, *Mahoney v. Atlantic & St. L. R. Co.* 63 Me. 68, *supra*, II. d, 4, was distinguished upon the ground that there the injury complained of resulted solely from the wrongful act of the servant of the lessee who had sole control of the trains, and not, as here, from the wrong of the lessor in the original negligent construction of its depot.

A railroad company is not liable for the negligence of another company where the legislative authority to lease the road included by implication exemption from liability for negligence of the lessee operating the road, where it did not involve any breach of the public duties imposed upon the lessor by its charter or the

pany; and we shall only add to what he has said that as to such acts, whether of omission or commission, there is no reason of public policy why the rights and obligations of the lessor and lessee should be held to be different from those which the law annexes to any other lease. We therefore hold that upon the facts alleged the St. Paul, Minneapolis, & Manitoba Railway Company is not liable, and its demurrer to the complaint should have been sustained." The court further says (68 Minn. 551, 552): "We start with the proposition that a railroad company is liable for the negligence of its lessees or licensees in the operation of its road, unless it is relieved therefrom by legislative exemption, express or implied. In case of a lease made with legislative authority, which gives the lessee the exclusive control and possession of the road, we have just held that such exemption is necessarily implied. The fact that the lease transfers to the lessee this control and possession, thus putting it out of the power of the lessor to interfere with or regulate the operation of the road, is an influential, if not the controlling, consideration for holding that this legislative exemption is implied." Wood, Rail-

way Law, § 490, sums up the authorities thus: "But where the statute authorizes the lease the lessee assumes, during the existence of the lease, all the duties and obligations of the lessor, and from the time that it enters into possession of the road becomes solely liable for all injuries resulting from its management unless it is operating the road in the name of the lessor." Hutchinson, Carr. 2d ed. § 515b, says: "An authorized lease, however, not otherwise providing, will absolve the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor has no control." 2 Elliott, Railroads, § 468, says: "As said in the preceding section, some of the cases make a distinction between negligence in the operation of the road and negligence in its construction, and adjudge that the lessor company is not liable for the negligence of the lessee in operating the road. The text-writers generally favor the doctrine that for negligence in operating the road the lessor is not liable." And in § 469: "Our opinion is that where the lease is executed under the provisions of a statute, in accordance with its require-

general laws of the state. *Heron v. St. Paul, M. & M. R. Co.* 68 Minn. 542.

And a railroad company leasing its track to another company where the statute authorizes the lease is not responsible for injuries caused by torts of the lessee company if the injury resulted from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road, matters over which the lessor company could in the nature of things have no control, in such case the lessee being solely responsible; but where the injury results from the omission of some duty which the lessor itself owes to the public in the first instance, as something connected with the building of the road, the company assuming the franchises cannot devert itself of responsibility by leasing its track to another company though under legislative authority. *St. Louis, W. & W. R. Co. v. Curl*. 28 Kan. 822.

Thus, where one railroad company enters into an agreement with another giving the latter the right to lay its rails on the side of its roadbed, and to have the exclusive use of the same when laid for the purpose of making a connection with its road, the licensor or lessor company after having thus parted with the possession and control of its property for a lawful purpose cannot be made responsible for the improper manner in which the licensee or lessee company may have exercised its power of control over the premises, unless the contract contemplated, or its execution necessarily involved, the production of a nuisance. *Gwathney v. Little Miami R. Co.* 12 Ohio St. 92.

And a railroad company which has leased its road to another for a period of ninety-nine years, the road being managed and controlled exclusively by the latter, the former having entirely withdrawn from the operation of its business as a railroad company, is not liable for injuries sustained by a passenger on such road by reason of the wrongful and negligent acts of the lessee's servants. *Fisher v. Metropolitan Elev. R. Co.* 34 Hun. 433.

In the above case, *Abbott v. Johnstown, G. & K. Horse R. Co.* 80 N. Y. 27, 38 Am. Rep. 572, *supra*, II. a, was distinguished upon the 44 L. R. A.

ground that in that case the lease was made to an individual, and was therefore held to be inoperative, while by chap. 218, Laws 1839, it was made lawful for any railroad corporation to lease to another railroad corporation.

And *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, 21 L. ed. 675, *supra*, II. b, was distinguished upon the ground that there it appeared that the persons in charge of and operating the railroad were still, as a matter of fact, in part at least, in the service of the company.

But trustees under a railroad mortgage for the benefit of bondholders, who, after entering into possession thereunder, leased the railroad to others, but under verbal agreement continued to operate the road for the lessees, and received the earnings, paid the expenses, selected, contracted with, and discharged the persons employed on the road, and exercised all the other powers usually exercised by railroad companies over their own roads, are personally responsible for any injury sustained by reason of the negligence of a person so employed. *Ballou v. Farnum*, 9 Allen, 47.

And while, if a railroad company should lease its entire road or an entire portion of its road to another company it would cease under the Missouri statute to be liable as a common carrier as to the whole or such portion, it cannot parcel out its business to agents and be a common carrier without the liabilities thereof, as in such case the doctrine would apply that the responsibility of a franchise with exclusive privileges cannot be escaped by delegating to others the power to transact a portion of the business. *Speed v. Atlantic & P. R. Co.* 71 Mo. 303.

6. Operation and charter duties distinguished.

Trespasses committed by employees of the lessee railroad company while putting in a new culvert in the railroad, the owner or lessor having no connection with or authority over such men, cannot be regarded as having been committed within the exercise of any of its franchises, and it is not liable therefor. *Chicago, M. & N. R. Co. v. Eichman*, 47 Ill. App. 156.

And where parties hire the use of cars from a railroad company to be employed in transport-

ments, is made to a company having authority to accept it, and is made in good faith, and not for the purpose of transferring duties or obligations to an irresponsible party, the lessor company is not liable for injuries caused by the negligence of the lessee, and not attributable to a breach of any public duty of the company that executed the lease." Many cases cited by counsel for plaintiff in error are upon questions of liability of lessor companies for the negligent construction of the road, or the negligent maintenance of it when the duty of maintenance has not been assumed by the lessee. Of this class is the decision of this court in *St. Louis, W. & W. R. Co. v. Curl*, 28 Kan. 622. In that case the second subdivision of the syllabus reads thus: "In case of a lease of a railway track, a distinction exists as to the liability of the lessor and lessee company between those cases in which the liability arises from the omission of some duty in the construction of the road and those which arise from negligence or the omission of some duty in the handling of trains and the management of the road." Justice Brewer delivered the opinion, and said (pp. 623,

624) as follows: "Defendant contends that, where the statute authorizes the lease by one railway company to another of its track, the lessor company is not responsible for injuries caused by the torts of the lessee company, and in support of that doctrine cites some authorities. To a certain extent this proposition is true. If the injury results from negligence in the handling of trains, or in the omission of any statutory duty connected with the management of the road, matters in respect to which the lessor company could, in the nature of things, have no control, then the lessee company will alone be responsible; but when the injury results from the omission of some duty which the lessor itself owes to the public in the first instance,—something connected with the building of the road,—then we think the company assuming the franchise cannot divest itself of responsibility by leasing its track to some other company."

We are entirely satisfied that the judgment of the court below was right, and it is therefore affirmed.

All the Justices concur.

tation of freight to be laden as the hirers choose, the company does not incur any risk with reference to the mode adopted in loading them. *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291.

And the killing of a conductor while endeavoring to make a coupling between the engine under his control and a train in its front, caused by a defect in the engine, is not a wrong for which an action may be maintained against the owner of the road, where the road was leased, and such conductor was in the employ of the lessee, and the engine was furnished by it. *East Line & R. River R. Co. v. Culbertson*, 72 Tex. 375, 3 L. R. A. 567.

So, no duty rests upon a railroad company to keep in repair or well-lighted a passage to premises owned by it contiguous to its road, which are leased by it to be used as a railway eating house, such duty resting upon the lessee and not the lessor; and the lessor is not liable to a person injured by a failure to perform such duty. *Texas & P. R. Co. v. Mangum*, 68 Tex. 342.

And the lessor of a railroad cannot be made liable for damages for the negligence or torts of the lessee in constructing and maintaining an embankment on the road, where the lease was valid and the lessee was in possession, because it was bound, under the lease, to issue to the lessee its bonds for the cost of any work chargeable to construction, where the work was nevertheless the work of the lessee, and it did it in its own way, the lessor having no control. *Miller v. New York, L. & W. R. Co.* 125 N. Y. 118.

So, an employee of a lessee of a railroad cannot hold the lessor thereof responsible for an injury received while coupling cars, due to the fact that a platform for the purpose of loading lumber had been permitted to be constructed, which was so near the railroad track that it did not permit of a man standing between the platform and the track while a train was passing. *Evans v. Sabine & E. T. R. Co. (Tex.)* 18 S. W. 493.

And where a lessee of a railroad under a valid lease fills in a trestle, making a high embankment so near the lands of an abutting owner that, in times of rains and melting snow,

sand and earth are washed down and flow upon such abutting land, causing damage thereto, the lessor is not liable therefor though it originally constructed the trestle and was chargeable under the lease with the cost of the embankment. *Miller v. New York, L. & W. R. Co.* 125 N. Y. 118.

And a railroad company owning a line of railway, which constructs a bridge thereon of sufficient height to permit of its operation with ordinary cars in the usual way, and leases the same, is not liable to an employee of the lessee who is injured while in the discharge of his duties in the ordinary way, by reason of his employer receiving into its train a car of peculiar construction and unusual height, and failing to give notice thereof to the trainmen. *Texas & P. R. Co. v. Moore*, 8 Tex. Civ. App. 289.

But raising the track of a railroad to such an extent as to cause an overflow of water upon adjacent premises, and throwing dirt upon such premises, or requiring a retaining wall to be built to prevent ground from the railroad from sliding down upon adjacent lands, is in the nature of a nuisance for which all persons are liable who create or continue the same; and where a change of grade is made by a railroad company while operating its road, and it afterwards leases it to another company which raises the grade still higher, they are jointly liable for permanent injuries to property thereby caused, and such liability is not limited to the injury after the lease, where in its nature it could not be separated from that accruing before it, though as to injury resulting from the raised track before the lease the lessor alone would be liable. *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496.

So, a railroad company is liable after notice to abate, for damages resulting from the continuance upon its right of way of a nuisance placed there by a former company of the same name while it had possession under a lease from the state, and the fact that the nuisance in question was created in an effort to abate another nuisance causing similar damages of which complaint had been made is of no effect. *Western & A. R. Co. v. Cox*, 93 Ga. 561.

And a town which has been obliged to pay damages to a person injured by a nuisance

maintained upon a railroad where the railroad ran along a highway may look for its indemnity to the railroad company which originally altered the highway, thus creating the nuisance, though the injury occurred after that company had leased its road to another company and while the lessees were operating it under a contract devolving upon them, as between themselves and the first company, the duties and obligations of the first company. *Hamden v. New Haven & N. Co.* 27 Conn. 165.

So, a chartered railroad company permitting another company to run trains over its railroad and thus to use its franchise is liable to a passenger upon one of such trains for a personal injury sustained by him by reason of a derailment resulting from negligence in failing to have and maintain a safe track. *Central R. & Bkg. Co. v. Phinazee*, 93 Ga. 488.

And the lessor of a railroad which is leased under statutory authority containing no provision exempting the lessor from liability remains liable for an injury resulting from defective appliances furnished by the operating company. *Lee v. Southern P. R. Co.* 116 Cal. 97, 38 L. R. A. 71.

And a railroad company whose railroad is connected with another road by means of a switch is liable for an injury sustained by a passenger in its cars due to careless management of the switch, it being a part of its road over which it must necessarily carry all its passengers, although it was provided for and attended by a servant of the other road at the latter's expense. *McElroy v. Nashua & L. R. Corp.* 4 Cush. 400, 50 Am. Dec. 794.

And a depot company which constructs a railroad track under a contract by which it is to be used as terminal facilities for another road, the grounds and tracks to be used by different roads, cannot by its lease or a transfer of its franchises rid itself of its liability for the improper use of such road, and a person injured thereon is entitled to recover from the depot company, and of the lessee railroad company acting under such agreement, the damage sustained. *A. Backus Jr. & Sons v. Detroit W. Transit & Junction R. Co.* 71 Mich. 645.

So, a railroad company cannot divest itself of responsibility for injuries resulting from an omission to construct and place sufficient cattle guards upon its tracks before it uses them or permits anyone else to use them, and it remains responsible though the injury is caused by the trains of the lessee. *St. Louis, W. & W. R. Co. v. Curl*, 28 Kan. 622.

And legislative consent to the leasing of a railroad under Mo. Rev. Stat. § 790, which will release the lessor from liability for negligence of the lessee, will not release it from liability for its own negligence; and where it permits salt to remain upon its tracks, which attracts stock upon the track, where it is killed, it will be held liable. *Brown v. Hannibal & St. J. R. Co.* 27 Mo. App. 394.

In the above case, *Main v. Hannibal & St. J. R. Co.* 18 Mo. App. 388, *supra*, II. d, 2, was distinguished upon the ground that in that case the effort was to make the lessor liable for the negligence of the lessee.

And in *Richardson v. Great Eastern R. Co.* L. R. 10 C. P. 486, 33 L. T. N. S. 248, which was an action against a railway company for negligence in allowing a defective truck to be used on its line, causing a collision with a passenger train, in consequence of which a passenger sustained an injury, the truck in question belonging to a wagon company whose duty it was to keep it in repair, it was held that although it might not have been the duty of the railroad company itself to cause the truck to be

properly examined and prepared previous to its breakdown, it was somebody's duty to do it, and the railroad company was guilty of culpable negligence in not satisfying itself that a proper examination had taken place before it allowed it to proceed. But this was reversed in L. R. 1 C. P. Div. 342, 24 Week. Rep. 907, upon the ground that there must be some limit to the amount of examination required.

So, while a lessor railroad company is not liable for the mere neglect of its lessee in running its trains causing temporary injury, where the construction and operation of the road are an invasion of, or an appropriation of, a right of property without the owner's consent, he has a clear right to recover damages by way of compensation for the unlawful appropriation. *Stickley v. Chesapeake & O. R. Co.* 93 Ky. 323.

And a railroad company which enters upon and appropriates the land of another to its own use without right cannot transfer its corporate privileges to another so as to justify a continuance of the wrong by the vendee or lessee as if the latter were an innocent purchaser. *Ibid.*

But a failure of the lessee of a railroad to run cars for the transportation of freight and passengers over a portion of the road must not only be an intentional, but a wilful, violation of the charter in order to render the violator amenable to a proceeding in quo warranto for the purpose of depriving the owner of its charter rights. *Atty. Gen. v. Erie & K. R. Co.* 55 Mich. 15.

III. Under running privileges or arrangements.

The same principles seem to govern the liability of the owner of a railroad for injuries thereon by a company or person having running privileges or arrangements over its road as apply in case of leases of railroads, and something of the same conflict is found among the cases.

Thus, the rule has been laid down that a railroad company holding the franchise and exclusive right to operate a railroad must so use it as not to endanger passengers or property whether the use be by itself or others whom it may permit to use the road, and if it permits another company to run its trains on and over its track, and injuries grow out of the negligent use of the road thus authorized, the company owning the road and franchises will be liable therefor. *Peoria & R. I. R. Co. v. Lane*, 83 Ill. 448.

And that a railroad company permitting another railroad company to use its track in running its own trains over the consenting company's road, and thus exercising the franchises of the latter, remains liable for the consequences of mismanagement to the same extent as it would be for such mismanagement of its own servants in running its own trains. *Sellers v. Richmond & D. R. Co.* 94 N. C. 654; *Aycock v. Raleigh & A. Air Line R. Co.* 89 N. C. 321; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678.

And that a railway company furnishing a track for other companies to run cars upon is responsible for the negligence of both or either of the other companies, as well as its own. *Chicago & E. R. Co. v. Meech*, 59 Ill. App. 69.

Within this rule, a railroad company cannot escape liability for injuries occasioned by arrangements with other roads to which it assents, by which the safety of passengers is jeopardized, and an arrangement between several companies, by which all are to use the same track, will not relieve the owner of the track from responsibility for an injury done by one of the other companies to a passenger, though a tribunal consisting of the directors of all the roads had been established for the joint man-

agement. *Eaton v. Boston & L. R. Co.* 11 Allen, 500, 87 Am. Dec. 730.

And a railroad company owning a railroad upon which animals are killed in its operation is not relieved from liability therefor by the fact that the killing was directly caused by an engine operated thereon by another railroad company with its consent or permission, and that such injury was not caused by the willful acts of the servants of the owner. *Toledo, P. & W. R. Co. v. Rumbold*, 40 Ill. 143.

And a railroad company over whose road another company has a running privilege authorized by statute to be paid for by part of the traffic receipts is liable to a passenger on a train of the latter company on the road of the former company for an injury caused by the negligence of a porter at a platform devoted exclusively to the traffic of the licensee company. *Self v. London, B. & S. C. R. Co.* 42 L. T. N. S. 173, 41 J. P. 344.

So, a railroad company which allows the trains of another chartered company to use its depot and run over a short section of its track for the purpose of approaching and leaving the depot must protect its own passengers, who are themselves not out of place, against injury from the trains of such other company. *Central R. & Bkg. Co. v. Perry*, 58 Ga. 461.

And where a mortgage is made upon a railroad and the mortgagees take possession under it for breach of condition, they stand in the place of the corporation, and are vested with its rights and subject to the liabilities incidental to the exercise of the franchise and the operation of the road; and where they permit another corporation to run an engine upon such road they are liable for damages by fire from such engine to the same extent as the corporation itself would have been if no mortgage had been made. *Daniels v. Hart*, 118 Mass. 543.

And the owner of a railroad over which by license or permission another company runs an engine belonging to itself without being an assignee or lessee of the former company is liable for a cow killed by such engine, where the injury occurred, not from any negligence in running it, but in consequence of the omission to inclose the road with a lawful fence to prevent animals from going thereon. *Kansas City, Ft. S. & G. R. Co. v. Ewing*, 23 Kan. 273.

And a railroad company is liable for injuries from fire thrown by a locomotive of another company which it permitted to be run on its road without any spark arrester, where its defective condition was known to the train dispatcher of the owner of the road, who exercised no supervision over it. *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214.

Nor does the fact that the lease of a railroad provided that the officers of the lessee should prescribe the rules for and direct the running of the trains in any way change the character and effect of a contract between the companies to the effect that they should operate the road jointly and have equal rights thereon, and that each company should pay and settle all claims for injuries committed by its trains and servants in the management of the railroad, including damages for the killing of stock. *Wabash R. Co. v. Williamson*, 8 Ind. App. 190.

And where a railroad company owns a road upon which it was running a car in which a passenger was killed by a collision, it is liable for such death, although the collision was caused by the fault of persons in charge of another train run by its permission by another company on the same road. *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591.

And a transit company with which a railroad

company has an arrangement for the hauling of its cars over a bridge and through a tunnel to its final destination, the transit company furnishing the motive power, is the agent of the railroad company so as to render the railroad company responsible for an injury to a passenger who held a ticket to its final destination, though the injury was caused by the negligence or unskillfulness of the transit company furnishing such motive power. *Keep v. Indianapolis & St. L. R. Co.* 10 Fed. Rep. 454.

Where one has received an injury at the hands of two or more wrongdoers, all, however numerous, are severally liable to him for the full amount of the damage occasioned by such injury, and he has an option to sue all jointly or bring his separate action against each; and where a passenger on a railway train receives an injury through the mutual negligence of the servants of the company on whose train he is traveling, and those of another company using the same road, from a collision between the trains of the two companies, an action may be brought against either company, and the person injured is not restricted to an action against the company on whose train he travels. *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791.

It has been held, however, that a railroad company by giving permission to another railroad company to use a part of its track does not thereby bind itself to make its track safe or to put it in repair, or to make any change in its existing state, and does not place itself under any duty to the passengers of the other company, the claim of such passengers for injury being upon the company with whom they contract. *Murch v. Concord R. Corp.* 29 N. H. 9, 61 Am. Dec. 631.

And the rule has been laid down, upon the other hand, that where a railroad company allows the trains of another company to use its depot and run over a section of its track for the purpose of approaching and leaving the depot, and a passenger is injured by reason of his own want of promptitude in boarding a train of the licensee company, whose passenger he is, the licensor company is not liable for any negligence which is exclusively the negligence of the other company. *Central R. & Bkg. Co. v. Perry*, 58 Ga. 461.

So, where one company by agreement or otherwise has a right to run its trains over the roads of another company, the servants of the former company may maintain an action against the company owning the road for an injury occasioned by the improper and negligent management of a switch which it was the duty of the latter company to keep in the proper place. *Re Merrill*, 54 Vt. 200; *Sawyer v. Rutland & B. R. Co.* 27 Vt. 370.

And where a company owning a railroad track gives to another company permission to run its cars over it, in the absence of any legal arrangement varying the rule, the owner must be held to the exercise of ordinary care in the construction and maintenance of bridges along the track for the protection of the servants of the lessing company, as well as its own. *Texas & P. R. Co. v. Moore*, 8 Tex. Civ. App. 289.

And a person in the general employment of a railroad company, his duty being to attend to the switches and couple and uncouple its cars together with those of another company at a station where they use a common track, whose wages are paid by both companies though he receives them from the former, who is injured while coupling cars for the latter, is the latter's servant so as to be able to maintain an action against it for such injuries if caused by

its negligence. *Vary v. Burlington, C. R. & M. R. Co.* 42 Iowa. 240.

But where two or more charter railway companies whose lines terminate at the same point use in common a track belonging to one of them, the owner thereof is not responsible to its employees for personal injuries sustained solely by reason of the negligent use of the track by the employees of another company, the redress being, in such case, against the company whose employees are in fault. *Georgia R. & Bkg. Co. v. Fridell*, 79 Ga. 439.

In the above case, *Coggin v. Central R. Co.* 62 Ga. 685, 35 Am. Rep. 132, *infra*, IV., was distinguished upon the ground that in that case the negligence was by an employee of the proprietary company, and the injury was to the employee of a telegraph company; and *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 478, *supra*, was distinguished upon the ground that in that case the negligent company was using the franchise as well as the track of the proprietary company; and *Central R. & Bkg. Co. v. Perry*, 58 Ga. 461, *supra*, was distinguished upon the ground that in that case the injury was to a passenger.

So, there is no variance in an action for a personal injury, between an allegation that the defendant was in use of the road on which the injury occurred, and that the person having charge of the switch was in its employment and under its direction and control, and proof that under an agreement with the defendant company another company was permitted to run its trains upon such road, and that while the plaintiff was conducting a train over the road the engine and cars were diverted from the track by the negligence of the defendant's servants placed in charge of the switch which caused the injury complained of, the object of the averment being to show that the plaintiff was lawfully on the road at the time of the injury. *Sawyer v. Rutland & B. R. Co.* 27 Vt. 370.

Under the Iowa statute, where a railroad company has the privilege of running its trains over the tracks of another company and an injury is caused by the operation of the road, the company which causes the injury is the party liable to respond in damages therefor without reference to which owned and constructed the road. *Clary v. Iowa Midland R. Co.* 37 Iowa. 344; *Stephens v. Davenport & St. P. R. Co.* 3d Iowa, 527.

IV. Under contracts for construction or otherwise.

A railroad company which permits a construction company to exercise its franchise of running cars over its road is liable for any injury done, to the same extent as though it itself had run such cars. *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 482; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105.

The principle of law releasing an owner from liability for acts performed by an independent contractor has no application where an injury is sustained from a neglect of duty created by law, which duty exists irrespective of any contract, or where the contract is merely introductory. *Sawyer v. Rutland & B. R. Co.* 27 Vt. 370.

And where a railroad company enters into a contract with another railroad company to build and construct its road, and such other company operates and runs trains over the road so far as it has been constructed for purposes of general traffic, the owner is responsible for torts committed by it in the operation of its trains thereon, whether it was allowed the privilege of using such road, or the privilege of operating it arose out of some consideration of the contract 44 L. R. A.

to build and construct. *Iakin v. Willamette Valley & C. R. Co.* 13 Or. 436, 57 Am. Rep. 25.

In the above case, *Cunningham v. International R. Co.* 51 Tex. 503, 32 Am. Rep. 632, *infra*, was distinguished upon the ground that there the trains under the contract of the contractor were not being used for the purpose of traffic, but for the purpose of construction, when the injury occurred.

So, a railroad company which contracts with an individual to move its cars to the various consignees by horse power and bring them back empty to the yard, the contractor employing the teams and men and exercising an independent control over them, is not thereby relieved from responsibility for the negligent acts of such contractor in the moving of such cars, whereby a person is hurt. *Philadelphia, W. & B. R. Co. v. Hahn* (Pa.) 12 Atl. 479.

And the fact that an engine killing stock was in use for traffic at the time under an agreement, instead of being employed in construction of the road under a contract therefor with the owner of the road, will not affect the position of the contractor as an agent for the owner, or the liability of the owner for the damage. *Bay City & E. S. R. Co. v. Austin*, 21 Mich. 390.

And a railroad company on whose track a person was injured by the negligent management of a car cannot relieve itself from liability therefor upon the ground that the car was not being operated by it but by a construction company with which it had a contract for an electrical equipment of its railroad, where the car in question was a passenger car which was being operated for profit. *Cogswell v. West Street & N. E. Electric R. Co.* 5 Wash. 46.

In the above case *Cunningham v. International R. Co.* 51 Tex. 503, 32 Am. Rep. 632, *infra*, was distinguished upon the ground that in that case the passenger was carried by a construction train operated by independent contractors for the building of the road, without the knowledge of the railroad company and against its express prohibition.

So, one who makes a contract by which he is to take entire charge of the freight business of a railroad company at a station, loading and unloading the cars, handling them, and making up the trains, and doing all other yard service necessary to the transaction of the freight business, and having control over the grounds, yards, buildings, engines, and cars at that station, for which he is to be paid at a designated rate per ton for freight received or delivered and per car hauled, the business to be done under the railroad company's superintendent and to his satisfaction, stands in the relation of a servant to the railroad company so as to render the company liable for his acts, and not in the relation of an independent contractor. *Speed v. Atlantic & P. R. Co.* 71 Mo. 303.

And a railroad engineer in the employ of the owner of the road remains its servant while in its pay and liable to be discharged by it, though he is temporarily subjected to the orders of a telegraph company while engaged solely in transporting materials for such telegraph company with a force of attendants employed by it, and will be required to observe the general law of diligence applicable to his vocation except as to acts and omissions dictated by express orders, and his failure to do so will be negligence imputable to the railroad company, which will be liable for a personal injury resulting therefrom to one of the force of attendants employed by the telegraph company. *Coggin v. Central R. Co.* 62 Ga. 685, 35 Am. Rep. 132.

But as between a railroad company and the servant of a telegraph company which was under contract with the railroad company by

which the railroad company was to transport the materials used and men engaged in the construction and repair of a telegraph line, such servant of the telegraph company will be deemed to have taken all risks whatsoever not occasioned by negligence imputable to the railroad company, but none that arose from such negligence. *Ibid.*

And in establishing the liability of the owner of a railroad for damages caused in its operation, the question whether the parties doing the damage were running the train over the railroad under contract with it or by its permission and consent is immaterial. *Pennsylvania Co. v. Ellett*, 132 Ill. 654.

In *City & Suburban R. Co. v. Moores*, 80 Md. 348, however, it was held that the mere fact that a railroad company owned the track on which an engine was being run in performance of a contract would not make it liable for injuries caused by such engine, as it would not be connected with the act causing the injury; but this seems to be a case of an independent contractor rather than of a lessee.

And the fact that a railroad company has leased its line, and that a person was injured thereon by the negligent operation of its trains, does not render the railroad company liable for such injury, where the person injured was not in the employ of either the lessor or lessee, but was working for an independent contractor who was building a fence for the lessor for a certain sum per mile. *Galveston, H. & S. A. R. Co. v. Gartelser*, 9 Tex. Civ. App. 456.

So, where a shipper by consent of a railroad company undertakes with the help of his own employees alone to run cars down a grade to the place where they are intended for loading, and while so employed one of such employees is injured by the negligence of his coemployees, the railroad company is not liable to an action for damages on account of such injuries. *Hanna v. Chattanooga & N. R. Co.* 88 Tenn. 313, 6 L. R. A. 727.

And a railroad company is not liable in damages for alleged negligent management of one of its trains used and controlled by an independent contractor for construction purposes on a portion of the road built under the construction contract and not yet surrendered to the company. *Cunningham v. International R. Co.* 51 Tex. 503, 32 Am. Rep. 632.

And a railroad company whose road was in the possession of an improvement company having authority under its incorporation to construct and equip the road will not be held responsible for wrongful acts or omissions of the employees of such improvement company because it ran trains and carried passengers and freight where the road was not leased to be operated for general traffic, and the charge was not based upon the theory that the improvement company was operating the road in its own name for the use and benefit of the railroad company merely to relieve the latter from responsibility. *Kansas C. R. Co. v. Fitzsimmons*, 18 Kan. 34.

See also *Huey v. Indianapolis & V. R. Co.* 45 Ind. 320, *supra*, VIII.

V. Under ineffectual attempt to consolidate.

A railroad company is liable for injury sustained by a person through the negligence of persons operating its road under an attempted consolidation which was illegal and ineffectual. *Latham v. Boston, H. T. & W. R. Co.* 38 Hun, 265.

VII. Occupation must be authorized.

The rule that a railroad company permitting another company to use its track remains liable for the consequences of mismanagement in such use to the same extent as though its own

agents and servants were using it does not apply to a case in which the owner of the railroad allowed another company to use its track for a short distance to get to a station, and some cars of the road became detached from a train and ran in on the licensor's road, in consequence of which an accident occurred, such cars running at random, and being under no control, and the accident happening at a place where the licensee company had no authority or license to go, even in a lawful manner. *Sellers v. Richmond & D. R. Co.* 94 N. C. 654.

In cases of injury inflicted by the lessee of a railway, however, no other negligence need be alleged or proved to fix the liability of the owner than that of the company or corporation permitted or authorized by the owner to use the railroad. *Ibid.*

But an allegation in an action against the lessor of a railroad for damages caused by its operation, that such lessor was a corporation owning and using the railroad tracks in question on which the defendant and other railroads ran their cars, the defendant having control and occupation of the tracks, is not subject to objection on a motion in arrest of judgment; as, for aught that appears, the company by which the damage was done might have been a trespasser upon the defendant's road. *Pennsylvania Co. v. Ellett*, 132 Ill. 654.

See also *East Line & R. River R. Co. v. Culbertson*, 72 Tex. 375, 3 L. R. A. 567, *supra*.

VII. Injuries to employees.

See also *Virginia Midland R. Co. v. Washington (Va.)* 7 L. R. A. 344.

The same principle seems to have been adopted where the injury is to an employee of one of the companies as when it is to a third person.

Thus, a railroad company by accepting its charter assumes the obligation to keep its tracks in safe condition for the operation of its trains over them, and this duty is due to all persons who are permitted by it to travel upon or operate trains over it, including employees of a lessee. *Galveston, H. & S. A. R. Co. v. Daniels*, 9 Tex. Civ. App. 253.

And the lessor of a railroad is liable to an employee of its lessee who is injured by the imperfect construction and maintenance of the rails and tracks. *Lee v. Southern P. R. Co.* 116 Cal. 97, 38 L. R. A. 71.

And a railroad company which has leased its road is liable for an injury to a person caused by a defective side track belonging to it, although at the time of the accident he was acting as a brakeman of the lessee company on a train operated by it. *Trinity & S. R. Co. v. Lane*, 79 Tex. 643.

So, a railroad company over a section of whose track another company had a contract for the running of its trains is liable in tort to the latter's brakeman, who without the fault of himself or his coemployees receives a personal injury while in the performance of his duty on his employer's train, solely by reason of the negligent construction of the former's depot. *Nugent v. Boston, C. & M. R. Co.* 80 Me. 62.

Agreements between several railroad companies having connecting lines of railroads have no effect upon the rights of strangers to the agreement, and do not make the employees of one company the coemployees of the employees of the other so as to bar a recovery by an employee of the one for an injury arising from the negligence of an employee of the other. *Philadelphia, W. & B. R. Co. v. State, Bitzer*, 58 Md. 372.

The rule that every employee assumes the risk of the negligence of his coemployees does not apply in case of an injury to an employee of a

railroad company occurring on the road of another railroad company upon which it had running arrangements, caused by the imperfect condition of the road. *Ibid.*

And the fact that a trainman and switchman by whose negligence the trainman was injured were both under the exclusive control of the railroad company owning the road does not make them fellow servants so as to relieve the company from liability for the injury where the switchman was in the employ of the company and the trainman was in the employment of another company having the right to use the track of the former company for the purpose of transporting coal thereon, under an arrangement that the track should be kept in running order by the owner, the business of each company being entirely separate. *Tierney v. Syracuse, B. & N. Y. R. Co.* 85 Hun, 146.

And the owner of a railroad yard and tracks, though it has rented them and given complete possession and control thereof to the receiver of another railroad company in consideration of a stipulated rental and an undertaking by the company to do certain switching, is not relieved thereby from its duty to keep the tracks in a safe condition. And in case of a negligent failure on its part to do so a breach of the duty which it owes the lessee company and its employees is committed, which will render it liable to the widow of an employee who lost his life as a result of such negligence. *Rome R. Co. v. Thompson*, 101 Ga. 26.

So, a variance between an averment in an action against a railway company for negligence that the plaintiff was an employee of the railroad company and proof that he was employed by its lessee and injured through the lessor's negligent construction of the road is immaterial. *Lee v. Southern P. R. Co.* 116 Cal. 97, 88 L. R. A. 71.

And proof in an action for personal injury that the person injured was in the employment of and acting for another corporation which was operating the railroad under a lease is admissible therein under a general denial. *Baxter v. New York, T. & M. R. Co.* (Tex. Civ. App.) 22 S. W. 1002.

And in *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705, which was an action for a personal injury to a third person caused by the negligent act of the yard master of the lessor which was brought against the lessee, the court declined to say whether the lessor was also liable, but said that if it was, the person injured would have her option to sue either.

But a company owning a railroad is not liable to the servant of a company using it, in the absence of a special agreement, for any injury caused by the negligence of the latter company or of its servants. *Texas & P. R. Co. v. Moore*, 9 Tex. Civ. App. 289.

And an employee of a railroad company who in his contract of employment assumed all risk incident to his employment cannot claim that he was injured on the road of another company for the purpose of avoiding his agreement, and at the same time seek to make his employer liable for the injury. *Galloway v. Western & A. R. Co.* 57 Ga. 512.

An instruction in an action by an employee of the lessee of a railroad for an injury caused by its negligent operation, that if the owner and lessee were under a joint duty to keep the track in repair the plaintiff could not recover, is not erroneous as against the railroad company. *Rome R. Co. v. Thompson*, 101 Ga. 26.

And an engineer in the employ of the owner of a railroad, who receives an injury from a collision with a train of another company using 44 L. R. A.

a part of the road under a lease from the owner through the negligence of the lessee, cannot recover damages from the owner of the road, as the negligence of the employees of the lessee is not one of the hazards against which it must be presumed he contracted. *Clark v. Chicago, B. & Q. R. Co.* 92 Ill. 43.

So, a railroad company is not bound to answer in damages for injuries alleged to have been caused by a coemployee, where the person injured was a track hand and servant of an individual lessee on the road, and not of the railroad company itself, and the injury was caused by one likewise in the service of the individual lessee. *Jones v. Georgia Southern R. Co.* 66 Ga. 558.

And a railroad company is not liable for an injury received on its road by a brakeman in the service of another railroad company, where it was caused by the negligence of his fellow servant on a train owned and operated by their employer. *Baltimore & O. & C. R. Co. v. Paul*, 143 Ind. 23, 28 L. R. A. 216.

In the above case *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678, *supra*, III., was distinguished upon the ground that there the president of the railroad company was also a member of a construction company engaged in constructing the road and having possession and running its trains thereon for that purpose, and that at the time of the injury the person injured was acting under his special directions, and was therefore a servant of the company.

So, a servant or employee of a railroad company operating a road belonging to another company without authority cannot recover of the owner damages for personal injuries resulting to him in the course of his employment through the negligence of his employer or of its officers or agents. *East Line & R. River R. Co. v. Culherson*, 72 Tex. 375, 3 L. R. A. 567.

The duty owing from the lessee of a railroad to its employees is one which arises wholly from contract, and is not imposed by the charter of incorporation of the railroad, and the lessor company is not obliged to employ as a servant any particular members of the public, and a person entering the services of the lessee company therefore acquires no right against the lessor, except by virtue of the terms of the employment, and cannot recover of the lessor for injuries sustained by the negligence of the lessee in the operation of the road, his sole remedy being against the lessee. *Hukill v. Maysville & B. S. R. Co.* 72 Fed. Rep. 745.

And the provisions against leasing a franchise so as to relieve it or property held under it from liability of the lessor or grantor, lessee or grantee, made by Cal. Const. art. 12, § 10, does not give an employee of the lessee of a railroad a right of action against the lessor company upon the conviction that it is his employer, but merely enables him to enforce his judgment based on the negligence of his employer against the property. *Lee v. Southern P. R. Co.* 116 Cal. 97, 88 L. R. A. 71.

As to injuries to employees, see also *Vary v. Burlington, C. R. & M. R. Co.* 42 Iowa, 246; *Georgia R. & Bkg. Co. v. Friddell*, 79 Ga. 489; *Sawyer v. Rutland & B. R. Co.* 27 Vt. 370; *Re Merrill*, 54 Vt. 200; *Texas & P. R. Co. v. Moore*, 8 Tex. Civ. App. 289, *supra*, III., and *Coggin v. Central R. Co.* 62 Ga. 685; *Hanna v. Chattanooga & N. R. Co.* 88 Tenn. 313, 6 L. R. A. 727, *supra*, IV.

VIII. Provisions for joint liability.

The owner of a railroad is liable, under Ind. Sess. Laws 1863, p. 24, providing that the lessee of a railroad shall be jointly and severally

liable with the lessor for injuries to stock thereon occasioned by trains of the lessee when such lessee uses the road in the corporate name of the company which owns it, where animals are killed by the trains of another corporation running in its own name and in its own behalf and under its control, over a part of the track of the owner under a contract for that purpose between the two corporations. *Indianapolis & M. R. Co. v. Solomon*, 23 Ind. 534.

And Ind. act March 4, 1863 (3 Ind. Stat. 413), making the company owning a railroad jointly and severally liable with the lessees and assignees, receivers and other persons running or controlling it for stock killed or injured, includes contractors, and it is no defense in an action to recover for stock killed that the injury was done by the train of another company which was in the exclusive use and protection of contractors for the construction of the road, who had not completed the same. *Huey v. Indianapolis & V. R. Co.* 45 Ind. 320.

And 3 Ind. Stat. 413, § 1, providing that lessees, assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company shall be liable jointly and severally with such company for stock killed or injured by the locomotives, cars, or other carriages of such company, renders the company owning the road liable without reference to the company or person who may have been running the locomotives, cars, etc., and such company may be sued alone. *Fort Wayne, M. & C. R. Co. v. Hinebaugh*, 43 Ind. 354.

But a railroad whose road is operated by a lessee is not liable for stock killed or injured under Ind. act March 4, 1863, providing that when a road is run or controlled by a lessee thereof in the corporate name of the owner, the lessees should be liable jointly and severally with such owner, where the lessee leased it in his own name. *Pittsburgh, C. & St. L. R. Co. v. Bolner*, 57 Ind. 572; *Pittsburgh, C. & St. L. R. Co. v. Hannon*, 60 Ind. 417; *Pittsburgh, C. & St. L. R. Co. v. Currant*, 61 Ind. 88.

And under the Indiana statute an animal killed or injured by a railroad train run by a lessee must have been struck by some part of the train by which it is claimed that it was killed or injured, to render the lessor and lessee jointly liable for its value. And where the evidence shows that two animals were tied together, and one was struck and killed and the other one injured by being dragged, the owner of the animal is not entitled to recover in a joint action for the animal which was not struck. *Jeffersonville, M. & I. R. Co. v. Downey*, 61 Ind. 287.

And in order to make a railroad company by whose train stock is killed jointly and severally responsible therefor with the owner of the road, under 3 Ind. Stat. 413, § 1, it must have been running or controlling the road of that company in the corporate name of such company either as lessee, receiver, or otherwise, and where the complaint in an action for such injury contains no allegation to that effect, it shows no cause of action against the lessee. *Cincinnati & M. R. Co. v. Townsend*, 39 Ind. 38; *Cincinnati & M. R. Co. v. Paskins*, 39 Ind. 380.

So, a complaint in an action for killing or injuring stock under Ind. act March 4, 1863, providing that assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company shall be liable jointly and severally with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, is insufficient where it fails to show that the railroad company by its agents and employees

had anything whatever to do with the killing of the stock, or that the locomotive doing it belonged to such company. *Pittsburgh, C. & St. L. R. Co. v. Hannon*, 60 Ind. 417.

And a complaint in a joint action under the Indiana statute against one railroad company as the owner and another as the lessee of a railroad, to recover for stock alleged to have been killed by the cars of the latter on such road, must, to be sufficient as to the lessee, allege that the lessee was running such railroad in the name of the owner. *Jeffersonville, M. & I. R. Co. v. Downey*, 61 Ind. 287.

In the above case, *Indianapolis, C. & L. R. Co. v. Warner*, 35 Ind. 515, *infra*, was distinguished upon the ground that in that case the complaint did not show the relation of the two companies.

And evidence that at the time of an injury to stock the railroad upon which it was injured was being run by a lessee in its own name, is admissible in an action against the railroad company for damages for such injury commenced before a justice of the peace. *Pittsburgh, C. & St. L. R. Co. v. Bolner*, 37 Ind. 572.

So, in North Carolina a railroad company leasing its road is answerable jointly with the lessee company operating the road for injuries due to the negligence of the latter. *Tillett v. Norfolk & W. R. Co.* 118 N. C. 1031.

And Ohio Rev. Stat. § 3305, declaring that notwithstanding a lease to a foreign corporation by a railroad company of the state, the lessor shall remain liable as if it operated the road itself, and both the lessor and the lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such road, applies to leases previously made as well as to those to be made in the future, and is not unconstitutional as impairing rights under the contract of lease. *Fisher v. Baltimore & O. & C. O. R. Cos.* 3 Ohio N. P. 283.

IX. Effect of lease or other contract upon failure of duty to fence.

The duty to fence a railroad right of way is largely, if not entirely, a statutory one, and under most of the statutes it is deemed to rest with the owner of the road, and any liability arising from a failure to perform such duty rests upon such owner.

Thus, if a railroad company either owns or operates a railroad it is liable for live stock killed unless its track is fenced, under the Washington statute, and the owner of the road is liable as such, though it had previously leased it to some other company. *Oregon R. & Nav. Co. v. Dacres*, 1 Wash. 195; *Whitney v. Atlantic & St. L. R. Co.* 44 Me. 362, 69 Am. Dec. 103.

And the owner of a railroad under a charter requiring it in general terms to fence its road upon both sides where a fence may be requisite is liable to a person whose cow is killed through neglect to fence the road, though the road was being run by another company under a long lease. *Nelson v. Vermont & C. R. Co.* 26 Vt. 717, 62 Am. Dec. 614.

And a railroad company operating the road of another company under a contract for its construction is the agent of the owner so that such owner will be liable for its negligent acts, within the meaning of Mich. Laws 1867, § 43, imposing the duty to maintain fences along the line of the road upon the owners and occupants respectively. *Bay City & E. S. R. Co. v. Austin*, 21 Mich. 390.

So, a railroad company leasing its road may be held responsible for damages caused by a defective or broken-down fence while the road was being operated by another, though the evidence

was sufficient to authorize a finding that a lease existed. *Price v. Barnard*, 85 Mo. App. 649.

And the duty of a railroad company to keep its right of way fenced devolves under the California statute providing that it shall be the duty of the railroad company to make and maintain a good and sufficient fence, and that it shall be liable for stock killed in case of its failure to do so, upon the owner of the road, and such owner cannot relieve itself from liability for cattle killed because of a failure to maintain a proper fence, by pleading that it had leased the road, and that the cattle were killed by the trains of the lessee. *Fontaine v. Southern P. R. Co.* 54 Cal. 645.

And the fact that a railroad was incomplete, and that the railroad company permitted a contractor to run a construction train over it, will not absolve the company from liability for the killing of a cow by such construction train, though it was operated and controlled by the contractor, where the road was not inclosed by a lawful fence in accordance with the statute, casting the liability upon the company for cattle killed or injured by the engine or cars on its railway. *Wichita & C. R. Co. v. Gibbs*, 47 Kan. 274.

And in *Missouri P. R. Co. v. Morrow*, 32 Kan. 217, it was said to be always the duty of a railroad company operating a railroad to see that proper cattle guards exist wherever its railroad enters or leaves improved or fenced land, whether such railway company owns the railroad or is simply operating it under a lease; but this was an action brought against the lessee.

So, a railroad company owning a road will be held responsible to third persons under the Illinois statute requiring railroads to fence their roads, for such damages as are incurred, where it operates its road itself or allows others to do so without fencing the track, either the lessee or the lessor company being liable in such case. *East St. Louis & C. R. Co. v. Gerber*, 82 Ill. 632.

And a railroad company owning a road is liable under the Illinois statute requiring railroad companies to fence their tracks within six months after the road has been opened for use, if they fail to fence the track thereof within six months after they begin to run trains on it, though for construction purposes, and the fact that the road remains under the control of the contractors does not affect the liability. *Rockford, R. I. & St. L. R. Co. v. Heflin*, 65 Ill. 367.

And in *Illinois C. R. Co. v. Kanouse*, 39 Ill. 272, 59 Am. Dec. 307, which was an action against the lessee of a railroad for the killing of a horse due to the fact that the railway land was unfenced, it was said that it was the duty of the owner to fence the road, and that it would have been liable for the injury had it been sued.

So, in Maine a railroad company whose charter requires it to erect and maintain substantial, legal, and sufficient fences on each side of the land taken by it for its road where the same passes through inclosed and improved lands, and in default of which they are liable for injuries occasioned thereby, cannot relieve itself from any liability for loss or injuries to stock from a failure thus to fence the road by the assignment and leasing of the road to another company. *Whitney v. Atlantic & St. L. R. Co.* 44 Me. 362, 69 Am. Dec. 103.

And a railroad company which permits the running of cars upon its road before it has erected fences as required by law will not be exonerated from liability for damages for the killing of a horse which had strayed on the 44 L. R. A.

track by proof that at the time certain persons were operating the road under an agreement with the company that they should receive and retain the earnings, where it was further stipulated that the train should run under the direction and control of the company. *Wyman v. Penobscot & K. R. Co.* 46 Me. 162.

And in Indiana an action for injury to stock upon a railroad on account of a failure to fence the right of way when regarded as one for tort, or in the nature of a tort when brought against two railroad companies, is sufficiently charged in a complaint alleging that the act was done by defendants without showing what relation they sustained to each other, but a recovery cannot be had against one upon evidence showing its liability, or under the statute against both jointly or severally. *Indianapolis, C. & L. R. Co. v. Warner*, 35 Ind. 516.

And such a complaint charging that a horse was killed on the road of one of them, where the track was not securely fenced, by the cars of the other passing over the road in charge of the officers of the latter company, is insufficient where it does not show that the owner of the road leased it to the other or had in any way consented to its use thereof. *Cincinnati & M. R. Co. v. Townsend*, 39 Ind. 38; *Cincinnati & M. R. Co. v. Faskins*, 36 Ind. 380.

Under Iowa Laws 1862, chap. 169, § 6, providing that any railroad company hereafter running or operating its road and failing to fence it against live stock shall be absolutely liable to the owner of any live stock injured or killed by reason of the want of such fence, and Laws 1868, chap. 79, § 1, providing that all companies, lessees, or corporations running or operating any railroad shall be liable for injuring, destroying, or killing any live stock, where the two railroad companies operate trains upon the same road, one being the owner and the other the lessee, each is liable only for stock injured or killed by its trains by reason of the road being unfenced, and not for that injured or killed by the trains of others. *Stephens v. Davenport & St. P. R. Co.* 36 Iowa, 327.

The word "agents" in N. Y. Laws 1892, chap. 676, § 32, providing that so long as fences upon the sides of railroad tracks are not made or not in good repair, the company, its lessees, or others in possession shall be liable for all damages done by their agents, has reference only to the agents of the corporation or person operating the road, and does not apply so as to render a lessee operating the road the agent of the lessor which never operated it. *Throne v. Lehigh Valley R. Co.* 88 Hun, 141.

And a railroad company owning a line of railroad which leased its right of way and all its property real and personal and franchisees except the franchisee to exist as a corporation, to a foreign corporation for a period of 999 years, having no rolling stock and never operating the road, the engines and cars thereon belonging to the lessee company, is not liable for the negligent killing of stock because of the omission to fence the side of the road, under N. Y. Laws 1892, chap. 676, § 32, requiring every railroad corporation and any lessee or other person in possession before the lines of its road are open for use to erect and maintain fences, and providing that so long as such fences are not made or in good repair the corporation, its lessee or other person, shall be liable for all damages done by its agents, engines, or cars to any domestic animals thereon, as the duty of maintaining such fences was imposed upon the lessee by N. Y. Laws 1864, chap. 582, § 2. *Ibid.*

So, the conductor of a railroad train belonging to the lessee of a railroad which injures a

person through the negligence of the engineer in failing to give a proper warning of the approach of a train to a highway crossing, is not the servant of the lessor of the road so as to render it liable for his negligence under a trackage contract, though it provided that the conductor should be under the control and subject to the orders of the superintendent of the lessor road through courtesy, and such superintendent was allowed to discharge the employees of the lessee road for any dereliction in duty occurring upon the leased road. *Cain v. Syracuse, B. & N. Y. R. Co.* 20 Misc. 459.

And a statute providing for fences for the protection of cattle and other animals named has no application to fences for the protection of persons traveling on a highway. *Ditchett v. Spuyten Duyvil & P. M. R. Co.* 67 N. Y. 425.

In the above case it was said that it may well be doubted whether the lessor of a railroad who had parted with the possession could be held liable for the negligence of the lessee under a statute requiring railroad corporations to fence the sides of their roads. *Ibid.*

F. H. B.

O. L. ANTHONY, *Plff. in Err.*,
v.

E. M. NORTON.

(.....Kan.....)

*The common-law rule in actions by a parent for damages for the seduction of his daughter, which required him to sue, in the capacity of a master, for the loss of her services as a servant, although in fact permitting a recovery by him in his parental relation, was the rule of a legal fiction which no longer obtains, under the reformed procedure, because of the abolition by the Code of fictions in pleading, and its requirement to state the actual facts in controversy.

(March 11, 1899.)

ERROR to the District Court for Coffey County to review a judgment in favor of plaintiff in an action brought to recover damages for the seduction of plaintiff's daughter. *Affirmed.*

The facts are stated in the opinion.

Messrs. Madden Brothers, for plaintiff in error:

The relation of master and servant is necessary in order to maintain an action for seduction.

Ogborn v. Francis, 44 N. J. L. 441, 43 Am. Rep. 395; *Vanhorn v. Freeman*, 6 N. J. L. 393; *Lavery v. Crooke*, 52 Wis. 612, 38 Am. Rep. 768; *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; *White v. Nellis*, 31 N. Y. 405, 88 Am. Dec. 282; *Martin v. Payne*, 9 Johns. 387, 6 Am. Dec. 288; *Clark v. Fitch*, 2 Wend. 450, 20 Am. Dec. 639;

*Headnote by DOSTER, Ch. J.

NOTE.—This case furnishes a striking illustration of the abolition of a fiction of law. While the decision seems to be based on the statute which abolishes fictions of pleading, and the fiction here involved may be a rule of substantive law or of right more than a rule of 44 L. R. A.

Mulvehall v. Millward, 11 N. Y. 343; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Blagge v. Isley*, 127 Mass. 191, 34 Am. Rep. 361; *White v. Murland*, 71 Ill. 250, 22 Am. Rep. 100.

Mere sexual intercourse, without flattery or artifice, does not constitute seduction.

Hill v. Wilson, 8 Blackf. 123; *Comer v. Taylor*, 82 Mo. 341; *Simpson v. Grayson*, 54 Ark. 404; *Delvee v. Boardman*, 20 Iowa, 446; *Patterson v. Hayden*, 17 Or. 238, 3 L. R. A. 529; *Marshall v. Taylor*, 98 Cal. 55; *Mohelsky v. Hartmeister*, 68 Mo. App. 318.

If no loss of service was shown in the action, the care and attention bestowed by plaintiff on her daughter in her sickness and lying-in were not consequent damages recoverable by plaintiff.

There can be no recovery of vindictive damages, unless actual damages are shown.

Schippel v. Norton, 38 Kan. 507; *Adams v. Salina*, 58 Kan. 250; *First Nat. Bank v. Kansas Grain Co.* (Kan.) 55 Pac. 277.

Evidence of previous intercourse mitigates the damages, for the defendant is liable only to the extent his act has contributed to the girl's downward tendency.

21 Am. & Eng. Enc. Law, 1036; *Simpson v. Grayson*, 54 Ark. 404; *Hoffman v. Kemerer*, 44 Pa. 452; *Love v. Masoner*, 6 Baxt. 24, 32 Am. Rep. 522; *West v. Druff*, 55 Iowa, 335; *Hogan v. Cregan*, 6 Robt. 138; *Shattuck v. Myers*, 13 Ind. 46, 74 Am. Dec. 236; *Carder v. Forehand*, 1 Mo. 704, 14 Am. Dec. 317; *White v. Murland*, 71 Ill. 250, 22 Am. Rep. 100.

Messrs. G. E. Manchester and Lamb & Hogueland, for defendant in error:

If the relation of parent and child existed and the daughter lived with her mother and performed service for her mother, then the mother can recover.

21 Am. & Eng. Enc. Law, 1015-1017; *Beaudette v. Gagne*, 87 Me. 534.

The relation of master and servant is now held to be little else than a legal fiction by which damages are awarded, not to the master, but to the head of the family, for disgrace, humiliation, and anguish brought upon the plaintiff's family.

Hudkins v. Huskins, 22 W. Va. 645; *Vanhorn v. Freeman*, 6 N. J. L. 393; *Stoudt v. Shepherd*, 73 Mich. 588.

As the gist of the action is the debauching of the daughter, and the consequent supposed or actual loss of her services, it is immaterial to the plaintiff's claim under what special circumstances the injury was wrought.

Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; *Leucker v. Steileu*, 89 Ill. 545, 31 Am. Rep. 104; *Simpson v. Grayson*, 54 Ark. 404.

DOSTER, Ch. J., delivered the opinion of the court:

This was an action brought by Mrs. E. M. Norton, a widow, against O. L. Anthony, for

pleading, it may be asked if the power of the courts to modify the original rule which based the right of action on the loss of service until that rule had become only a fiction does not extend to the abandonment of that mere fiction.

damages for the seduction of her daughter, Turie Norton. Besides a denial of the imputed act, the defense was that the daughter was of full age, and did not, as to her mother, stand in the relation of a servant to a mistress, and that no loss of service to the mother, as mistress, had resulted from the alleged wrong. The daughter was about twenty-five years old at the time of the seduction charged, and was clerking in a store. At and before that time she lived with her mother, as a part of the family, and occasionally performed some slight household services. The court, among other matters of law, instructed the jury as follows: "If you find from the evidence that the plaintiff is a widow, and the mother of Turie Norton, whom it is alleged that the defendant seduced, and that at the time of said seduction the said Turie Norton lived with her mother, and performed service for her (and you are instructed that the performance of any slight service is sufficient to satisfy the law in that regard), then plaintiff will be entitled to recover, if you find that the seduction was accomplished as alleged. That you may find that the said Turie Norton was in the service of the plaintiff, you need not find that a contract existed between them for such service. It will be sufficient if she lived with her mother when the seduction occurred, and took part in the housework. And such service need not be paid for, and no pay need be promised or expected." A request made by the defendant for the following instruction was refused: "I instruct you that the mere relation of mother and daughter will not permit a recovery by the former for the seduction of the latter."

The instruction given is in accord with the almost unanimous voice of the courts, and, if it were the only one to be considered, we should have no hesitation in approving it, but the request preferred by the defendant and refused by the court brings before us the question whether an action for seduction can be maintained upon the mere relation of parent and daughter alone,—especially where, as in this case, the daughter is of age, and lives with her parent, and constitutes a part of the family. Upon this question the holdings of the courts are uniform to the effect that an action for the seduction of a daughter, brought in the parental capacity alone, is not maintainable except as allowed by statute. At common law the action is maintainable by the parent only in the capacity of master or mistress, and it must be in form an action for loss of the daughter's services as a servant. That the rules of the law should thus degrade the injured parent's right of action to one of mere compensation for the impaired ability of the daughter to perform labor, and for the recovery of the expenses incident to such sickness as results from the wrong done, has been, throughout the course of judicial decision, a matter of regret among the judges. So grievously has this reproach upon the law been felt, that the courts quite a time ago began to sanction a wide latitude of evidence as to damages in such actions, until now the rule has become firmly established that notwithstanding the

action must be, in form, for loss of services and expenses incurred in sickness, yet compensatory damages for parental and even general family shame and mortification may be recovered, together with an additional punitive sum for the flagrant wrong committed by the seducer. It will be profitable at this point to illustrate by quotations from the authorities the present liberal holdings of the courts upon this subject, and to note the extreme departure of the rule of proof from the rule of pleading, and also to note the lament of the judges over the arbitrary and technical theory which compelled the parent to disguise his action in the false and abhorrent form of a master's suit for loss of services.

Mr. Sedgwick, in his work on the Measure of Damages, 8th ed. vol. 2, § 471, says: "The common-law action of case, by the father or master, for seducing a daughter or female servant, is one of a peculiar character. It is eminently a legal fiction. The demand is based upon the mere loss of service, but the damages are very much at large, and in the discretion of the jury." Following the above statements, the author briefly traces the evolution of the rule of damages from one of mere compensation to the master for loss of services to one of compensation for parental mortification, anguish, and violated honor. In 3 Sutherland, Dam. p. 735, it is said: "At common law this action rests on the relation of master and servant, and proceeds, in form, for loss of service. Trespass *vi et armis* is deemed the proper action where the servant resides with the master or parent. Case may also be brought where the injury is not committed with force, or where the servant is only constructively in the master's service. Slight evidence will establish sufficiently the relation, and the extent of the loss of service is not the measure of damages. The allegations and proof on these points are almost an unmeaning formula,—an obeisance to a shadow of the past,—to reach the actual grievance. The action in reality is to afford redress for the injury done to the parent or other near relative, or person standing in *loco parentis*, for the dishonor and degradation suffered by the family in consequence of the seduction. And large damages, which the court will seldom relieve against, are recoverable, both for recompense to the plaintiff and punishment to the defendant. Caton, J., said: 'Technically, the ground of recovery is the loss of the services of the daughter; and the rule of the books seems to be that the father must prove some service, in order to entitle him to maintain the action. This is nominally the ground on which the plaintiff's right of action rests, while practically the right to recover rests on far higher grounds,—that is, the relation of parent and child, or guardian and ward, or husband and wife, as well as that of master and servant; and it seems almost beneath the dignity of the law to resort to a sort of subterfuge to give the father a right of action which is widely different from that for which he is really allowed to recover damages. But the law may still require proof

of service, or at least the right to service, when the child is a minor; but this, as well as any other fact, may be proved by circumstances sufficient in themselves to satisfy the jury that the party seduced did actually render service to the plaintiff, and the most trivial service has always been held sufficient.' *Doyle v. Jessup*, 29 Ill. 462. Even in England, where stricter proof of service is required, Blackburn, J., said: 'In effect, the damages are given to plaintiff as standing in the relation of parent, and the action has at present no reference to the relation of master and servant, beyond the mere technical point on which the action is founded.' *Terry v. Hutchinson*, L. R. 3 Q. B. 602. This is according to the general current of authority. While the courts adhere so far to the original distinctive character of the action as to require proof that the seduced female was in the service of the plaintiff at the time of the seduction, they do not require very strict proof. Very slight evidence of loss of service suffices, in favor of one standing in *loco parentis*, and affected by the graver consequences of the seduction. The actual loss sustained by the plaintiff, through the diminished ability of his daughter, relative, or ward, to yield him personal service, as well as the servile position of the supposed servant herself in the family of her protector, is ordinarily little more than a mere fiction. It is one of those cases in which an action devised for one purpose has been found to serve a different one, by the aid of the discretion which courts have assumed in instructing the jury, and the readiness of the jury to render substantial justice by their verdict, where the forms of law imposed by the instructions of the court admit of their doing so." In *Pollock on Torts*, 201, it is said: "The capricious working of the action for seduction in modern practice has often been the subject of censure. Thus, Sergeant Manning wrote forty years ago: 'The quasi fiction of *servitum amicit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child is sent unprotected to earn her bread amongst strangers.' All devices for obtaining what is virtually a new remedy by straining old forms and ideas beyond their original intention are liable to this kind of inconvenience. It has been truly said that the enforcement of a substantially just claim 'ought not to depend upon a mere fiction, over which the courts possess no control.'" In *Phelin v. Kenderdine*, 20 Pa. 361, the court says: "Although the action by a parent for the seduction of his daughter has its technical foundation in the loss of his daughter's services, it is well settled that proof of the relation of master and servant, and of the loss of service by means of the wrongful act of the defendant, has relation only to the form of the remedy, and that the action being sustained, in point of form, by the introduction of these technical elements, the damages may be given as a compensation to the plaintiff, not only for the loss of service, but also for 'all that the plaintiff can feel from the nature of the injury.'" In *Badg-*

ley v. Decker, 44 Barb. 588, the court says: "The rule is still adhered to, with us, that loss of service is the legal gravamen of the action. *Bartley v. Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338. But, to accommodate the action to cases where the daughter rendered no service, a presumed or a fictitious service is resorted to as a gravamen. [*Postlethwaite v. Parkes*] 3 Burr. 1878; [*Bennett v. Alcott*] 2 T. R. 166, 168; [*Holloway v. Abell*] 7 Car. & P. 528; [*Martin v. Payne*] 9 Johns. 389, 6 Am. Dec. 288; [*Clark v. Fitch*] 2 Wend. 459, 20 Am. Dec. 639; [*Hewitt v. Prime*] 21 Wend. 79-82. All the modern cases hold that the legal gravamen of the action is not the real gravamen as is apparent when we come to consider the rule of damages recognized in the action, and judges have not unfrequently spoken of the action as resting upon a fiction. . . . The real gravamen of the action is not the loss of service. That is a very small item in the measure of damages. The loss of service in many cases could not be considered anything in reality, and often when the least service is performed the highest damages are given. The real gravamen of the action is the mortification and disgrace of the family, and the wounded feelings of the plaintiff." In *Davidson v. Abbott*, 52 Vt. 573, 36 Am. Rep. 767, the court says: "The action, in form, is to recover damage for loss of service; but it has become well settled for a century in England and this country that the loss of service is slight and nominal in most cases and the recovery is had essentially for wounded feelings, dishonor, and disgrace." In *Riddle v. McGinnis*, 22 W. Va. 271, the court says: "While at common law the father and master was obliged to allege and prove the loss of service, however trivial or valueless, as the foundation of the recovery, yet it was regarded only as the foundation, for the courts have always treated the relation of master and servant, and the loss of service, as innocent fictions, which merely served to give the court jurisdiction, while the measure of the plaintiff's damages was not merely the actual value of the service lost, but compensation for the shame, disgrace, and anguish suffered by the father in the defilement and ruin of his daughter. These elements now enter into, and generally constitute, the real measure of damages, while the jury, in estimating them, must almost necessarily be influenced and controlled by the position of the parties in society, and by all the other circumstances surrounding each particular case."

Many more quotations like those above could be made from text writers and reported decisions. The views of all legal authorities upon the subject are to the effect that the rule which requires a parent suing for the seduction of a daughter to plead loss of her services as his servant, but which obligates him to only nominal proof of the cause of the action stated, is an empty and senseless legal fiction,—a pretense and sham which does discredit to the law, and with which it were highly desirable to dispense. What seems to us a satisfactory definition of a fiction of law, though one admittedly

broad, is that given in Maine, Anc. Law, p. 25. It is: "Any assumption which conceals, or affects to conceal, the fact that a rule of the law has undergone alteration, its letter remaining unchanged, its operation being modified. . . . The fact is that the law has been wholly changed. The fiction is that it remains what it always was." The substance of all the definitions of a legal fiction is that it is a pretense that the law as to a particular matter is different from what it really is. The legal fiction in actions by a parent for seduction is that he has lost the services of his daughter, and has been subjected to expense on her account, wherefore he sues for such loss and expense, and for them alone. The fiction assumes his right to recover for these, and these alone. The fact is that he has lost no services, and has been subjected to no expense; but the law is that, notwithstanding his lack of loss and expense, he may nevertheless recover for the wounds to his parental feelings, and may mulct the seducer in punitive damages also. We say the law is that he may recover notwithstanding his lack of loss in his capacity as master. The courts make a pretense of holding him to proof of such loss, and make a pretense of withholding relief if he fails to make the proof, but it is a pretense only. Proof of the very slightest kind of service will suffice. The service proved need be nothing more than nominal. It need not be actual or beneficial, and many of the courts hold that, where the daughter was not actually in the service of the parent, she nevertheless was, if a minor, constructively in his service, and that such constructive service was sufficient to uphold the right of action. It is a shameful pretense to hold that a daughter whose labors, for instance, merely consist in pouring the tea at her father's table and doing the honors of his household to his guests, is in his service as a servant, and that he may recover damages because of the loss of such labors through her seduction. Many of the courts have deplored the lack of legislation to enable them to dispense with the fiction in question, so as to allow them to bottom cases in theory, as well as in fact, upon the actual and meritorious ground upon which the damages are really awarded. If by this is meant legislation which in express terms abrogates the fiction of the relation of master and servant, we deny its necessity in this and other states which have adopted the reformed Code of Procedure. The Code was devised for the very purpose of dispensing with legal fictions and antiquated forms of action. Its spirit in this respect can be illustrated by a score or more of its provisions. Out of them one general rule of reform is collectible, and that is that the actual facts from which the claimed right of action is deducible must be stated. Nay, more, it is even expressed in some of the sections of the Code. "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished." Section 6. "There can be no feigned issues." Section 7. "The rules of pleading heretofore existing in civil actions are abolished."

Section 85. "The petition must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition." Section 87. "All fictions in pleading are abolished." Section 116. If in fact a right of action is given to the parent, as such, for the seduction of the daughter; if in fact the injury done is to the parent in that relation; if in law the courts take to themselves the right to probe beneath the thin veneering of the form of the action, as one for the loss of services, in order to reach the heart and core of the controversy and give damages for the actual injury committed; if these things are allowed and done, it cannot be that the liberal rules of the Code still require conformity to the fictitious and embarrassing formulas of the common law. Not only was it the design of the Code to simplify the rules of pleading by reducing to unity all the various forms of action existing at common law, and requiring the parties to state the actual facts of the controversy, but it contemplated the existence of the modern and enlarged ideas of justice as to matters of substantive right which had begun to prevail. To furnish a better medium for the working out of the newer and more equitable thought was equally its design. No relation in life has been more visibly affected by the humanizing influence of latter-day concepts of justice than has the domestic one. Originally the child was in the fullest sense the slave of its father. Indeed, the origin of slavery, according to the view of a most learned and deep-searching historian, was in the family circle. The child was born into slavery to its sire. Ward, *Ancient Lowly*, cc. 2, 3. In the course of time the legalized state of the child passed from that of a slave to that of a servant of the one who had begotten it. Now it holds, in general estimation, at least, if not in law, a quite nearly co-ordinate position in the family. As long as its minority lasts, it is under the guardianship and tutelage of its parents, but it is no longer in fact, or in legal theory, their servant; and when, it being a daughter, suit is brought on account of its seduction, such suit is not in fact founded upon the idea of service lost, but upon the idea of parental affection wounded, parental anguish endured, and parental liability for care and nurture increased. Damages, therefore, in respect to the violated parental relation, are the facts which the Code ordains shall be stated in the petition; and the pretense of services lost to the parent, as a master, is the legal fiction of pleading, which the Code ordains shall be abolished. If necessity ever existed for cloaking the real cause of action under the nominal disguise of another one, it no longer exists, and we hold accordingly. In this state a parent may maintain an action for the seduction of the daughter without averment or proof of loss of services or expenses of sickness.

A question subsidiary or incidental to the one above discussed now arises. In this case the daughter was of full age. The law had emancipated her from the guardianship and control of her mother, and, so far as

legal liability is concerned, the mother was absolved from responsibility for the acts and conduct of the daughter. May the mother, therefore, maintain the action? As before stated, the daughter constituted, in fact, a part of the mother's family. The mother was the head of that family, and was charged with that moral responsibility for the virtue and orderly conduct of its various members which devolves upon the head of a household. The purity and rectitude of behavior of those within the domestic circle were in an especial manner the objects of her solicitude and care. The law, therefore, will not deny compensation to her for the invasion of her home by the ruthless destroyer of its peace and happiness, simply because in law she could no longer command the services of her daughter. The mere fact of the legal emancipation of the daughter from parental control has never been made a test of the right to maintain the action for seduction. When the right to maintain it was founded upon the legal fiction of loss of services, the cases divided themselves into two classes,—one, where the daughter was a minor, in which instance the right to the service was legally presumed; the other, where the daughter was of age, in which instance proof of a contract of service was required, or in lieu thereof proof of facts from which it could be inferred. The right of action was given in the last-mentioned case, as well as in the former; and the courts, although adhering in the last case, as well as in the former, to the fiction of the loss of services, nevertheless gave damages in vindication of the parental right, and in melioration of outraged parental feelings. In *Badgley v. Decker*, 44 Barb. 577, and in *Davidson v. Abbott*, 52 Vt. 570, 36 Am. Rep. 767, the daughters were twenty-five and thirty-one years, respectively, at the times of their seduction. The actions were held maintainable in these cases; and in the following ones they were likewise upheld, although the females had passed the period of minority: *Sutton v.*

Huffman, 32 N. J. L. 58; *Wert v. Strouse*, 38 N. J. L. 185; *Lamb v. Taylor*, 67 Md. 85; *Moran v. Dawes*, 4 Cov. 412; *Lipe v. Eisenlrad*, 32 N. Y. 229; *Villepique v. Shular*, 3 Strobb. L. 462; *Long v. Keigley*, 11 Ir. Law T. 77. Many other like cases might be cited but these are sufficient to show that the minority of the daughter has never been held essential to the right of recovery by the parent. There exists no reason for distinguishing between cases of minority and of full age of the daughter, and granting a recovery in the former while denying it in the latter, merely because the legal fiction of services lost, upon which they were formerly both prosecuted, has been cleared out of the way, and the right of recovery placed in law as well as in fact upon its real ground. There is no magic in the passing of a daughter's eighteenth birthday anniversary, to relieve against parental solicitude and care, or parental anguish over her fall from virtue. At what time in the advancing age of a daughter the feelings of parental mortification over such fall become sufficiently dulled, and the sense of parental responsibility sufficiently weakened, to reduce the damages to a nominal sum, or to deny them altogether, we need not concern ourselves. The law heretofore has set no time for the passing of parental feelings as to such matter into a condition of indifference, and we need not speculate as to it. Each case will depend upon its own particular facts, and as to such facts the jury is the judge.

Two other claims of error are made. They are founded upon the court's instructions, and its refusal of requests for instructions. One of them relates to the meaning of the word "seduction," and raises a question as to its legal definition. The other relates to the measure of damages recoverable. Both of them, however, are unfounded, and the judgment of the court below will be affirmed.

All the Justices concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

John W. WARNER, Receiver, etc., of First National Bank of Watkins, Appt.,
v.

William J. PENoyer et al.

(91 Fed. Rep. 587.)

1. Bank directors are not required to procure periodical expert examination of the books in order to verify by personal examination such details of the bank's condition as they ought to know before declaring dividends, or which are required to be reported to the comptroller of the currency, if there is no reason to distrust the integrity or efficiency of the cashier.
2. Directors of a national bank are required to cause examination of the

discounted paper of the bank, with reasonable frequency, and to keep themselves sufficiently informed about it to enable them to pass an intelligent judgment upon its value.

3. Directors of a national bank who are members of the discount and examining committees will be held liable for losses occasioned by the reckless loans of the cashier, where they made not even a cursory examination of the discounts or overdrafts beyond looking at such notes as the cashier saw fit to consult them about.
4. Mere failure to attend meetings of the board will not render directors of a national bank liable for defalcation of the cashier.

(November 3, 1898.)

APPEAL by plaintiff from a decree of the Circuit Court of the United States for the Northern District of New York dismiss-

NOTE.—As to liability of bank directors, see also *Swentzel v. Penn Bank (Pa.)* 15 L. R. A. 305, and note.
44 L. R. A.

See also 46 L. R. A. 244.

ing a bill which sought to hold defendants liable as directors of a national bank for losses alleged to have come from their negligence. *Reversed in part.*

The facts are stated in the opinion.

Before *Wallace, Lacombe, and Shipman*, Circuit Judges.

Messrs. Martin S. Lynch and Edward Winalow Paige, for appellant:

The question of negligence in a case like this is one of fact, and the test is that the same amount of diligence is required as that which a prudent man would naturally exercise in the conduct of the same business, if it were his own.

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662; *Robinson v. Hall*, 25 U. S. App. 48, 63 Fed. Rep. 225, 12 C. C. A. 674.

Mr. Frederic Collin, for appellees:

The authorities defend the directors against any liability.

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662.

"I know of no law," said Vice Chancellor McCoun in *Scott v. Depeyster*, 1 Edw. Ch. 513, 541, "which requires the president or directors of any moneyed institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent, or to set a watch upon all their actions."

Nor is knowledge of what the books and papers would have shown to be imputed.

Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; *Hallmark's Case*, L. R. 9 Ch. Div. 329; *Clews v. Bardon*, 36 Fed. Rep. 617; *Witlers v. Sowles*, 31 Fed. Rep. 1; *Swentzel v. Penn Bank*, 147 Pa. 140, 15 L. R. A. 305.

A condition precedent to the right to bring and maintain the action is that the comptroller should institute proceedings under § 5239 for the forfeiture of the charter of the bank. This has not been done. There is no allegation or proof that such course has been pursued.

Gerner v. Thompson, 74 Fed. Rep. 125; *National Exch. Bank v. Peters*, 44 Fed. Rep. 13.

If it be claimed that this is an action not under § 5239, but an action at common law, then it is not an action in equity but an action at law, and this court will not entertain jurisdiction thereof.

Stephens v. Overstolz, 43 Fed. Rep. 771; *Higgins v. Tefft*, 4 App. Div. 62; *Brinckerhoff v. Bostwick*, 43 Hun, 458; *O'Brien v. Fitzgerald*, 143 N. Y. 377; *New York Guaranty & Indemnity Co. v. Memphis Water Co.* 107 U. S. 205, 27 L. ed. 484; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873; *Thompson v. Central Ohio R. Co.* 73 U. S. 134, 18 L. ed. 765; *Foster*, Fed. Pr. 2d ed. §§ 2-5; *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358.

Wallace, Circuit Judge, delivered the opinion of the court:

The First National Bank of Watkins was organized in 1883, had a capital of \$50,000, was located in a village of about 3,000 population, and carried a line of deposits and discounts approximating \$200,000. It had paid dividends semiannually of 4 per cent. 44 L. R. A.

except in 1893, when the usual July dividend was not declared. So far as appears, it was a prosperous and well-conducted concern until within two years of the time of its failure, when, owing to the mismanagement, frauds, and criminal acts of its cashier, its assets were depleted to the extent of about \$140,000. February 8, 1894, its doors were closed, and its assets passed into the hands of a receiver. The receiver, alleging in his bill of complaint that the losses of the bank were attributable to the disregard of the directors of their trusts and duties, brought the present action to charge them with the amount. The court below dismissed the bill, influenced largely by the judgment in *Briggs v. Spaulding*. 141 U. S. 132, 35 L. ed. 662, and convinced that the directors were less negligent than those who were absolved by the supreme court in that case. This appeal requires us to review the whole case made by the proofs, to determine whether there was error in the decision.

There is not a particle of evidence indicating that the directors were aware of the culpable actions of the cashier. They trusted the cashier implicitly, relying on his fidelity and capacity, and had no suspicion of the real condition of the affairs of the bank, apparently not even when the dividend was passed.

Since its organization until his death, which occurred in August, 1892, William M. Love, the father of the cashier, had been the president of the bank. He was the largest stockholder, and took an active part in conducting its business. While he supervised its affairs, there were no serious irregularities on the part of the cashier. These began a month or so before his death, inferably when his failing health devolved larger control and opportunities upon the cashier. The cashier had acted in that capacity since the organization of the bank. He was a small stockholder, and was in good repute financially and morally. Upon his father's death, the management of the bank devolved almost exclusively upon him, none of the directors being bankers, or men of much business experience. August 27, 1892, the directors selected a new president, the defendant Tuttle, who had long been a director, and was probably as well qualified as any of the board, voting him a small salary. He was a farmer, residing 2 or 3 miles from the village, and was one of the largest stockholders. He remained president until the bank failed. He visited the bank frequently, sometimes advised with the cashier about discounts, and, when the cashier was absent, signed drafts, and authorized small discounts. He was not familiar with bookkeeping, and never looked at any of the bank books. A leather wallet, containing the discounted notes maturing the current month, was kept on the bank counter during business hours. He occasionally looked at some of the notes in this wallet. He never investigated the assets of the safe. He relied on weekly statements prepared by the bookkeeper or cashier, and which he examined every Tuesday morning, and upon conferences with the cashier or clerks, to keep

himself informed about the business and condition of the bank. The directors had an examining committee and a discount committee, but these committees only met at the semiannual meetings of the board of directors. At these meetings the cashier would bring in a list, prepared by him, of the outstanding discounted notes, and some of the members of the examining or discount committee would look the notes over, and tally and compare them with the cashier's list. At the meetings held in July, 1892, and in January and July, 1893, the discounts were reported as examined and approved.

The discount committee was composed of two directors and the president. One of these directors visited the bank two or three times a week, and approved such paper as the cashier asked him to consider. The other never acted.

Periodical reports to the comptroller of the currency, in the prescribed form, were prepared by the cashier: the attesting directors accepting his statements without any independent investigation. His statements were likewise accepted, without independent investigation, at the semiannual meeting, as showing the condition of the bank.

This summarizes the evidence respecting the supervision exercised by the president and directors of the business management of the bank. They did not at any time investigate, or cause an investigation to be made of, its resources and liabilities. They all deferred to the better judgment and banking experience of the cashier, and, as testified to by the vice president, the entire management of the bank was practically left to him, as the man best qualified of all those who were interested in it. No evidence is in the record about the examinations by the official bank examiners, or about the circumstances which led to passing the semiannual dividend in July, 1893; nor is there any as to what took place at the semiannual meeting of the directors in January, 1894, the last meeting before the failure.

The principal item of loss for which the receiver seeks to charge the defendants arose from transactions of the cashier with the Western Improvement Company, an association engaged in land speculation, having but little, if any, financial responsibility. The cashier was the vice president and a stockholder of that concern, and his associates were not residents of Watkins. In April, 1892, he discounted a note for \$3,046, made by Church, its president, and indorsed by Bengier, its treasurer, and placed the proceeds to the credit of its treasurer on the books of the bank. Thereafter, from time to time, until the bank failed, he discounted other notes for the concern, among them ten for \$5,000 each, gave it fictitious credits, and permitted it to overdraw its accounts. Nearly all the notes were renewed as they matured, and were carried unpaid until the failure. Some of the notes were made and indorsed by the officers of the company, some of them by the officers as individuals, and some by individuals who were stockholders in the company. The discounted notes were entered regularly in the discount register.

Whether or not they were kept in the wallet of the maturing notes does not satisfactorily appear. Kapell, the teller and bookkeeper, was not asked the question. Miss Hore, the other bookkeeper, testifies that she does not recollect having seen any of them. Tuttle testifies that he never saw any of them. Neither party examined the cashier as a witness, although his testimony was available.

When the bank failed, the Western Improvement Company owed it \$72,000; about \$24,000 arising from overdrafts, and the balance from worthless discounts. None of the directors knew of the overdrafts, or seemed to have been aware of these discounts. The members of the examining committee testify that they have no recollection of having seen any of the discounted notes among those delivered by the cashier to the directors at the semiannual meetings, except one for \$2,500. The cashier's list presented at the meeting in July, 1893, is in evidence, and upon it appear eight notes, for \$5,000 each; but the list does not give the names of the makers, or otherwise describe the notes, except as to three, two of which are marked "Lembeck," and the other "G. W. Co." Who "Lembeck" was does not appear, but "G. W. Co." probably designated the Goundry Wagon Company, a concern which was solvent at that time, and in which the vice president of the bank was interested. These are the only notes in the list for above \$3,000; the great majority of them being for sums below \$300. It appears by the discount register that there were at that time unpaid five notes, each for \$5,000, discounted for the benefit of the Western Improvement Company. The defendants Gray and Tuttle, who examined the discounts at that meeting, testify that they have no recollection about any of the \$5,000 notes.

The directors of a national banking association are authorized to appoint a cashier, and delegate to him all the usual powers of such an office, including the discounting of notes. U. S. Rev. Stat. § 5136. To him is properly confided the custody of its property, money, securities, and valuable paper, and the supervision of its books and accounts. He is the executive officer, who transacts its daily affairs. The directors cannot devest themselves of the duty of general supervision and control by committing this duty to him, but they properly may intrust to him all the discretionary powers which usually appertain to the immediate management of its business. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *Wild v. Bank of Passamaquoddy*, 3 Mason, 505; *Franklin Bank v. Steward*, 37 Me. 519; *Sturges v. Bank of Circleville*, 11 Ohio St. 153, 78 Am. Dec. 296.

Where they have acted in good faith and with ordinary diligence in exercising their duty of general control and supervision, they are not liable for losses sustained through his malversations. They are not called upon to devote themselves to the details of the business management, and may properly commit these to the clerks and bookkeepers, and to the superintendence of the cashier.

They are not required to adopt any system of espionage over their cashier, or any of their subordinate agents, or to entertain suspicion without some apparent reason, and, until some circumstance transpires to awaken a just apprehension of their want of integrity, have a right to assume that they are honest and faithful. *Scott v. Depeyster*, 1 Edw. Ch. 513, 514; *Knox v. Eden Musee American Co.* 148 N. Y. 441-460, 31 L. R. A. 779; *Percy v. Millaudon*, 8 Mart. N. S. 68, 17 Am. Dec. 186. Directors are not merely required to be honest, but they must also bring to the discharge of the duties they undertake ordinary competency. "They cannot excuse imprudence or indifference by showing honesty of intention, coupled with gross ignorance and inexperience, or coupled with an absorption of their time and attention in their private affairs." *Williams v. McKay*, 46 N. J. Eq. 25. Before they can be made responsible for losses which have occurred through the mismanagement or dishonesty of the cashier, it must appear that such losses resulted as a consequence of the omission of some duty on their part. If, in all probability, these would have occurred just the same, notwithstanding they had been ordinarily diligent and vigilant, there is no justice in shifting them upon the directors, and no principle of law to justify it. They are responsible for their own acts and omissions, but not for those of codirectors in which they have not actively or passively participated.

It is manifest that the directors in this case relinquished almost untrammelled control of the bank to the cashier, and that their supervision over its affairs was so superficial as to be hardly more than perfunctory. But we are not satisfied that actionable negligence is imputable to them, collectively or individually, were it not found in their laxity of supervision over the discounts. They might have required periodical examinations of the books to be made by experts. They might have insisted upon verifying, by personal investigation from time to time, such details of the bank's condition as they ought to have known before declaring dividends, or as were required to be reported to the comptroller of the currency. And, if they had done so, this falsification of entries and accounts would probably have been discovered, if not prevented. But these would have been measures of unusual precaution, not imperative when there was no reason to distrust the integrity or efficiency of the cashier. They are not to be deemed remiss because they did not resort to exceptional methods, or because they relied on the cashier's supervision over the books and accounts, or because they reposed confidence in his reports of the amount and other clerical details of the assets and liabilities. They were under no duty to observe the extraordinary vigilance short of which a bank cannot be protected from the crimes conceived by a dishonest cashier. The systematic surveillance observed in large banks, especially in city banks, is not customary in the small village banks; and, in considering their conduct, we are at liberty to assume that the 44 L. R. A.

bank was visited and examined from time to time by those officers whose statutory duty it is to make a thorough investigation into all the affairs of such institutions and a full and detailed report to the comptroller of the currency. Such investigations, however, cannot be expected to probe the value of the discounted paper of a bank. This depends upon matters outside the cognizance of such an officer,—not only on the genuineness of the signatures and the financial responsibility of the makers and indorsers, but upon various extrinsic circumstances, as whether it is discounted for ordinary business transactions or for speculative enterprises.

We think it was incumbent upon the directors, in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause examination of this paper to be made with reasonable frequency, and to keep themselves sufficiently informed about it to enable them to pass an intelligent judgment upon its value. The solvency of the bank depended upon the character of this paper, and no dividend could legitimately be declared by the directors, unless they were reasonably certain that it was good and sufficient for the purpose. However honest and capable a bank cashier may be, he is not to be regarded as infallible; and directors are not justified in relinquishing to him unlimited discretion in investing the capital and deposits, and acquiescing blindly in all he does in that behalf. Perhaps the most important function of directors is to exercise an intelligent oversight upon the investments. See *Bank Comrs. v. Bank of Buffalo*, 6 Paige, 497.

The directors themselves recognized the propriety of maintaining careful supervision of the discounted paper. By resolution of the board, adopted in January, 1892, they provided that no notes of over \$1,000 should be discounted unless approved by some member of the discount committee. At the meeting of the board in August, 1892, at which time the new president was elected, an examining committee was appointed, with authority to meet once in each month. It was contemplated that this committee should examine notes monthly, as appears from the record of the board meeting in January, 1893. We cannot doubt that, if the members of these committees had faithfully discharged the duties thus committed to them, or, doing less than this, had manifested their determination to acquaint themselves from time to time with the kind of paper which the bank was carrying, the bank would have escaped the greater part of the loss which it sustained through the paper discounted for the Western Improvement Company. More than this, if there had been reasonably diligent supervision of that character, its deterrent effect upon the conduct of the cashier would have tended, and possibly would have sufficed, to prevent the overdrafts, the false credits, and his misconduct generally. That they neglected such supervision, and did not use ordinary circumspection over this paper, sufficiently appears from the fact that it was examined only once

in six months; that at no other time did the president or any member of the two committees undertake or suggest a methodical examination of it, or even any cursory investigation, beyond looking at such notes as the cashier saw fit to consult them about; and that at the semiannual meeting the examinations were so perfunctory that no member of the committee is able to recall having noticed a single one of the eight \$5,000 notes which were submitted to the committee on the occasion when the dividend was passed. If any inquiries had been made about any of these notes, exceptionally large in comparison with the ordinary discounts, and representing in the aggregate nearly the whole capital of the bank, some of the directors would have been likely to remember the circumstance. So unquestioned and autocratic was the control over the discounts permitted to the cashier that he apparently resented any criticism, and considered it presumptuous; and the directors, unwilling to incur his displeasure, refrained from the appearance of surveillance. Mr. Colgrove, a member of the discount committee, in his testimony exhibited the situation in the succinct statement: "I saw he was offended if I made any suggestions, and I had every confidence in the way in which he conducted the business."

The adjudication in *Briggs v. Spaulding* does not meet a case like this, because there is but little similarity in the special facts. As was observed in the opinion, "each case has to be determined in view of all the circumstances." Judge Story says (Story, Bailm. § 11): "Indeed, what is common or ordinary diligence is more a matter of fact than of law."

The gist of the decision in *Briggs v. Spaulding* is stated in the concluding part of the opinion, as follows: "Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled, under the law, to commit the banking business, as defined, to their duly-authorized officers; but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention. But in this case we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within ninety days after they became directors, and it is ready to that the case becomes reduced at last."

In this there is nothing inconsistent with the general tenor of the authorities.

We are of the opinion that only those directors, including the president, should be held responsible for the losses, who were members of the discount and examining committees. If these persons had performed their duties faithfully, while it cannot be said that there would have been nothing to

criticise in the management of the bank, it may be reasonably inferred that the losses from the discounts for the benefit of the Western Improvement Company would not have occurred. If the other directors were cognizant of the neglect of duty by these directors, the proofs do not show it. The members of these committees were the defendants Tuttle, Colgrove, Bennett, Gray, and Haring. Haring became a member of the examining committee at the July meeting, 1893, and should not be held responsible for any negligence on the part of his predecessors upon that committee. We are not satisfied that there should be any recovery for the losses which did not accrue previous to the directors' meeting of August, 1892.

Perhaps other losses would have been prevented if the members of the discount and examining committees had properly discharged their duties, but the proofs do not satisfactorily show that. The fact that other paper turned out eventually to be uncollectible does not prove that it was such that the directors would have refused to approve, if it had been brought to their notice at the time when it was discounted. As to all these losses, the case for the complainant seems to have been prepared and presented upon the theory that when a bank has failed, and it appears that there was a general supineness and looseness of management by the directors, the burden of exoneration for the losses is on the directors. This is not a correct theory. If it were, the cases would be few in which the directors of a bank, wrecked by the misconduct of a cashier, could not be held accountable for all the losses. The court cannot decree upon conjecture. As against two of the directors, the case for the complainant is predicated upon their failure to attend the semiannual meetings of the board. It is not a necessary or legitimate inference that this omission was a contributory cause of the losses. It does not follow, because a director has failed to attend meetings, that he is legally or morally responsible for the disasters that may have befallen his bank. In the present case the board had provided for a reasonably vigilant supervision of the cashier. The cause of the losses was the neglect of those who had been appointed to keep watch of the discounts. Those directors who attended the meetings, and had no reason to suppose that the members of the discount and examining committees were neglecting their duties, are not responsible for the losses, which are solely attributable to such neglect. The directors who did not attend the meetings are in no worse category. What could they have done or prevented, exercising common diligence, if they had been present? A director who has failed to act is not liable for the thefts or shortcomings of the cashier, unless it appears, inferentially, at least, that his omission had some proximate relation to the losses.

We have reached the conclusion that there should be a decree against the directors named with great reluctance, because their

neglect of a proper supervision of the bank was in a sense unintentional, and is palliated by their business inexperience, and they have already sustained very considerable losses as the principal stockholders of the bank.

The decree is reversed, with costs, and with instructions to the court below to decree, conformably with this opinion, against the defendants Tuttle, Colgrove, Bennett, Gray, and Haring. As to the other defendants, the decree is affirmed, with costs.

ALABAMA SUPREME COURT.

Lorenzo COREY, *Appt.*,
v.

W. W. WADSWORTH.

(.....Ala.....)

The preference of a creditor of an insolvent corporation is not invalid because he was a stockholder, director, and president of the company, and as such participated in the transaction by which he was given a preference over other creditors.

(January 31, 1899.)

APPEAL by defendant from a decree of the Chancery Court for Morgan County in favor of plaintiff in a proceeding brought to set aside an alleged preference given by the insolvent Decatur Building & Supply Company to its president as one of its creditors by a bill of sale. *Affirmed.*

The facts are fully stated in the opinions and in the opinion upon the hearing upon demurrer reported in 23 L. R. A. 618.

Messrs. Harris & Eyster and Speake & Russell for appellant.

Mr. E. W. Godbey, for appellee:

Corey's presidency and general managership of the Decatur Building Supply Company; the extraordinary powers conferred upon these positions by virtue of new by-laws compiled by a committee of his own appointing; his assumption of the large claim against his brother-in-law, Hoy, whose brief general managership was the last; his appropriation at first cost, less freight, of many cargoes of material ordered from distant dealers in the name of the moribund corporation; the appropriation of other choice articles at an unjustifiable discount, and of still others without charge; the unaccountable loss, during his six months' administration, of the \$6,000 borrowed from his Exchange Bank, of the \$25,000 represented

NOTE.—The above decision overruling Corey v. Wadsworth (Ala.) 23 L. R. A. 618, strongly reinforces the decisions which permit insolvent corporations to prefer their own officers as creditors. The conflicting decisions on this question are carefully reviewed in a note to Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. (Tex.) 22 L. R. A. 802.

The right to make such preferences is upheld in the later case of Schufeldt v. Smith (Mo.) 29 L. R. A. 830.

For other cases on the subject of preferences by insolvent corporations, see Illinois Steel Co. v. O'Donnell (Ill.) 31 L. R. A. 265; Blair v. Illinois Steel Co. (Ill.) 31 L. R. A. 269; Adams & W. Co. v. Deyette (S. D.) 31 L. R. A. 497; Tradesman Pub. Co. v. Knoxville Car Wheel Co. (Tenn.) 31 L. R. A. 593; and Fowler v. Bell (Tex.) 39 L. R. A. 254.

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by the capital stock, of the \$27,000 worth of material for which creditors were never paid, and of the \$4,000 derived from his negotiation of the Peters' notes; followed by an assignment for creditors, of assets whose nominal value was only \$15,000, and which produced for creditors a dividend of only 15 per cent.—constitute a striking object lesson of the wisdom of that rule forbidding preferences to corporate officers, which the following authorities declare to be well established:

Conover v. Hull, 10 Wash. 673; *Wait, Insolvent Corp.* § 102; *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 5 L. R. A. 378; *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* 86 Tex. 143, 22 L. R. A. 807; *Siccardi v. Keystone Oil Co.* 149 Pa. 148; *Howe v. Sanford Fork & Tool Co.* 44 Fed. Rep. 231; *Bonney v. Tilley*, 109 Cal. 346; *Tillson v. Downing*, 45 Neb. 549; *Northwestern Mut. L. Ins. Co. v. Cotton Exch. Real Estate Co.* 70 Fed. Rep. 155; *Lowry Bkg. Co. v. Empire Lumber Co.* 91 Ga. 624; *Sutton Mfg. Co. v. Hutchinson*, 24 U. S. App. 145, 63 Fed. Rep. 496, 11 C. C. A. 321; *Adams v. Kehlror Milling Co.* 35 Fed. Rep. 433; *Roseboom v. Whittaker*, 132 Ill. 81; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *W. P. Noble Mercantile Co. v. Mt. Pleasant Equitable Co-Op. Inst.* 12 Utah, 213; 1 Beach, Priv. Corp. 241; 17 Am. & Eng. Enc. Law, p. 122; *Hill v. Pioneer Lumber Co.* 113 N. C. 173, 21 L. R. A. 560.

The director is a part of the corporation, and between the two there is a substantial identity.

Mobile & O. R. Co. v. Nicholas, 98 Ala. 92.

Directors are sole arbiters between contending candidates for preference, and they should preserve an attitude of impartiality in the consideration of such questions. The corporation has no knowledge or notice, or power to will or to act, save that possessed by its directors; and as no natural person is thus dependent on others for the exercise of every function, so, no analogy between natural persons occupying relations of debtor and creditor is pertinent. As corporate disasters are due to the faults or mistakes of directors, they should not fare better than creditors having no part in the administration of affairs.

The right to prefer creditors is not expressly conferred upon an artificial person; it is not a power incident or necessary to the accomplishment of any of the ends of its creation, and, being inequitable, it cannot be implied.

Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. 86 Tex. 143, 22 L. R. A. 807; *Sutton Mfg. Co. v. Hutchinson*, 24 U. S. App.

145, 63 Fed. Rep. 496, 11 C. C. A. 321; *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 5 L. R. A. 378; *Tillson v. Downing*, 45 Neb. 549.

The excess of Corey's debits on the books of the company over his credits, the undervaluations of items of debits, his inability to designate the items for his alleged claim against the Supply Company; his failure to claim of the assignee any dividend on such claim, while receiving dividends on claims subsequently purchased from outside creditors; and the vacillation of his pleadings in fixing the amount of said claim at various times in divers sums, ranging from \$9,000 to \$800,—destroy his contention that he is in any sense a creditor of the defunct corporation.

The failure of Corey while appropriating assets for the liquidation of the bank's claim for which he was bound as surety, to deduct the amount due by himself to the Supply Company, was fatal to the validity of the transaction.

Harmon v. McRae, 91 Ala. 401.

The seizure of the staple articles of the concern at gross undervaluation, to pay, long before maturity, a debt with exorbitant and illegal interest, was a wanton sacrifice, and rendered the appropriations fraudulent, even if the corporation had then been solvent.

Cole v. Millerton Iron Co. 133 N. Y. 164; *Bliss v. Matteson*, 45 N. Y. 22; *First Nat. Bank v. Asheville Furniture & Lumber Co.* 116 N. C. 827.

McClellan, Ch. J., delivered the opinion of the court:

One of the main questions in this case is whether an insolvent and failing corporation can make a valid transfer of property to one of its directors in payment of a debt owing from the corporation to him, thus preferring him to other creditors in the payment of its debts, or perhaps more accurately, whether directors of such corporation can prefer themselves in the payment of corporate debts. The writer not only has very affirmative views favorable to the validity of such a transfer on abstract principles, but he is further quite convinced that the point has been to all intents and purposes so decided by this court. We are, of course, aware that many courts have held the contrary view, and some of the text writers have strongly condemned the doctrine we believe to be absolutely sound; some of them, indeed, resorting largely to invective and epithet in denunciation of the idea that a corporation may pay a just debt to an honest creditor, though he be a director, in preference to the just debts of other honest creditors who are strangers to the corporation. We have no epithets to apply to such courts and writers, nor to the rule they declare. Many of them are able expounders of the law, and all of them are doubtless actuated only by a purpose to ascertain and expound the true principle in this connection. And they may be right, and we wrong; but we do not think so, and we shall endeavor to give the reasons for the faith that is in us.

We are utterly unable to conceive, upon 44 L. R. A.

any just and sound principle or consideration, the least shadow of difference or distinction between the debt of a director and the debt of a stranger against a corporation, upon which could be predicated one rule in respect of a preference by the corporation in the payment of the former, and another rule in respect of such preference in the payment of the latter. Take the case we have here, assuming, for the discussion of the point immediately under consideration, that the transaction involves no actual fraud. The corporation is a going concern, and its managers do not contemplate its failure. But it is in debt, and needs money to continue its business and to pay its maturing obligations. It borrows the money from a director, directly or through a pledge of his credit. At the same time it incurs debts to strangers for supplies necessary in its business. The money borrowed from the director is used for corporate purposes. It is paid out to other creditors, or is applied to liquidate corporate expenses. So, also, the supplies constituting the consideration of the debts to strangers are applied to the authorized uses of the corporation, and inure to its advantage. There is nothing covinous in the creation of either class of debts. Neither the advancing director nor the supplying stranger has any intention or expectation of receiving any undue or illegal benefit from the transaction he thus has with the corporation. It may well be that the director, being a stockholder, anticipates that the aid he gives the corporation in his individual capacity will redound to his advantage ultimately in the increased value of, or in dividends upon, his stock. But, as all debts must be paid before the stockholder can be benefited by such a transaction, the intention and expectation of the advancing director involves and presupposes the payment of all corporate indebtedness. It follows obviously that, in lending his money or credit to the corporation, the director can have no purpose or intent inimical to existing or future creditors, but, to the contrary, the primary effect of the aid he thus gives the company is of affirmative benefit to its creditors. The stranger creditor, to the contrary, does expect a direct profit to himself by the transaction in which he becomes its creditor. If he lends it money, he expects and contracts for interest, and even this remuneration does not inure to the director who pledges his credit. If he sells his wares to it, he expects and contracts for a profit upon them. Of course, all this is perfectly legitimate. But it shows that, so far as the expectation of benefit goes, the director who pledges his credit, as did the respondent here, stands in a less selfish attitude towards the corporation and its creditors than does the stranger who sells property to it on credit. And, at least, we may say that the director creditor and the stranger creditor—the respondent and the complainant in this case—stand, in the creation of their debts, equally untainted of wrong done or intended; and, regarded from the point of view of the inception of their claims, are equally and to like extent entitled to the

favorable consideration of the courts and the just protection of the law.

It is equally clear that the corporation itself and its other creditors are, to say the least, as much benefited by the money it borrows on the individual credit of the director as by the wares it purchases on time from the stranger. As we have seen, both the money so borrowed and the property so purchased become assets of the corporation, enable it to prosecute its business, to pay its creditors, and to meet its expenses. There is, in other words, nothing in the uses to which the money borrowed and the property purchased are applied, or intended to be applied, which differentiates the attitude and rights, before the courts and the law, of the director who pledges his credit, from the attitude and rights of the stranger creditor. In the effects and results of their respective transactions, as well as in the purposes and intents which actuated each to the thing he did, is found no scintilla of evil, and nothing of wrong or injury, to the corporation or its creditors, which would entitle the one to more consideration than the other, which would accord to one rights denied to the other, or which would admit of a preference in the payment of the debt of the one, and condemn as fraudulent a preference in the payment of the debt of the other.

A step further in unfolding this question and case: The expectations of the officers and managers of the corporation, entertained at the time of borrowing the money on the faith of the director, as to keeping the corporation a going concern and continuing indefinitely to carry on its business, are disappointed. They find that, notwithstanding the personal efforts of the director in pledging his credit to raise money for the business and creditors of the concern, the corporation cannot keep its head above water, but must discontinue its business, cease to be a going concern, and apply its assets to the payment of its liabilities. Among these liabilities they find the debt due its director for money borrowed, and a debt due a stranger for property purchased. The assets are sufficient to pay one in full and a percentage only on the other. The debts were equally just and bona fide in their inception. The corporation and its creditors have been equally benefited by each of the transactions by which these debts, respectively, were incurred. Neither is tainted by any infirmative circumstance whatever. There is no more abstract justice in paying the stranger in full to the exclusion of the director than in paying the director in full to the exclusion of the stranger. If one may be so paid, so may the other, upon every conceivable consideration of justice and right. That the stranger creditor may be so paid to the exclusion of the director creditor nobody denies. Indeed, there is a sort of alacrity and joyousness in many of the authorities so holding, as if the director creditor had been guilty of some enormous wrong or crime in advancing his money to the corporation for the primary benefit of its stranger creditors without reward or the hope thereof, and he and his claim for simple reimbursement were

unclean and unrighteous things before the law. That the director creditor may be so paid is strenuously denied by many authorities, sometimes with an acerbity of statement and a bitterness of denunciation which happily are rarely found in juridical writings. And why may the director creditor not be so preferred and paid? Confessedly, his debt is a just one. Confessedly, the corporation, its business, and its creditors are benefited by the consideration of it as fully as by the consideration of the debt due the stranger creditor. Confessedly, under a general assignment by the corporation he would be entitled to share upon the same footing as the stranger creditor. Confessedly, indeed, in every contingency and under all circumstances and conditions the director creditor and his claim stand upon the same footing and have the same rights as the stranger creditor and his claim, except only that, as is insisted, the corporation may prefer and pay the latter in full, while the preference and payment in full of the former is fraudulent and void. There is, we are firmly of the opinion, no reason whatever for this distinction, and we believe it can be so demonstrated.

Let us first examine the reasons which are advanced by the judges and writers who hold to that view. Nearly all of the adjudged cases which hold that an insolvent and failing corporation cannot convey property to its officers and directors in payment of their debts, in preference to the debts of stranger creditors, rest their conclusions entirely upon the ground that the assets of such corporation constitute a trust fund in the hands of its officers and managers as trustees for the payment of its debts, and that such trustees cannot pay themselves in preference to other creditors. We content ourselves upon this point by saying that this "trust-fund doctrine" has been utterly repudiated in this state in a thoroughly considered case, and by an opinion prepared with considerable care and research, in which all the judges of this court concurred. *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 28 L. R. A. 707. But, leaving the trust-fund doctrine out of the case, it is sought to rest the conclusion that the transfer to a director involved in this case is fraudulent upon other grounds, being the same to which a text writer or two and perhaps some courts have referred a like conclusion. And what are they?

In the first place, the notion is advanced that such a transfer involves the reservation of a benefit to somebody,—whether to the corporation, or to the director creditor, or to the other creditors, is not made at all clear in the statement of the general proposition, and, when a more concrete statement is ventured upon, the identity of the person or entity receiving an undue benefit becomes more and more uncertain. And we do not hesitate to maintain that no benefit is, in such transaction, reserved, or in any way inures, to anybody beyond what the law clearly and fully contemplates, allows, and approves. What is a benefit reserved which will vitiate the transfer of property by an insolvent and failing debtor in the payment

of a debt? Is it not, in the nature of things, an undue benefit? Is it not essentially and necessarily the securing of some advantage beyond and in addition to the satisfaction of the debt sought to be paid? Can there be any such thing as the reservation of a benefit when the whole effect of the transaction is the payment of a just and honest debt by the transfer to the creditor of property precisely equal in value to the amount of the debt? By such transaction there are benefits, of course, inuring to each party, but not such as the law condemns, or as afford any ground for complaint on the part of other creditors. The debtor is benefited by the liquidation of his liability, and the creditor is benefited by receiving the money which he is entitled to receive. But these are not undue or vitiating benefits. They contravene no principle of law or rule of moral action, but to the contrary, mark the accomplishment of the ends of the law in the premises, in a manner not inconsistent with abstract justice or with any tenet of sound morals. It is of no sort of consequence what the relations *aliunde* of the debtor and creditor are personally, or in estate, or by contract. They may stand to each other as father to son, or brother to brother, or husband to wife, or principal to agent, or *vice versa*, and even as partners, but for a consideration to be hereafter adverted to. Whatever else and cumulative may be the relations of the parties, if one owes the other a just debt he may, whether solvent or insolvent, pay that debt by the transfer of commensurate property, without impeachment upon any legal or moral ground.

The suggestion that a director or stockholder creditor receives a benefit in addition to the payment of his debt, in that thereby the corporation is relieved of the liability, and his holdings of stock are enhanced in value, is palpably and obviously without the least shadow of merit. The stock can have no value to the prejudice of any creditor. All creditors must be paid before any of the assets of the company can go to its stockholders. An insolvent and failing corporation has not, and can never have, anything to go to its shareholders; and the payment of one or more debts, to the exclusion of others, cannot possibly result in giving a value to its stock, and thereby collaterally benefiting the director creditor whose debt is paid. And if it could be conceived that an insolvent and failing corporation could pay its debts and have assets over to form a basis of stock value, who would there be to complain of the benefit thus accruing to its officers and stockholders whose debts had been paid along with others? It is only creditors who can complain of undue benefits secured to the debtor or other creditors in the transfer of property in preferential payment of debts; and, in the impossible case suggested, there would be no creditors, and hence nobody to be injured or prejudiced, and hence no wrong or injury done or suffered. One just and honest debt, it seems necessary to remark, is as just and honest as any other just and honest debt, and may be paid in the same way, under the same conditions. The whole end of the law is that

all the property of an insolvent debtor shall be applied to his debts. The debtor may be a father, son, brother, husband, wife, principal, agent, corporation, or individual. Whatever the outside relations are, the law requires only that his assets shall go to his creditors, and does not require that they shall go to them ratably, but only that for each dollar in value of such assets a dollar of honest indebtedness shall be paid, wholly irrespective of whether the debt so paid is due to one creditor of many, or to all of the many. We draw a line. Upon one side of it is the insolvent debtor and his insufficient property. On the other are ranged his creditors and their claims. The law is simply and merely that that property must pass to the other side of that line, to somebody on the other side, and to the payment, in whole or part, as the case may be, of some, to the exclusion of other, claims on that side, or of all of them ratably. The property must go to the indebtedness. It must reduce the aggregate of the claims of the several creditors considered as one gross sum, and though it thus reduce the gross indebtedness only by satisfying in full a particular item entering into the aggregate, by paying one claim in full and nothing on the others, the law is satisfied; its ends have been met; its purposes effectuated; no undue benefit has been reserved; no undue advantage has been taken; and it lies in no man's mouth to complain.

But it is said that "the officers of an insolvent corporation are in a position to know the real condition of the corporation, an advantage not attainable by creditors generally," and for this reason preferences in the payment of their debts should not be allowed. Has it ever been suggested before that better knowledge of a debtor's pecuniary condition by a particular creditor was any ground for declaring fraudulent and setting aside a preferential transfer to such creditor? Was such a doctrine ever ruled by any court? To the contrary, has it not been, over and over again, held by this court that, so long as all the creditor receives is the fair equivalent of his honest debt, his knowledge of his debtor's insolvency, and even his perfect consciousness that the effect of the transfer to him will necessarily be to leave other creditors unpaid and without hope of payment, are matters wholly apart from the issue,—wholly irrelevant and inconsequent? Knowledge on the part of the creditor, however accurate and exclusive, of the debtor's precarious situation, and of the injurious effects of a proposed transfer of property to such creditor, whether such knowledge be incident to the relations existing between the parties or not, is absolutely without a scintilla of influence upon a transfer of property, at a fair valuation, to pay an honest and adequate debt. Given the transfer at such a valuation in payment of such a debt, the law concerns itself in no degree whatever with the creditor's knowledge or information, or even with his purposes and intent. For whatever he knows or intends, he has taken only that which he is entitled to take under the law, and hence, in the eyes of the law, he has done no wrong.

Again, it is contended that the officers and managers of an insolvent and failing corporation must be held to the same line of duties, and subjected to the same incapacities and liabilities, as partners or mere members of an association of individuals. There is, in our opinion, no law or reason in this position. The fundamental, and in the present connection all-important, difference between the managers of an insolvent and failing corporation, on the one hand, and partners and members of associations, on the other, lies in the fact that the corporate managers are not liable, in any sense, for the debts of the corporation, and partners and members of associations are individually liable to the fullest extent for all the debts of their partnership or association. The stranger creditor of a partnership or association is entitled, as against the members thereof, to take and apply to his debt, not only all the property of the partnership or association, but also all the property of each of its members, to the entire exclusion of their claims as individuals against the partnership debtor. And, indeed, there is a vitiating infirmity in a debtor and creditor transaction between a partnership and a partner from its very inception, so far as other creditors are interested; for if it could be conceived that a partner advancing money to his firm stands upon the same footing as other creditors, abstractly speaking, the loan going, as it would, to reduce partnership liabilities, would operate to cut down the advancing partner's ultimate individual liability, and, on the assumption that he would be entitled to have the loan refunded to him, the effect would be to reduce his liabilities as an individual partner by a transaction in which he in fact has paid or parted with nothing. Of course, this cannot be allowed; and this view of such a transaction is but another way of reaching the inevitable conclusion that the partner in such case is not a creditor of his firm, in any sense, against the claims of outside creditors. The fact manifestly is that the contribution of money or property to a partnership by a partner beyond his share under the partnership articles is, especially when the firm is insolvent, in the nature, and has the effect, of a payment by such partner on his individual liability for the partnership debts, and is essentially not the creation of a debt from the firm to him, except as between the other partners and himself; and this is so, of course, as to voluntary associations and their members.

Now, as to corporations and their officers and stockholders: No officer or stockholder of a corporation is at all, or in any case, liable for any debt of the corporation. Nobody, we suppose, will question this proposition. If an officer or stockholder lends his money to the corporation, it does not go in reduction of his individual liability, because he is under no such liability. It is not in the nature of the payment of a debt to the creditors of the corporation, because he owes them no debt. Neither he nor the corporation is benefited or injured either by the loan or its repayment, except to the extent there might be benefit or detriment to the parties if the

loan were made by a stranger; and, confessedly, the loan creates a debt from the corporation to the advancing officer or stockholder, not only as between the corporation and him, but also as between him and stranger creditors of the company. And this, whether the corporation be solvent or insolvent; in a prosperous condition or in failing circumstances. He may sue and recover his debt in full, whatever the effect of such recovery on the claims of other creditors. If the corporation assigns or is being wound up, he, like every other creditor, is entitled to share in its assets. The corporation may pay him as it may pay any other creditor, though the effect be to disable it to pay other creditors in full, since his is an honest and just debt, and the whole end of the law is the application of corporate assets, either ratably or preferentially, to the payment of honest and just debts. And the *quo modo* is immaterial. The payment may be made in money or by the transfer of property. So long as the honest creditor gets no more, either in money or property, than his just debt, no undue benefit is reserved to the corporation or inures to the officer creditor, and no detriment, in legal contemplation, results to other creditors; no wrong has been done to anybody; nobody has been unduly advantaged; and the transaction is lawful, honest, and valid.

The suggestion that a transfer by directors to one of their number, of property in payment of a debt, is invalid as being the act of the party accepting the transfer, has no merit, dissociated from the exploded trust-fund doctrine. On that doctrine the directors become trustees, and on the principle that a trustee cannot transfer the trust estate to himself as an individual is rested the further proposition that directors of an insolvent corporation cannot, being trustees, transfer its property to themselves in payment of debts which the corporation owes them. But with the elimination of the main proposition, that such directors are trustees, falls the dependent proposition that they cannot prefer themselves in the payment of debts. With the trust-fund doctrine out of the way, the separate corporate entity continues to exist for all purposes, wholly unaffected by the fact of insolvency, and its functions must continue to be performed. These functions are performed by the directors for and in the name of the corporation, and their official acts are not their individual acts at all, but the acts of the corporation; and, not being trustees for creditors, their acts, when assailed by creditors, are not subject to the rule that, if a trustee contracts with himself in reference to the trust estate, his acts are void, at the election of, or as against, the *cestui que trust*. There being in such case no trustee, and no relation of trustee and *cestui que trust* between the directors of the corporation and its creditors, the matter stands thus: A corporation, without assets to pay all its debts, owes its directors and it owes strangers. The debts of the two classes of creditors are equally honest and just, and stand upon the same footing, in law and in equity. The corporation has an undoubted

right to pay some creditors to the exclusion of others. Any creditor has the undoubted right to accept a preference. The corporation has the same right to pay its directors as it has to pay strangers. The directors have the same right to preferential payment as do strangers. To the exercise of this undoubted right to make preferences it is essential that the corporation must act. It can only act through the directors. If the directors cannot act to the end of preferring their own just debts,—having the undoubted right to such preference,—the preference cannot be made, and the undoubted right of the corporation to make it, and of the directors to accept it, is denied and defeated. The ends of the law, that the assets of the corporation shall be applied to such of its debts as the corporation prefers, are defeated. And for what? Upon what ground? Not that the directors are under any incapacity to prefer themselves which can be referred to any principle of law. Not that they are trustees; for they are not trustees for the creditors. Not that they are agents of other creditors; for they are not such agents. Not that they occupy any other fiduciary relation to other creditors; for, being only the agents of the corporation, and, in that capacity only the trustees for stockholders alone, they bear and can bear to the creditors, who have to do with the corporation as an entity, and not with the shareholders at all, only the relation of the agent of a debtor to his creditor,—a relation which is obviously as devoid of every attribute of a fiduciary character as the direct relation of debtor and creditor. Upon what ground, then, we repeat, is rested the idea that directors cannot prefer themselves? Getting away from the trust-fund doctrine, it is based upon the bald assertion that the director in such case is acting both for the corporation and himself in contracting in his representative capacity with himself as an individual; and this, it is said, the law will not allow. That is the sole ground put forward. It cannot for a moment be sustained upon principle or well-considered authority. The results claimed do not follow. The contract of a director with himself as an individual, and the sale of corporate property by directors to themselves as individuals, is not void, even as against the corporation itself or the stockholders. Upon all reason and authority, it is perfectly valid, if not disaffirmed by the corporation itself or the stockholders. And the election belongs exclusively to the corporation and stockholders. If they do not exercise it, the transaction must stand. Strangers, of course, cannot question it, for they are wholly without interest in the premises. General creditors cannot question it, since no right of theirs has been violated by it. They cannot hold the directors to account as fiduciaries, as there are no fiduciary relations between them. As creditors, their only right is to have the corporate assets applied to just corporate debts, and this right is not impinged upon, but, to the contrary, fully conserved, by the payment of the just debts of the directors. They have no lien upon corporate assets. They have no rights of owner-

ship in corporate property. They cannot claim their debts should be paid in full, to the total or partial exclusion of other equally honest and just debts. The property not being impressed with a trust in their favor, and standing, as they do, in no superior right to director creditors, they, the right of preference being recognized, have no shadow of right to insist upon even a *pro rata* application of the assets to all indebtedness. Their only right is to insist that all the assets shall be applied preferentially or otherwise, to the indebtedness; and this right is absolutely subserved, as we have seen, by the payment of director creditors to the exclusion of stranger creditors. They have no right to insist upon the equal payment of all debts *pro rata*. The right of preference, which every debtor confessedly has, necessarily involves favoritism,—the right of choice of one creditor, and of any one creditor, to the exclusion of others. It is utterly inconsistent with all notions of equality, and, as a natural person may prefer his relatives and his friends to the exclusion of strangers, so an artificial person may prefer its friends and those occupying official relations to it to the exclusion of strangers.

There is, the writer thinks, no semblance of sound principle or well-considered authority for a different conclusion. It seems to him that those courts which have taken a different view have been largely moved thereto by a consideration of the danger of fraudulent claims being brought forward by directors, and of the facility afforded directors by their positions to establish such claims, rather than by any just consideration of any recognized principle of law or equity obtaining in the premises. They have allowed themselves to be driven to the denial of a right altogether because of a practical difficulty in mere matter of evidence. They deny an undoubted right to the directors, because, forsooth, the persons asserting the right have opportunities for deceiving the courts as to the existence of the facts upon which it rests. They deny the right, though proved beyond all peradventure in the particular case, because in other cases it may be supported by fraud and perjury. The same considerations are as applicable to other relations, and the courts might, with equal force and propriety, strike down all conveyances and transfers in payment of debts between parent and child, brother and brother, husband and wife, and the like, because those relations afford opportunities for simulation and fraud. Yet nobody pretends that such transfers in preferential payment of honest debts are under the ban of the law, as being constructively fraudulent. And no more upon reason and principle and well-considered authority can like transactions by directors be avoided on the ground that such officers have opportunities for fraud and simulation, which have, however, not been utilized in the particular case. It is not for the courts to be governed by such considerations. They are to ascertain the facts in each case, and to apply the law thereto, and the law is not to be changed in its application in a given case by the fact that to apply it as it ex-

ists might be to admit of difficulties of proof in another case. If the danger of administering the law as it is is sufficiently great and imminent to require a change of the law, that is a matter for the legislature, and not for the courts. It is a question of legislative policy, and not of existing law.

We have considered this matter on principle at some length, because of its importance, and because it has been not a little mooted in this state. For the same reasons, we will now, at some length, refer to authorities sustaining the view we have declared. The first case to which we will invite attention, as well because of the ability of the court deciding it as because it is among older ones, is that of *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516. The opinion is by John F. Dillon, a judge and law-writer of national reputation for ability and learning. Buckingham & Co. were general creditors of a corporation. Buell was also a creditor, a director thereof, and its president. Buell participated with the other two directors, the presence of all three being necessary to a quorum, in a sale and transfer of the corporate property to himself in payment of the debt the corporation owed him. The transaction was assailed by Buckingham & Co. on the same grounds that are advanced by the corporation in the case at bar. Assuming Buell's participation as president and director in the sale to himself as an individual, Judge Dillon proceeds: "This makes it necessary to discuss the nature of the relations which Buell and the defendants, respectively, sustained to the corporation. In one respect, their relations were common and identical. They were both creditors. Their equities in this respect were equal and the same. Being an officer in the corporation did not deprive Buell of the right to enter into competition with other creditors and run a race of vigilance with them, availing himself in the contest of his superior knowledge and of the advantages of his position to obtain security for or payment of his debt. He has an advantage, it is true, but it is one which results from his position, and which is known to every person who deals with and extends credit to a corporation. This is one of the causes which have operated to bring corporate companies into discredit, and may constitute a good legislative reason for giving priority to outside creditors. But the legislature must furnish the remedy. That the act of Buell was not legally or constructively fraudulent in consequence of his being an officer or member of the corporation, see *Whitwell v. Warner*, 20 Vt. 425, 444; *Ang. & A. Corp.* § 390; *Gordon v. Preston*, 1 Watts, 386, 26 Am. Rep. 75; *Sargent v. Webster*, 13 Met. 497, 46 Am. Dec. 743; *Central R. & Bkg. Co. v. Claghorn*, Speers, Eq. 562. But, in addition to being a creditor, Buell sustained to the company the relation of a stockholder and director. Such companies are essentially partnerships, except in form. 'The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all of the property and effects of the corporation.' *Per Walworth, Ch.*, in 44 L. R. A.

Robinson v. Smith, 3 Paige, 222, 232, 24 Am. Dec. 212; *Cunningham v. Pell*, 5 Paige, 607; *Slee v. Bloom*, 19 Johns. 479, 10 Am. Dec. 273; *Hoyt v. Thompson*, 5 N. Y. 320. The corporation is an artificial person, owning its property and necessarily acting by its agents, and these agents are the directors. After much reflection, it seems to me that the correct view of Buell's position is this: He is a trustee and the beneficiaries are the corporation, or, in other words, the stockholders; or, what is in essence the same, he is an agent and the stockholders the principal. If this is the relation, then the rules of law applicable to purchasers by agents and trustees apply to the purchase in question. There is a manifest impropriety in allowing the same person to act as the agent of the seller and to become himself the buyer. There may be, in all such cases, a conflict between duty and interest. Acting for himself, Buell's interest would be to obtain payment. Acting for the best interests of the corporation, his disinterested and unbiased convictions of duty might be to advise against a sale of the entire property to one creditor or against any sale at all. It is in view of these considerations that 'the wise policy of the law hath put the sting of a disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation.' Even these principles would not, in my judgment, apply to the case, if there had been a quorum without Buell. Now, the purchase of property by an agent or trustee, or by any person acting in a fiduciary capacity, is not void *ab origine* and absolutely. It is voidable only. It is made subject to the right of the principal or beneficiary, in a reasonable time, to say that he is not satisfied with it. It is valid in equity as well as law, unless the parties interested repudiate it or complain of it, and these may set it aside without showing either fraud or injury. *Bank of Old Dominion v. Dubuque & P. R. Co.* 8 Iowa, 277, 74 Am. Dec. 302; *Davous v. Fanning*, 2 Johns. Ch. 252; *Bostwick v. Atkins*, 3 N. Y. 53, 60; 1 Parsons, Contr. 75, 76, and cases in note; [*Fox v. Mackreth*] 1 White & T. Lead. Cas. Eq. 167; *MacGregor v. Gardner*, 14 Iowa, 326, 335. As the principal or parties interested may confirm the sale, a mere stranger cannot make the objection that the trustee was the purchaser or that the sale was irregular. The remedy belongs only 'to persons who had an interest in the property before the sale, and no other person can apply to set aside the sale.' *Hawley v. Cramer*, 4 Cow. 717, 744; *Edmondson v. Welsh*, 27 Ala. 578; *Foster v. Goree*, 5 Ala. 428; *Hannah v. Carrington*, 18 Ark. 85; *Herbert v. Hanrick*, 16 Ala. 581; *Greenleaf v. Queen*, 1 Pet. 138, 7 L. ed. 85; *Hillegass v. Hillegass*, 5 Pa. 97; *Wightman v. Doe*, *Reynolds*, 24 Miss. 675. Adopting this as the true view, it follows that Buell's participation in the sale and purchase of the property did not make the same void. The utmost effect it could have would be to make the sale voidable at the instance of any person having an interest in the property sold. But the defendants, being at that time general creditors, and hav-

ing no interest in or lien upon the property, and there being no actual fraud, are not entitled to avoid the sale simply on the ground that Buell was one of the three directors necessary to constitute a quorum. This, in my judgment, is the correct view to be taken of the case. But adjudged cases go farther (and it is possible some of them go too far), and sustain the purchase of Buell on broader grounds. I will refer briefly to some of them. Thus, it is held that if three persons are appointed a committee 'to finish and repair a schoolhouse' (*Geer v. 10th School Dist.* 6 Vt. 76), or to superintend the building of a church, they may 'as effectually bind the society by a contract concluded with one of their own number as with a stranger.' These cases were confirmed in *Rogers v. Danby Universalist Soc.* 19 Vt. 187, where the court says: 'There is perhaps some incongruity in thus allowing a person to act in a double capacity as an agent for a corporation contracting with himself. But, whether a majority or the whole act, the party contracted with, as well as any other, may participate in the bargain. Partiality so gross as to amount to fraud will, when sustained, defeat the contract.' In these cases the court held the objection not good, even when made by the corporation. The case of *Hayward v. Pilgrim Soc.* 21 Pick. 270, shows that where the trustees are creditors of the society, and therefore interested, they may nevertheless vote that the treasurer execute a note to them for the amount, and it is valid."

In *Planters' Bank v. Whittle*, 78 Va. 737, like questions arose and were decided in the same way, the court, by Lewis, P., saying: "There is no proof of actual fraud in the transactions involved, but the appellees insist that the assets of an insolvent corporation are a trust fund for the payment of its debts; that the directors are trustees for the creditors, whose duty it is to apply the assets ratably for the benefit of the general creditors, and that therefore they can make no lawful preferences in favor of themselves, or in favor of those creditors for whose claims they are individually responsible. That the directors of a corporation are bound to act in discharge of their duties with prudence, vigilance, and fidelity, and to apply its assets, in the event of insolvency, for the benefit of the creditors in preference to the claims of stockholders or other persons, is a proposition which is not, and cannot be, disputed. But that they are technically trustees for the creditors, and bound to apply the assets ratably among the general creditors, is a proposition which has never been judicially affirmed in this state, and is in conflict with the great weight of authority elsewhere. Much stress is laid by the appellees on the case of *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731. In that case the well-established principle was asserted that the capital stock of the corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors, which cannot be withdrawn from their reach by any act or device on the part of the directors. But no such doctrine as is here contended for was there laid down. On the

contrary, the court recognized a distinction between the capital stock of a corporation and its ordinary assets, with which, it was said, the directors may deal as they choose. It is not only settled that the directors may make preferences between creditors, but such preferences may be made in their own favor when they themselves are creditors of the corporation. Of course, in such cases they must act with the utmost good faith, and the transactions, to be upheld, must be free from the taint of fraud or suspicion. This was distinctly held in the well-considered case of *Buell v. Buckinham*, 16 Iowa, 284, 85 Am. Dec. 516. There the controversy was between a judgment creditor of an insolvent corporation and one of its directors. An execution in favor of the former was levied on certain property which the latter claimed by purchase in discharge of a debt due him by the company. The property was sold and conveyed to him pursuant to an order made by the directors, at a meeting at which he was present and voted, his presence being necessary to make a quorum for business. The transaction was assailed by the judgment creditor as illegal and void, but it was held to be valid. . . . In *Gordon v. Preston*, 1 Watts, 385, 26 Am. Dec. 75, a mortgage by a corporation was held good which was assailed by creditors, on the ground, among others, that it was in favor of the president and treasurer of the company, and who were present at the meeting of the directors when the mortgage was authorized and executed. Chief Justice Gibson delivered the opinion of the court. He said: "That a director may sustain the relation of debtor or creditor in regard to the corporation, and in the latter receive a security, is a proposition which requires not the aid of an argument, and here the existence of a meritorious debt is not disputed." In *Ashhurst's Appeal*, 60 Pa. 290, Judge Strong, for the court, said: "There must be many things which directors can do for their individual benefit which are binding upon a corporation of which they are directors. If they have advanced money, I cannot doubt they may pay themselves with corporate funds. If they have become liable as sureties for the corporation, they may provide for their indemnity. And though, ordinarily, the law frowns upon contracts made by them in their representative character with themselves as private persons, such contracts are not necessarily void; they are carefully watched, and their fairness must be shown."

The case of *Central R. & Bkg. Co. v. Claghorn*, decided by the court of appeals of South Carolina as far back as 1844, is to the same effect. There it was insisted by general creditors that a mortgage executed to directors of a corporation to indemnify them against liability as indorsers on the company's paper was constructively fraudulent, on the ground that in the execution of the mortgage the directors contracted with themselves. The validity of the transfer by the directors to themselves was sustained, the court saying: "There is, upon a superficial view, something very startling in this, if the facts be true, and they probably are as

to some, perhaps all, of the indorsers, but the alarm will cease when we take into consideration the motives and influences which operate upon men to lend their credit to assist individuals or corporations to pursue their enterprises. The directors of a corporation ought to be, and generally are, better informed as to its liabilities and resources than anyone else, and if they, having the means, refuse to aid them in their operations by the loan of money or credit, no one else will be found to do it; and I need not add what is known to all having any experience that an overweening confidence in their capacity to manage the affairs of a corporation, and a mistaken view of the state of its finances, have often involved the stockholders, and especially the directors, in distress and ruin. No man likes to give up an enterprise in which he has embarked, until he is satisfied that it cannot succeed, and this feeling is strengthened by the numbers that are embarked in it. Few are willing to recede while there are any to persevere. Now, there is nothing, either in law or equity, which forbids a member, or even a director, of a corporation from contracting with it, and, like any other individual, he has a right to prescribe his own terms, which the corporation is at liberty to accept or reject, and when the contract is concluded, he stands in the same relation to the other creditors of the corporation as any other individual would under the same circumstances. When the question of priority arises, it must depend on the bona fides of the transaction, fraud or no fraud. If by greater diligence, and without fraud, he has fairly gained an advantage over the other creditors, he is entitled to retain it; and I cannot, from the evidence in this case, detect the slightest ground of suspicion that there was any fraud on the part of the indorsers in obtaining the mortgage to secure the debt of the steamboat company." *Speers, Eq. 545, 562.*

The supreme court of Vermont committed itself many years ago to the same doctrine. Speaking to the questions we have before us here, for that court, that eminent jurist and commentator, Isaac F. Redfield, used the following language: "But it does not occur to us that there is any just ground for charging the defendants, with the exception of Cummings, perhaps, with any actual or constructive fraud. As to constructive fraud, it is not competent, certainly, to predicate this of the mere fact of a stockholder's availing himself of his superior advantages to obtain security for debts due to himself, to the exclusion of other debtors. The stockholder and the stranger, who are both creditors of a corporation, no doubt stand in very unequal positions. But it is an inequality which the law allows, and which is understood by those who contract with corporations, and one which will always tend, more or less, to bring in doubt the credit of such bodies. But it is a subject with which this court has nothing to do. Some modification of the law upon this subject has been attempted, I believe—to what purpose, time must determine. We are content to leave that subject as it is. And while we would, no doubt,

guard the exercise of such a privilege, in the stockholders of a corporation, with some degree of severity, we must not forget that all just rights are entitled to a fair consideration in a court of justice. We should not, then, watch the exercise of a right with so much strictness as to declare its mere exercise to be a constructive fraud." *Whitwell v. Warner, 20 Vt. 425, 444.*

The supreme court of Connecticut unequivocally declares the same doctrines. In the case of *Smith v. Skeary, 47 Conn. 47, 53, 54*, the following is the opinion of the court on the questions now before us: "The plaintiff Hotchkiss, and Smith, the intestate of the other plaintiff, were stockholders and directors of the Star Tool Company, a joint-stock corporation. They were creditors to the corporation to an amount exceeding \$6,000, which was justly due and unsecured. On the 15th day of December, 1876, pursuant to a vote of the board of directors, there was transferred to them from the corporation, in payment of their claim, personal property, including that embraced in the present suit, of the value of about \$6,000. The corporation was in fact insolvent, although it was supposed by the parties at the time that it would be able to pay all its debts and liabilities. The transaction was in entire good faith, with no intention to defraud creditors, and there was no fraud unless the same arises as matter of law from the facts found. We are unable to discover any principle of law which renders the transaction fraudulent. The corporation had a right, and it was its duty, to pay this debt. These creditors had a perfect right to receive pay in money or goods, and the fact that they were stockholders and directors did not modify or abridge that right, so long as there was no actual fraudulent intent. The fact, if it be a fact, that it operated to prefer these creditors, is not sufficient at common law to stamp it as fraudulent, for the common law favored the vigilant, and a creditor might lawfully obtain a preference. It does not become fraudulent under our insolvent laws, because no proceedings in insolvency were instituted in due time, so that the case cannot be brought within the operation of those laws. The consideration was good and adequate, so that there is no badge of fraud in that respect."

In a later Iowa case the principles declared by Dillon in *Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516*, were again announced and reaffirmed, the court saying: "May a director enforce such a debt? We understand that he may become a creditor of the corporation, may advance it money, or sell it property, and obligations of the corporation executed therefor may be enforced by him. In this regard he occupies no different position from that of any other creditor; and if the debt he holds was contracted in good faith, and there is an absence of fraud on his part, he may take security or payment though the corporation be insolvent, and he may thereby acquire priority in the payment of his claim. Counsel for defendants admit this proposition, with an exception in the case of the insolvency of the

corporation. They insist that the directors of an insolvent corporation cannot take from it security, by mortgage or other conveyance creating a lien upon its property, even though given in good faith and without fraud in the transaction. We are not prepared to admit this proposition. A creditor may accept payment or security from an insolvent debtor free from any claim of other creditors. A corporation may make payment of its debts, or give its property in security therefor, just as a natural person may do. If, therefore, a director holds the indebtedness of an insolvent corporation, he may take payment or security in a good-faith and honest transaction. No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way, take its property in security. If the property, money, or other consideration of the debt was fairly used for the benefit of the corporation, was added to its assets, or used in its business, it would be unreasonable to hold that the director is deprived of rights and remedies held by other creditors. It is not shown, in the answer of defendants, that there was any bad faith or dishonest practices on the part of the creditors for whom plaintiff is trustee in becoming creditors of the plow company, and taking security from it. It is true that the courts will scan with care, and even with suspicion, such transactions, and demand that they be accompanied by the utmost good faith." *Garrett v. Burlington Plow Co.* 70 Iowa, 697, 701, 59 Am. Rep. 461.

And in a yet later case the same court uses the following language: "Counsel for the appellant contends that the 'organization of the company by the stockholders of the old corporation was for the purpose of transferring the property of the old organization in fraud of creditors.' It is not alleged in the petition that such sale and conveyance were made with the intent and for the purpose of defrauding creditors, but that what was done amounted to an unlawful preference. In other words, we understand the claim to be that what was done amounts to a legal fraud, as distinguished from an actual fraudulent intent. If wrong in this, we find, from the evidence, that the defendants did not intend to defraud anyone. Such was not their purpose, but they honestly believed they had the legal right to procure the mortgage and thus secure themselves, although other creditors of the corporation were not secured or paid; and whether they had this right is the important question in this case. The evidence satisfies us that the Marshall County Company was indebted to the mortgagees in the sum of \$10,000 at the time the mortgage was executed, and that such indebtedness was contracted in good faith. The mortgagees, it is true, were officers and stockholders of the corporation; but, notwithstanding this fact, they had the right to procure the corporation to execute the mortgage, although other creditors of the corporation are unable to obtain payment of their indebtedness. Corporations can make contracts and transfer property possessing

the same powers in such respects as private individuals. Code, § 1059 [par. 6]. Such is the rule in the absence of a statute, and therefore it has the right to prefer one creditor to another. 2 Moravetz, Priv. Corp. § 802. The fact that the preference is exercised in favor of directors or shareholders of the corporation is immaterial, although the director or shareholder may have voted for the proposition, and the security given was to secure an indebtedness to himself. *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Garrett v. Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461. It is insisted that this case is distinguished from those cited, because of the fact that all of the officers, directors, and shareholders voted in favor of the creation of the indebtedness and the execution of the mortgage. We do not believe this can or should make any difference. The material question is one of right and power, and, if this exists, it is immaterial whether this power is exercised by all or a part of the persons in whom the power is vested." *Warfield v. Marshall County Canning Co.* 72 Iowa, 666, 669.

The supreme court of Missouri fully supports all the views we have set forth in this opinion. Among the many cases decided by that court upholding the right of director creditors of an insolvent corporation to pay themselves by a transfer of corporate property, we refer specially to two among, if not, the latest. The opinion of the court in the case of *Schufeldt v. Smith*, 131 Mo. 280, 286, 29 L. R. A. 830 *et seq.*, is as follows: "Most of the questions involved in this record have, in some recent cases in this court, been given careful and exhaustive consideration. The investigations given the subject have been more labored and thorough on account of apparent want of harmony in some of the previous decisions of this court, as well as on account of the diversity of opinion in other jurisdictions. The conclusion reached by each of the divisions, which received the concurrence of all the members, may be briefly given, in the language of the syllabi prepared by the judge who wrote one of the opinions, as follows: 'A corporation in failing circumstances may . . . prefer one creditor to another in discharging its obligations, if such preference is made in good faith, while the property of the company remains in its possession, unaffected by liens or by process of law. . . . Mere insolvency of a corporation does not, of itself, transform its assets into a trust fund for the equal benefit of all its creditors.' *Alberger v. National Bank of Commerce*, 123 Mo. 313; *Slavens v. Cook Drug Co.* 128 Mo. 341; *Waggoner-Gates Milling Co. v. Ziegler-Zaiss Commission Co.* 128 Mo. 473. . . . It would seem to follow logically, from these decisions, that a preference may be made to a director for a debt directly due him from the corporation, unless it would be defeated by his own act in voting himself the preference. But it is insisted with much earnestness, and argued with great ability, that the directors had no power to bind the corporation to an agreement made with themselves

and in which they had a personal interest, and that therefore the resolution of the board of directors authorizing preferences to be given the members thereof over other creditors, and the deed of trust executed in pursuance thereof, were absolutely void. This contention must rest upon one of two theories; either that the directors of a corporation are trustees for its creditors, and its assets constitute a trust fund which they must apply ratably toward the satisfaction of all the debts, or that such a transaction is upon its face constructively fraudulent. As has been seen, the so-called trust-fund theory, as applied to a corporation while dominion over its property is retained, is not recognized in this state as being sound. Nothing additional need be said on that subject. The board of directors are undoubtedly trustees for the corporation and stockholders, and when acting for them, are bound to exercise the utmost good faith. Any attempt, in dealing with its property or affairs, to secure themselves personal advantages over other stockholders, should, at least, be subject to the most rigorous scrutiny. *Hill v. Rich Hill Coal Min. Co.* 119 Mo. 9, and cases cited. But it cannot be said, as a correct proposition of law, that officers of a corporation cannot themselves, and in their own names, contract with it. To so hold would virtually deny to corporations the credit upon which so much of the business of the country is transacted and which is so essential to success. If the stockholders and officers of corporations are not permitted to advance money to them, or to indorse for them, without subjecting themselves to such disadvantages, they would be deprived of their most valuable source of credit. A corporation naturally looks to those interested in its affairs for accommodations. If directors can lend the corporation money or indorse for it, they should certainly have the same right to collect the debts or secure themselves as is accorded to other creditors. The cases cited abundantly show that a corporation, so long as it has control of its property, though insolvent, may, when acting honestly, prefer one creditor to another. A mortgage, then, giving such preference, is not constructively fraudulent. Neither the corporation nor the other stockholders are injured by the preference given. To defeat them, actual fraud should be shown. The honest debts all stand, and should stand, on equal footing. All the creditors should have equal rights to enter in the race of diligence. The fact that the race may be unequal should not deprive the winner of his reward. An individual debtor can prefer his family, his neighbors, and his friends. If the preferred debt is honest, the preference cannot be impeached, though the wife of the debtor secure the advantage. *Hart v. Leete*, 104 Mo. 338; *Riley v. Vaughan*, 116 Mo. 176. No reason can be seen why a corporation may not also prefer its friends. There is no more equity in allowing an individual debtor to prefer his creditor wife or children than in allowing a corporation to prefer its stockholders and officers. To permit equities to control would defeat all prefer-

ences. While the owner of property retains the power of its disposal, he may apply it to the payment of any honest debt, is the rule upon which the right to make preferences among creditors rests. The rule should apply as well to corporations as to individuals, and any change should be made by the legislature, and not by the courts. If the debt is an honest one, and the corporation had the power to contract it, it has the right to pay or secure it, and no fraud can be imputed to it from the fact that it is paid or secured in preference to another. 'It may be conceded,' said Judge Taft in a recent case, 'that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and places the burden upon the preferred director of showing beyond question that he had a bona fide debt against the corporation; but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a bona fide creditor. Preferences are not based on any equitable principle. They go by favor, and, as an individual may prefer among his creditors his friends and relatives, so a corporation may prefer its friends.' *Brown v. Grand Rapids Parlor Furniture Co.* 16 U. S. App. 221, 58 Fed. Rep. loc. cit. 292, 7 C. C. A. 231, 22 L. R. A. 817. See also *Worthen v. Griffith*, 59 Ark. 562, and cases cited."

And in the yet later case of *Butler v. Harrison Land & Min. Co.* 139 Mo. 467, the following propositions, as shown by the headnotes, were laid down: "(1) The transfer by an insolvent corporation of its property to its directors, who are bona fide creditors because of money previously advanced by them to the company, is valid as against general creditors. (2) The law does not limit the power of a corporation to transfer its property by fair dealing, in the interest of its stockholders, so long as the corporation undissolved, holds the title thereto, and the possession thereof; nor is it true that, as soon as a condition of insolvency is approached, its property is impressed with a trust for the general good. (3) A corporation can transfer its property to its directors to pay money advanced to it by them in the same way that it can use that property to pay the president or other officer for services performed by him in managing the business. (4) The trial court committed error in holding that land honestly transferred by a corporation to its directors in liquidation of subsisting debts was impressed with a lien or trust in behalf of a third party who had obtained a judgment against the company after such transfer. (5) The directors of a corporation, when bona fide creditors, stand on a footing equally as good as its general creditors; and, if such corporation has in good faith transferred its entire property to such directors in payment of an honest debt, a general creditor whose claim was not a lien at the time of the transfer has no remedy."

In New Jersey, also, it is the established law that a sale, at a fair valuation, by the directors, of the property of an insolvent cor-

poration, to themselves, in payment of just debts due them, is valid as against stranger creditors whose debts in consequence go unpaid. *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 643-645.

The supreme court of Arkansas, speaking by Riddick, J., after utterly repudiating, as we have done, the idea that the assets of an insolvent corporation constitute a trust fund for its creditors, proceeds to discuss the right of such corporation to prefer its directors in the payment of debts, as follows: "But it is contended that the funds of an insolvent corporation are in the hands of the directors, to be disbursed on their unbiased and impartial judgment, and that, when personal interest or individual gain is an element subserved through their preference, it should be set aside, as being in contravention of sound equitable principles. To support this contention, counsel cite, among other cases, the well-considered case of *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131. In that case the directors of a corporation undertook to use their official position for their own benefit, and to increase their salary, to the injury of the interests of the corporation. The familiar rule that no one acting in a fiduciary capacity shall be permitted to make use of that relation for his own benefit, at the expense of the interests of his principal, was invoked by the corporation and applied by the court. There can be no doubt that the rule was properly applied in that case, for the directors are agents, and, to a certain extent, trustees, of the corporation. They will not be allowed to enter into engagements in which they have a personal interest conflicting with the interests of their principal, whose interests they are bound to protect. The rule is of wide application, and applies, as was held in that case, to agents, partners, guardians, executors, and to trustees generally, as well as to the directors and managing officers of corporations. If personal engagements hostile to the interest of their principals are entered into by persons holding such fiduciary relations, they are not, in law, absolutely void, but voidable, at the election of their principals. We do not see how that rule can apply in this case, for the party complaining here is not the corporation, but certain creditors of the corporation. The directors of a corporation are neither trustees nor agents of the creditors, and they do not occupy a fiduciary relation towards them, and therefore the rule does not apply. Although there are expressions in many of the cases cited by counsel that seem to support the contention that, even when an insolvent corporation may make preferences, the directors of such corporation must be free from personal bias in disbursing its assets and making such preferences, yet we do not believe that such a rule has any sound reason to rest upon. The very fact that preferences are made shows always that the party making them is biased more or less towards the person in whose favor they are made. As long as preferences are allowed to be made by insolvent debtors, they will be disbursed more or less by the personal bias of the person making them. The individual debtor, when insolvent and forced to make an assignment, generally prefers his friends, and often members of his own family. The home creditor and neighbor is preferred at the expense of the nonresident one, perhaps equally deserving. So, when this drygoods company came to make an assignment, it is not strange that, in making preferences, it should favor the home creditors. The contention that the estate of an insolvent debtor should be disbursed by someone acting without bias or personal interest would apply almost as well to the case of an assignment by an insolvent individual or partnership as to that of a corporation, and, if adopted, would result in forbidding all preferences in assignments by insolvent debtors,—a result that might be productive of much good, but it is one that the courts must leave to the wisdom of the legislature to accomplish; for, to quote the language of Judge Caldwell in *Gould v. Little Rock, M. R. & T. R. Co.*, the right to make preferences 'is too firmly embedded in our system of jurisprudence to be overthrown by judicial decision, and it can no more be overthrown by the courts in its application to corporations than to individuals.' *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 684. That was a case that arose in this state, and was controlled by the laws of this state, and, after an examination of the authorities, the court held that an insolvent corporation of this state may prefer its creditors, whether they be officers of the corporation or strangers. 'The doctrine established by the best-considered cases and by the Supreme Court of the United States,' says Judge Caldwell in his opinion in that case, 'is that the mere fact that creditors of a corporation are directors and stockholders does not prevent their taking security to themselves as individuals to secure a bona fide loan of money previously made to such corporation, and used by it in conducting its legitimate business.'" *Worthen v. Griffith*, 59 Ark. 562, 578.

The same position has been taken by the circuit court of appeals of the sixth circuit. In *Brown v. Grand Rapids Parlor Furniture Co.* 16 U. S. App. 221, 58 Fed. Rep. 236, 7 C. C. A. 225, 22 L. R. A. 817, the court, by Taft, circuit judge, says: "We now come to the question whether the fact that Harry W. Long, and W. J. Long, Jr. [directors] were interested as guarantors and indorsers upon most of the notes secured by the mortgages, and that they were directors and stockholders in the corporation, and as such voted to give the mortgages, renders the mortgages invalid. . . . Several cases have been cited, some of them decisions of circuit courts of the United States, in which it has been held that, while it is lawful for a corporation to prefer creditors, it is not equitable or permissible for directors of a corporation to prefer themselves, even if they are bona fide creditors, because they are trustees. It may be conceded that the trust relation justifies and requires courts of equity to subject preferences of its own directors by an insolvent corporation to the closest scrutiny."

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tiny, and places the burden upon the preferred director of showing beyond question that he had a bona fide debt against the corporation; but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a bona fide creditor. Preferences are not based on any equitable principle. They go by favor, and as an individual may prefer among his creditors his friends and relatives, so a corporation may prefer its friends."

The supreme court of Michigan is fully committed to the same doctrine. In *Bank of Montreal v. J. E. Potts Salt & Lumber Co.* 90 Mich. 345, 350, opinion by Montgomery, J., it is said: "Nor is it the law of this state that, as soon as a corporation becomes insolvent, the directors of the corporation become trustees for all the creditors alike, in such sense as to prevent their giving valid security by way of preference to one of the stockholders or directors. We are aware that the decisions in the various states are not uniform as to the question, and that a number of very eminent text writers have deprecated a state of the law which admits of such preferences. But to adopt the language of Dillon, J., in *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516, this condition of the law 'may constitute a good legislative reason for giving priority to outside creditors, but the legislature must furnish the remedy.' In the case referred to, it was held that being an officer of the corporation did not deprive Buell of the right to enter into competition with the other creditors, and run a race of diligence with them. . . . The rule in this state has, we think, been established since the case of *Town v. Bank of River Raisin*, 2 Dougl. (Mich.) 530, that a corporation may, in the absence of legislative restriction, deal with its property precisely as an individual may, and may prefer one creditor over another; and hence that the assets do not become a trust fund for *pro rata* distribution among all its creditors."

. . . This is the substance of the rule stated in both *Town v. Bank of River Raisin*, and *Turnbull v. Prentiss Lumber Co.* 55 Mich. 387. And in the later case of *Kendall v. Bishop*, 76 Mich. 634, a mortgage had been given to secure the directors of the corporation and to secure paper upon which they were indorsers. The question under consideration was fully discussed in the briefs of counsel, and it was said by Mr. Justice Campbell: "There seems to be no reason why one honest creditor should be on a worse footing than another, and we do not find in our law any such distinction." See also *Lucas v. Friant*, 111 Mich. 426.

The supreme court of Mississippi in effect indorses the doctrine that director creditors of an insolvent corporation may prefer themselves in payment of their claims by a transfer of corporate property. *Sells v. Rosedale Grocery & Commission Co.* 72 Miss. 590.

In *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 680, 684, it is said by Caldwell, J., after repudiating the trust-fund doctrine: "It is next contended that the deed of trust is void because it was executed to secure debts due to persons who were directors of

the corporation and large holders of its stock and mortgage bonds. The money was actually advanced by the directors in good faith, for the benefit of the company, and was used by the company for legitimate corporate purposes. It was not loaned or advanced for the purpose of obtaining any advantage over the corporation or its other stockholders or creditors, but to conserve and protect the best interests of all persons interested in the property. It is obvious that the directors who made these advances did not do so from choice, or because they esteemed it a safe or profitable investment in itself. They made the advances because the corporation stood in pressing need of the money, and its failure to get it was likely to result injuriously to all its creditors and stockholders. The inducement to make the loan was to protect and give value to their own large interests as creditors and stockholders of the corporation; but all other creditors and stockholders, in proportion to their interests, were equally protected and benefited by the loan. Upon these facts the deed of trust executed by the direction of the stockholders and board of directors to secure the advances previously made by these four directors to the company is a valid security. The advances constituted a valid debt against the corporation, which it was legally liable to pay, and could have been compelled to pay by suit. Where a corporation is legally liable to pay a debt it may undoubtedly give security for its payment. The use of its property to pay or secure a bona fide debt is not an unlawful use or diversion of its property, no matter what official relation the creditor sustains to the corporation. The corporation is under the same obligation to pay a bona fide debt due to one of its directors and stockholders that it is to pay a debt due to a stranger, and a security given for a debt due to a director and stockholder is as valid as a security given to any other creditor. The doctrine established by the best-considered cases and by the decisions of the Supreme Court of the United States is that the mere fact that creditors of a corporation are directors and stockholders does not prevent their taking security to themselves as individuals to secure a bona fide loan of money previously made to such corporation, and used by it in conducting its legitimate corporate business. Among the states maintaining this doctrine may be mentioned Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Virginia, Illinois, Minnesota, and Iowa. . . . And, to the same effect, see *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190, 88 N. Y. 1; *Harts v. Brown*, 77 Ill. 226; *Reichwald v. Commercial Hotel Co.* 103 Ill. 439; *Stratton v. Allen*, 16 N. J. Eq. 22; *Wilkinson v. Bauerle*, 41 N. J. Eq. 63; *Planter's Bank v. Whittle*, 78 Va. 737; *Ashhurst's Appeal*, 60 Pa. 314; *Whitwell v. Warner*, 20 Vt. 425; *Gordon v. Preston*, 1 Watts, 386, 26 Am. Dec. 75; *Sargent v. Webster*, 13 Met. 497, 46 Am. Dec. 743; *Kitchen v. St. Louis, K. C. & N. R. Co.* 69 Mo. 224; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329. An exhaustive and luminous

discussion of this question is found in the opinion of the supreme court of Minnesota, delivered by Judge Mitchell in the case of *Hospes v. Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470. The reasoning of the learned judge who delivered the opinion of the court in that case makes it extremely clear that an insolvent corporation may prefer its creditors, whether they be officers of the corporation or strangers, and that there is no foundation for the doctrine that the insolvency of a corporation has the effect to convert its assets into a 'trust fund,' in the technical sense of that term, and its officers into mere trustees charged with the duty of distributing its assets ratably among its creditors."

The view we have been elaborating is fully supported, also, by the English courts. It is there held that the assets of an insolvent corporation are not a trust fund for creditors; that its directors are not trustees for creditors; and that, of consequence, stranger creditors cannot avoid the disposition of its assets by directors in the preferential payment of their own just claims. In *Re Wincham Shipbuilding, Boiler, & Salt Co.* L. R. 9 Ch. Div. 322, the facts were that assets of the corporation were used by the directors in paying a corporate debt for which they were personally liable. The transaction was attacked by stranger creditors on the ground that the directors were trustees for them, and as such could not thus contract for their own benefit to the detriment of the complainants. Vice Chancellor Bacon agreed with them, and granted relief, but, on appeal, the learned Jessel, M. R., reversed the decree and sustained the transaction, saying: "The vice chancellor decided the question on this ground, that the directors were trustees of all their powers. So, no doubt, they were. But it is further said that they exercised their powers in breach of trust and for their own benefit, and, therefore, that the act which they did was nugatory. But it appears to me that the question is, For whom were they trustees? It does not appear that the vice chancellor considered this point; but it makes all the difference whether they were trustees for the persons who were injured by what had been done in this case,—namely, the other creditors of the company. It has always been held that the directors are trustees for the shareholders; that is, for the company. They are the managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company, for their own benefit, they are liable to make good the breach of trust to their *cestuis que trust*, like any other trustees. But directors are not trustees for the creditors of the company. The creditors have certain rights against a company and its members, but they have no greater rights against the directors than against any other members of the company. . . . That being so, there was nothing to impose a duty on the directors not to pay a debt of the company for which they were themselves liable, in priority to other debts, unless § 164 of the act of 1862 applied, which it certainly does not 44 L. R. A.

in the present case. The payment to the bank was not a fraudulent preference; it was made in the ordinary course of business. It was a good payment, and could not be recovered back; therefore the directors, although they derived a collateral advantage to themselves, did not injure their *cestuis que trust*. The payment was not any breach of duty to the only persons for whom they were trustees."

The reasoning of these authorities cannot, in our opinion, be answered. Certainly, the naked assertions of some courts that the law is otherwise is not even a pretense of refutation. Surely, also, such logic is not met by invective. And the conclusions which they reach, the principles which they establish, are not only logical, and the legitimate and necessary consequence of the most familiar and elementary doctrines of the law, long recognized, but they are also, in the highest degree, just and right.

The application of these principles to the case at bar leads to this result: The transfer of property by the Decatur Building Supply Company to Corey in payment of debts the company owed him, or to indemnify him against liability as indorser for the company, is not rendered fraudulent and void by the facts that the corporation was insolvent, and that he was a stockholder, director, and president of the corporation, and as such participated in the transaction by which his claims were thus preferred to those of complainant and other stranger creditors. The case of *Corey v. Wadsworth*, 99 Ala. 68, 23 L. R. A. 618, was directly, and the cases of *Gibson v. Troubridge Furniture Co.* 96 Ala. 357, and *Goodyear Rubber Co. v. George D. Scott Co.* 96 Ala. 439, were, in effect, overruled by the subsequent case of *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 28 L. R. A. 707, which has been several times reaffirmed by this court. *Barrett v. Pollak Co.* 108 Ala. 390; *Pollak Co. v. Muscogee Mfg. Co.* 108 Ala. 467. The later case of *Mary Lee Coal & R. Co. v. Knox*, 110 Ala. 632, is irreconcilable with the three cases last above named, and with the foregoing opinion in the case at bar. On the point under consideration it must be overruled.

But, as we shall presently see, the sale to, and purchase by, Corey of the property of the corporation, was covinous and vicious, wholly apart from the consideration of his personal and official relations to the company. The decree of the chancellor was, however, based equally upon those relations and upon actual fraud, and the foregoing will stand as the opinion of the court upon one of the two grounds on which his conclusion was rested, and also as supplying the reasons for our conclusion in the case of *Anderson v. Bullock County Bank* (which we now hand down) (Ala.) 25 So. 523.

Now, as to the other question in the present case, namely, whether the respondent Corey was under an honest liability for, or held an honest debt against, the Decatur Building Supply Company, commensurate in amount with the value of the property he took from the company in case of his liability or in payment of his debt, one or both,

we reach the conclusion, the *onus* being on him, that he has failed to show, with that clearness and fullness which the law requires, that he received from the corporation in payment of honest debts due from the corporation to himself, or to others for which he was bound as surety or guarantor, property which, reckoned at its fair value, was only sufficient to reimburse him or to save him harmless. In reaching this conclusion, we concede the integrity of the bank's claim of \$6,000 against the supply company, as to which he was guarantor or surety. But it is clear, upon the whole evidence, that he received property of considerably greater value than \$6,000; so that, all other questions out of the way, the transaction could not be allowed to stand. He seems to have appreciated this, and insists that the company owed him directly about \$800, which constituted in part the consideration for the property he received. We do not find that the company owed him this \$800. In the first place, he was very laggard in bringing forward this claim at all; so much so, indeed, that it has earmarks of afterthought. Then, his testimony as to the precise amount of the claim and the manner of its accrual is quite unsatisfactory. He, indeed, makes no pretense of an accurate statement in either respect, but in his testimony constantly refers to the books of the company, to the effect that they correctly set forth the amount, and upon what account the corporation incurred the debt, etc. When the books, thus vouched for by him, are looked to, they not only do not show that the company owed him this or any other sum; but, to the contrary, when taken in connection with his own evidence, they affirmatively show that he was, at the time of the transfer of this property to him, heavily indebted to the company himself. We suppose it will not be controverted that a creditor who is also, in less amount, the debtor of an insolvent, cannot take property in payment, except to the amount of his claim as reduced by deducting therefrom his indebtedness to the insolvent. As applied here, this rule would have allowed Corey to take property of the value of \$6,000 for which he was bound to the bank, less the amount he individually and directly owed the insolvent corporation. That he took largely more than this there can be no doubt. It is true that he testifies, in a general way, that the property was worth less than the amount of his just claims against the company, and that it sold for less. But these conclusions of his are manifestly based upon the unfounded assumption that the company owed him about \$800, independently of the bank matter, and they take no account of the fact, as we find it to be, that, instead of the supply company owing him that sum, he was indebted to it for himself, and on account of Hoy, two or three or more thousands of dollars. Then, too, it is shown very satisfactorily that a great deal of the property he received was not estimated at its real value. For instance he took several carloads of material—sash, blinds, doors, lumber, etc.—as it came into the company's possession about the time of the sale

to him, at 10 per cent off the cost at the factory, the supply company paying the transportation charges. And when added to all these considerations, attention is had to the fact which is inferable from the evidence and which the chancellor found, that the goods received by him were to a large extent ordered by the supply company at his instance, his brother-in-law being general manager and he president of the company. from complainants in this case, for the purpose of applying them to his alleged claims against the insolvent corporation, we are driven to the conclusion that the whole transaction was tainted with actual fraud, and that the effect of it was not to pay a bona fide debt with property of equal value, but to give a large bonus to Corey over and beyond the amount of his just claims against the corporation; and upon this view the *decree of the Chancery Court must be affirmed.*

NOTE.—The following opinion was written by Hon. Thomas W. Coleman, at the time a justice of this court. At his suggestion the case was passed over to the present court. The opinion has been again read and considered in consultation, and, though it has never been adopted or concurred in by any of the judges, it is printed here at Judge Coleman's request:

The present bill is purely and simply a creditors' bill seeking to subject the assets of the insolvent corporation, which, according to the averments of the bill, were sold and transferred to Lorenzo Corey in fraud of creditors. That complainants were creditors of the Decatur Building Supply Company, a corporation, at the time of the sale and transfer of the assets to Corey, is not controverted. That Corey was a stockholder, a director, and president of the corporation at the time of the transfer to him, and that Hoy, the general manager, was his brother-in-law, are admitted facts. A few days prior to the 26th of July, 1888, the president, general manager, and other officers discussed the pecuniary condition of the corporation, and the necessity of making a general assignment for the benefit of its creditors, and this course was then agreed upon. Corey employed and paid attorneys to prepare the deed for a general assignment, and the assignment was executed on July 28, 1888. At the time of the execution of the general assignment its indebtedness was \$26,000, and general creditors, other than those who were officers of the corporation realized only 15 per cent of their demands from the property assigned. There is no contention that the assignee failed to discharge his duty, or that less than their value was realized from the assets conveyed to the assignee. That on and from the 19th of July, to and including a part of the 26th of July, 1888, many thousands of dollars' worth of its available assets (salable property) and some choses in action were sold and transferred and delivered to Lorenzo Corey, and by him appropriated to his own use, are facts averred in the bill and fully sustained by the proof. The complainants base their right to relief upon two propositions: First, that if, in point of fact, Corey was bound for certain debts of the corporation as a guarantor, and that if Corey was a creditor of the insolvent corporation, being a stockholder, director, and its president, and exercising a controlling influence, the law will not permit him to indemnify himself against liability as a guarantor, and to prefer himself as a creditor to all the other creditors, by the pur-

chase of the assets of the corporation in payment of his demands and liability, he at the time knowing its insolvent condition and that it must necessarily cease to do business in a few days; second, that the demands claimed by Corey to be due him were not bona fide, and that the transaction of the purchase of the assets was a scheme concocted at the instance of Corey to protect him and other officers of the corporation, who were coguarantors, and to wreck the corporation for his own benefit, and that in the transaction actual fraud existed, and that, under either aspect, Corey should be held a trustee *in invitum* and made to account for the assets thus appropriated. The defense relied upon is that Corey was liable as a guarantor to the Exchange Bank of Decatur for a debt of the Decatur Building Supply Company, the debtor and defendant corporation, for \$6,000, and that the corporation was indebted to him individually in large sums of money advanced and loaned by him; and that he paid by checks on the Exchange Bank, payable to the Decatur Building Supply Company, \$6,000, with the understanding and agreement that it was to be applied to and in payment of the debt of the corporation due the bank for which he and other officers were bound as guarantors, and that the remainder of the property purchased by him was in satisfaction of bona fide debts due him from the building supply company, and that the transaction was free from fraud. It was proved that Corey was also a stockholder and director in the Exchange Bank of Decatur; otherwise, it does not appear that the Exchange Bank had any knowledge of the understanding as to the means provided for the payment of this debt. A further statement of the facts can be found in the report of the case in 99 Ala. 68, 23 L. R. A. 618.

The pleadings and evidence show that Lorenzo Corey, a stockholder, director, and president of the building supply company, a corporation, with a knowledge that it was insolvent, upon the eve of and in contemplation of a general assignment, appropriated, under the form of a purchase, largely more than half of its available assets to the payment of a debt for which he and other officers were personally bound as guarantors, and in payment of debts claimed to be due him individually; thereby securing such an advantage and preference over other creditors so that he sustained but little, if any, loss, while the other creditors did not realize more than 15 per cent of their claims. The question is, Can the purchase by a director and president be sustained in a court of equity against the claims of the other creditors? Under well-settled principles such a transaction, the debts being bona fide, would not necessarily be fraudulent and void if made between individuals, although the debtor might have been hopelessly insolvent at the time, provided the assets were sold for a fair price and the debtor received no benefit from the transaction. Can the same rule be applied in favor of officers in control of corporations, after the corporations have become insolvent and ceased to do business, without doing violence to well-established rules necessary to prevent undue advantage and injustice?

The direct question was settled by this court, after full discussion, in the case of *Gibson v. Trowbridge Furniture Co.* 96 Ala. 357, in which the court used this language: "The corporation, however, became insolvent, and he [Gibson], being a director, could not purchase its stock in trade, and close its operations, and thereby make himself a preferred creditor."

In the case of *Goodyear Rubber Co. v. George* 44 L. R. A.

D. Scott Co. 96 Ala. 439, this court declared that an insolvent corporation could prefer some of its creditors, but that a director or member of the governing board of an insolvent corporation was without authority to make himself a preferred creditor. In this case Scott was a guarantor or indorser of the insolvent corporation.

The direct question was again presented by demurrer to the bill in the case at bar on a former appeal (99 Ala. 68, 23 L. R. A. 618), and, after thorough consideration, the conclusion was reached by the court, as then constituted, that a director or governing member of the board of an insolvent corporation was not authorized to prefer himself to general creditors. True, the learned chief justice who wrote the opinion contended that the trust-fund doctrine was the "sounder rule,"—a doctrine which has not been accepted by this court, and upon which the equitable principle that a director or governing member of the board cannot prefer himself to other creditors does not depend. In the subsequent case of *Mary Lee Coal & R. Co.* 110 Ala. 632,—a case held under consultation for a long time, and reconsidered pending an application for a rehearing,—we used the following language: "The rule that a director of an insolvent corporation cannot prefer himself, directly or indirectly, over other creditors, is but the application of a very familiar principle to the directors and stockholders of a corporation. No insolvent person who is a debtor is permitted to dispose of his property by which a benefit is reserved to himself, to the prejudice of his creditors. . . . In one sense, corporations are entities; but corporations and the stockholders are not separate and distinct entities for all purposes and in all respects. A corporation is a collective body, composed of different persons. *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 124; *Morawetz, Priv. Corp.* § 227. Whatever is of benefit to the corporation, as a collective body, is a benefit to the stockholders [or persons] of which it is composed. Corporations are controlled by and act through a board of directors or stockholders. When, therefore, an insolvent corporation, acting by its governing body, which, by reason of their relations to the corporation, may know its condition and have advantages superior to other creditors, sells or transfers its assets, or any portion of them, on such terms or conditions as to place the property beyond the reach of its creditors and thereby protect the members or any of them from loss, and yet secure a benefit to those who effect the sale and transfer, whether consummated directly or through another corporation of which they are the owners and beneficiaries, such sale or transfer is in violation of the rule which prevails as to persons, and is void as to such persons making the sale and who are thus benefited. The rule is as much a necessity to prevent fraud, injustice, and undue advantage on the part of the directors and stockholders of corporations as to similar transactions between individuals. A person cannot be debtor to and creditor of himself but by reason of the fact that the same persons may be the directors and stockholders of separate corporations, one of which may become the debtor of the other; and thus, though not in name and form, in fact, stockholders often sustain the relation of debtor and creditor to themselves. In arriving at the bona fides of transactions and motives of parties thus situated, for the prevention of fraud and undue advantage and the administration of justice, courts should not regard corporations as separate, distinct entities from the owners and stock-

holders, and sanction as valid transactions which, if done by individuals under the same circumstances, would be set aside and annulled. We would not apply, however, to corporations, whether solvent or insolvent, which have not been dissolved or ceased to do business as going concerns, a different rule than that applied to individuals acting as such in this respect, and disable them from paying some creditors at the expense of others, under any and all circumstances. *Goodyear Rubber Co. v. George D. Scott Co.* 96 Ala. 439.

These decisions declare the law to be that the mere insolvency of a corporation does not convert its assets into a trust fund for its creditors, but by reason of the nature of a corporation, and the relation its governing officers bear to it, any disposition of its property, after insolvency, by its officers, by which they are preferred, or a benefit is reserved to themselves, over the other creditors, will be set aside as fraudulent and void, at the instance of creditors. This is the conclusion reached by the great weight of authority. All the courts holding to this view do not proceed upon the same grounds. It is the logical conclusion from the trust-fund doctrine, and the courts maintaining that rule, for the most part, declare their conclusion from it. Other courts, which do not accept the trust-fund doctrine, as this court has done, reached the same conclusion, upon other grounds. *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, and extended notes; *Sweeney v. Wheeling Grape Sugar & Ref. Co.* 30 W. Va. 443, 8 Am. St. Rep. 88; *La Grange Butter Tub Co. v. National Bank of Commerce*, 122 Mo. 154, 43 Am. St. Rep. 558; *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 15 Am. St. Rep. 644, and note; *First Nat. Bank v. Knowles*, 67 Wis. 373; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Ballin v. Merchants' Exch. Bank*, 89 Wis. 278, 27 L. R. A. 357, 46 Am. St. Rep. 834, reviewing the Wisconsin cases.

These authorities refer to many others. It is true that other courts hold to a different view, and declare that an insolvent corporation may prefer any creditor, even a director or president, to other creditors. *Garrett v. Burlington Plow Co.* 70 Iowa. 697, 59 Am. Rep. 461, and notes; *Worthen v. Griffith*, 59 Ark. 562, and 43 Am. St. Rep. 50, and notes. The principle upon which these latter cases proceed is that a corporation is a legal unit in every respect, as much so as an individual, and that the same rules of law must be applied to both alike. The argument, we are of opinion, proceeds from a false premise. A corporation is composed of several persons, and not of one person. It cannot act by itself, but only by agents. When the corporation increases in wealth, the enhancement redounds to the benefit of those who compose it. When it loses money, it is their loss. The persons who compose it are affected with the same infirmities of human nature, after the incorporation, as before. In all business transactions done in the name of the corporation, those engaged in accomplishing these business transactions, as its managing and governing officers, are subject to the same selfish influences which would operate upon them acting in their individual names, for their personal interest. These officers are in a position to know the real condition of a corporation, an advantage not attainable by creditors generally. The maxim that the law favors the diligent can have no just application to parties having such advantages. When an insolvent debtor prefers one creditor to another, it is of no pecuniary advantage to the debtor, and even in such cases, if he secures a benefit to himself, the preference will be 44 L. R. A.

set aside. If this be sound law and good morals, certainly, when an insolvent corporation sells to those who make up and constitute the corporation, the same legal and moral rule is violated. Why is it that a partnership is prohibited from preferring one of its own members to the other creditors, and the same principle is not applicable to corporations dealing with its own members and officers? When a person is solvent, having no creditors, he can dispose of his property to whom and on such terms as he sees proper and reserve to himself any benefit he may desire, but, when he is insolvent, a different rule arises. On account of the limited liability of corporations, the rule should, at least, be as strictly enforced against its beneficiaries as against persons. There is but one sound and practical way of dealing with insolvent corporations so as to prevent an unfair and unjust advantage by its officers and for protection of the creditors in their just rights, and that is "to treat the officers and stockholders as the proprietors"; or, as Morawetz says, always keep in mind that a corporation is an association of persons, and to apply the same rules to them as are applied to partnerships and individuals, so far as to prohibit them from acquiring the assets in preference to its general creditors. Mr. Thompson, in his comprehensive work on Corporations [vol. 2] has collected and cited a great many authorities which treat of the rights of creditors to the assets of insolvent corporations, and in § 1569 declares the trust-fund doctrine to be "nothing more than a rule which the law applies to every other debtor." He says: "In considering the power of corporations with reference to their capital and shares, it is necessary to note a fundamental distinction between the English and American cases. In 1824 the fertile brain of Mr. Justice Story invented the doctrine that the capital stock of a corporation is a trust fund for the payment of its creditors; and that the creditors have an equitable lien or charge upon it superior to that of the stockholders. This has become the settled doctrine of American courts. If this doctrine means anything more than that the creditors of a corporation must be paid before its property can be distributed among its shareholders, then there would be no difference in this respect between the English and American decisions; for this is the rule which obtains in the winding-up of partnerships: The partnership creditors must be paid before the individual partners can divide the social assets among themselves. And, indeed, treating the shareholders as proprietors,—and this is the only practical juridical conception of their status,—this rule is nothing more than that which the law applies to every other debtor; he cannot keep and enjoy his property, leaving his debts unpaid." A great many authorities are cited to this text. Upon the doctrine that an insolvent corporation can prefer its own directors, he uses the following language (5 Thomp. Corp. § 6496): "The writer wishes to weigh his words carefully, and not to speak disrespectfully of the judicial courts; but he feels that he does not characterize this doctrine in the language which it deserves, unless he calls it an infamous doctrine which is not supported by any underlying principles of justice. It gives added weight to calamity which the public suffer through the fact of nearly every form of industry passing into the hands of limited liability corporations. The infamy is intensified where the directors are allowed to appropriate the property of the corporation in payment of debts due from the corporation to themselves, leaving its other creditors hopelessly without remedy." Id. § 6498: "It is to be regretted that

some of the American courts have carried the right of an insolvent corporation to prefer creditors to the extent of holding that it may not only prefer creditors who are its own shareholders, but may prefer such as are its own directors. This infamous doctrine has been pushed to the extent of allowing the directors and shareholders of a corporation to prefer themselves at the expense of its creditors at large, although the director or shareholder may have voted for the proposition. A conception which proceeds upon a similar level is that the fact that the directors had falsely represented to the public, by means of the letter heads on which they conducted the business correspondence of their company, that it had a certain capital, does not estop them from preferring themselves before the general creditors of the company, whom they have thus deceived into giving credit to it. It cannot escape attention that this doctrine offers a new inducement to the incorporation of every species of business, because it gives the members of corporations an advantage over their creditors which the members of partnerships do not possess. A partnership cannot distribute its assets to its partners in preference to its creditors; but, under this miserable doctrine, if it becomes incorporated, it can do so." Id. § 6499: "It would not be profitable to quote the mouthings of judges upon this question; but it is strange that judges can be found so destitute of a sense of justice as to announce the following proposition: 'There is nothing, either in law or equity, which forbids a member, or even a director, of a corporation, from contracting with it, and, like any other individual, he has a right to prescribe his own terms, which the corporation are at liberty to accept or reject; and, when the contract is concluded, he stands in the same relation to the other creditors of the corporation as any other individual would under the same circumstances. When the question of priority arises, it must depend on the bona fides of the transaction, fraud or no fraud. If, by greater diligence and without fraud, he has fairly gained an advantage over the other creditors, he is entitled to retain it.' Undoubtedly, the directors have a right to contract with the corporation while it is a going concern, provided they do it fairly; but, in general, they are the only ones whose knowledge of the internal affairs of the corporation will enable them to predict, in any state of circumstances, whether it can continue a going concern, or must suspend and go into liquidation; and to say that when they avail themselves of this knowledge, as against outside creditors, who have, and from the nature of the case can generally have, no such knowledge, they are merely exercising 'greater diligence, and without fraud,' is a strange perversion of language, and one which exhibits a low sense of justice. The principle under consideration does not, of course, apply to the case where directors have advanced money to the corporation in good faith while it is a solvent and going concern, to enable it to prosecute its ordinary business, and the corporation, while still a solvent and a going concern, repays this advance. Nor does the principle have any necessary connection with a case where, a corporation being in difficulties, some of its directors come to its rescue, and advance money, and take a mortgage to secure their present advances, and thereby help the corporation out of its difficulties, and put it upon its feet, so that it becomes prosperous,—after which other of its members, who failed or refused to aid it in its difficulties, come forward, and, in a suit brought in its name, endeavor to make the directors, who have purchased its property under

their mortgage at a foreclosure sale, account for the profits which they have realized."

In the case of *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. Rep. 496, 24 U. S. App. 145, 11 C. C. A. 320, Harlan, J., considered the question at great length, reviewing many of the decisions of the Supreme Court of the United States, and drew the distinction between the rights and duties of the managing officers of an insolvent corporation and an individual who was not able to pay his debts. He uses the following language: "A corporation is not required, by any duty it owes to creditors, to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty when attempting, in good faith, by the exercise of its lawful powers and by the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created. In such a crisis in its affairs, and to those ends, it may accept financial assistance from one of its directors, and by a mortgage upon its property secure the payment of money then loaned or advanced by him, or in that mode protect him against liability then incurred in its behalf by him. Of course, in cases of that kind a court of equity will closely scrutinize the transaction, and, in a contest between general creditors and a director or managing officer who takes a mortgage upon its property, will hold the latter to clear proof that the mortgage was executed in good faith, and was not a device to enable him to obtain an advantage for himself over those interested in the distribution of the mortgagor's property. *Richardson v. Green*, 133 U. S. 30, 43, 33 L. ed. 516; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 588, 23 L. ed. 329. Entirely different considerations come into view when an insolvent corporation, having no expectation of continuing its business, and recognizing its financial embarrassments as too serious to be overcome, mortgages its property to secure a debt previously incurred by one of its directors, or, in a general assignment of all its property, gives him a preference. To a general assignment by a private corporation for the equal benefit of all its creditors, including directors, no objection could be made, because it recognizes the equal right of creditors to participate in the distribution of the common fund. Such an assignment, Lord Ellenborough said in *Pickstock v. Lyster*, 3 Maule & S. 371, 375, is to be referred to an act of duty rather than of fraud, and is an act by the assignor that 'arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors.' The contention of the defendants is that, in disposing of their respective properties, an individual and a corporation were recognized at common law as having equal rights; and as the former may, in the absence of a statute forbidding it, transfer the whole or part of his property with the intention or with the effect of giving a preference to some of his creditors, to the exclusion of others, so an insolvent corporation, when financially embarrassed and not intending to continue its business, may make a preference among its creditors, whoever they may be, and whatever their relation to the corporation or to the property transferred. If this be a sound rule, it would follow that directors, being also creditors, of an insolvent corporation which has abandoned the objects of its creation and ceased an active existence, may distribute among themselves its entire assets, if the rea-

sonable value thereof does not exceed their aggregate demands. We cannot accept this view. In our judgment, when a corporation becomes insolvent, and intends not to prosecute its business, or does not expect to make further effort to accomplish the objects of its creation, its managing officers or directors come under a duty to distribute its property or its proceeds ratably among all creditors, having regard, of course, to valid liens or charges previously placed upon it. Their duty is 'to act up to the end or design' for which the corporation was created (1 Bl. Com. 480), and, when they can no longer do so, their function is to hold or distribute the property in their hands for the equal benefit of those entitled to it. Because of the existence of this duty in respect to a common fund in their hands to be administered, the law will not permit them, although creditors, to obtain any peculiar advantage for themselves to the prejudice of other creditors. This rule is imperatively demanded by the principle that one who has the possession and control of property for the benefit of others—and, surely, an insolvent corporation which has ceased to do business holds its property for the benefit of creditors—may not dispose of it for his own special advantage, to the injury of any of those for whom it is held. That principle pervades the entire law regulating the conduct of those who hold fiduciary relations to others and, instead of being relaxed, should be rigidly enforced in cases of breach of duty or trust by corporate managers seeking to enrich themselves at the expense of those who have an interest equally with themselves in the property committed by law to their control. It would be difficult to overstate the mischievous results of a contrary rule as applied to those intrusted with the management of corporate property."

The latest decision bearing on the question, to which our attention has been called, is that of *Sanford Fork & Tool Co. v. Howe, B. & Co.* 157 U. S. 812, 39 L. ed. 713, the opinion delivered by Mr. Justice Brewer. In this opinion it is declared that "a corporation acting in good faith, and without any purpose of defrauding its creditors, but with the sole object of continuing a business which promises to be successful, may give a mortgage to directors who have lent their credit to it, in order to induce a continuance of that credit, and to obtain renewals of maturing paper, at a time when the corporation, although it may not be then in fact possessed of assets equal at cash prices to its indebtedness, is in fact a going concern, and is intending and expecting to continue its business." The circumstances under which a corporation not in fact possessed of assets equal, at cash prices, to its indebtedness, may execute a mortgage of indemnity in favor of its directors, is stated with great care and precision, as if the court intended carefully to guard against committing itself to the conclusion under different circumstances. The case of *Sutton Mfg. Co. v. Hutchinson*, 24 U. S. App. 143, 63 Fed. Rep. 496, 11 C. C. A. 320, is cited in the opinion, without an intimation of disapproval of any of its statements. It is impossible to read the opinion of Mr. Justice Brewer, *supra*, without being impressed with the conclusion that the court would not uphold a mortgage to indemnify directors of an insolvent corporation made with a knowledge of its insolvency, having no intention to continue its business or aid it, but in anticipation of its speedy termination as a going concern, the effect of which transaction merely secured a preference over other creditors. On page 319, 157 U. S., and

page 716, 39 L. ed., Mr. Brewer, says: "Carrying on business after the giving of an indemnifying mortgage, with a knowledge of insolvency, with the expectation of soon winding up the affairs of the corporation, and only for the sake of giving an appearance of good faith, leaves the transaction precisely as though the mortgage was executed at the moment of distribution and with the view of a personal preference."

The illustration that a line drawn, with the insolvent debtor and his insufficient property on one side, and the creditors and their claims on the other side, and that the passing of the property to somebody on the other side, is what the law demands, is misleading and fallacious. The fundamental difference is overlooked. In the case of the insolvent corporation, on one side of the line stands the director, having the power to dispose of the insufficient property, and on the other side of the line this same director is ranged with the other creditors with his claim. The grantor and the grantee are one and the same person. No amount of argument or assertion can ever satisfy an impartial judgment that the general creditors stand upon equal footing with a creditor who has the power to dispose of the assets subject to debts. Under such conditions, to apply the rule that the law favors the diligent perpetrates a travesty on justice. We do not believe that in any case has it ever been contended that it is right to permit a grantor to convey directly to himself, to the injury of creditors of the conveyed assets. The only escape from such an obnoxious rule is to take refuge behind the doctrine that a corporation is, in law, and must be regarded for all purposes as, a single individual. With this circumstance out of the way, there is nothing left to support the doctrine that a controlling officer of an insolvent corporation may prefer himself to all other creditors.

In the case of *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, one of the principal questions settled involved this question. The case was one of unusual importance, discussed orally, and at great length by written argument, by eminent counsel, and, after thorough discussion and great deliberation, this court unanimously approved the declaration that, for many purposes, a corporation was not in reality a person or thing distinct from its constituent parts. It required no statute to authorize stockholders, as such, to resort to courts of equity for protection against the corporation of which they were constituent parts, and yet an individual cannot maintain an action against himself. Many individuals are wealthy by reason of their stock in corporations. The debt of the corporation, and the appropriation of its assets to the payment of its debt, lessen the individual wealth of the owner of its stock. Whatever affects the interest of the corporation affects the pecuniary values of the stockholder in his individual capacity. The fact that by law the property of an individual partner may be subjected to the payment of partnership debts, and the liability of a stockholder for the debts of the corporation is limited to his corporate interest, emphasizes the fact that the debt of the corporation is his individual debt to the extent of his corporate interest. It is noticeable that so many of the authorities which announce the conclusion that the directors of an insolvent corporation may prefer themselves to other creditors seemingly admit that the contrary rule is the sounder and more just, but hold that it requires legislation to authorize the courts to so hold. This conclusion proceeds

solely from the premise that courts cannot distinguish between the members associated as a corporation under a corporate name and with corporate privileges and the corporation as a unit,—a holding contrary to everyday practice in the courts in other matters, and contrary to obvious facts and many adjudications.

Independent of these considerations, there stands the undisputed fact that the directors of an insolvent corporation, whose skill and supposed integrity have induced the credit and confidence of the business public, without warning of its tottering condition and approaching dissolution,—a condition known to the directors, and by them kept concealed from the confiding public,—conscious that the creditors, if perchance they should come to a knowledge of its condition, will be forced to the slow process of suit, can, by a simple transaction of purchase from the corporation, which they alone can execute, secure all its assets in satisfaction of their claims and demands. Of course, being the governing board, they know exactly how far to trust the electrified corpse, and when to act for their own security. No others can know. They are not deceived. It is in their power, and theirs alone, to see that they are fully paid. They run no risk in giving credit. When the creditors complain, they must be content with the reply that the "law favors the diligent;" that "our credit and money have kept the concern apparently alive for the past. True, you were deceived, and we were not, but that is your misfortune. We are in control of the assets, and will pay ourselves."

This court, in four decisions cited above, has deliberately condemned such a transaction as unjust and fraudulent. Justice and fair dealing must be against it. The great weight of authority is against it. We cite from brief of counsel a few decisions which have been verified out of the many which might be cited:

"The allowance of preferences was termed a 'pernicious doctrine,' in *Conover v. Hull*, 10 Wash. 673, 45 Am. St. Rep. 810, 'at variance with the whole theory of the law.' 2 Morawetz, Priv. Corp. § 803. 'The law does not intend or allow such an appropriation.' *Scardi v. Keystone Oil Co.* 149 Pa. 148. 'Weight of authority and reason was against the validity of such preferences.' *Howe, E. & Co. v. Sanford Fork & Tool Co.* 44 Fed. Rep. 231. 'It is a doctrine which is at variance with the whole theory of the law concerning the rights of creditors of insolvent corporations.' *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, and 5 L. R. A. 378, 383.' . . . 'Is entitled to take precedence among the many reckless absurdities,' etc. *Walt, Insolvent Corp.* § 162. 'Great weight of authority denies the right.' Editorial note, *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* 22 L. R. A. 807 [86 Tex. 143]. 'Could not be rightfully done.' *Sutton Mfg. Co. v. Hutchinson*, 24 U. S. App. 145, 63 Fed. Rep. 496, 11 C. C. A. 321. The invalidity of such preferences has been said to be 'well settled.' *Bonney v. Tilley*, 109 Cal. 346. This is said to be 'in line with the great weight of modern authority.' *Tilson v. Downing*, 45 Neb. 549. 'The conservative and preservative tendency of the courts . . . has been to establish and maintain the doctrine' of invalidity. *Northwestern Mut. L. Ins. Co. v. Cotton Exch. Real Estate Co.* 70 Fed. Rep. 155. 'A careful perusal of what is said by the leading text writers on the subject, and a laborious examination of the cases to which they refer, have convinced us that the decided weight of American authority is as indicated.' *Lowry Bkg. Co. v. Empire Lumber Co.* 91 Ga. 624. . . . 'The rule which prohibits directors, when a corporation is in-

solvent and about to go into liquidation, from preferring debts due to themselves,' etc. *Adams v. Kehlor Milling Co.* 35 Fed. Rep. 483. 'The modern authorities, almost without exception, utter the same strong condemnatory language.' *Corey v. Wadsworth*, 99 Ala. 68, 23 L. R. A. 618. 'That the appellants came within the prohibition of this rule is beyond controversy.' *Roseboom v. Whittaker*, 132 Ill. 81 (directly in point.) 'This principle was applied to the taking of a mortgage by the directors on the property of the corporation to secure their liability as sureties on the note of the corporation.' *Hainwood v. Lincoln Lumber Co.* 64 Wis. 639. 'It seems to be well settled that directors of an insolvent corporation . . . cannot secure to themselves any preference. . . . *Bonney v. Tilley*, 109 Cal. 346. 'It appears to be well settled by authority.' *W. P. Noble Mercantile Co. v. Mt. Pleasant Equitable Co-Op. Inst.* 12 Utah, 213. In speaking of cases holding to the same effect, it was said in *Tilson v. Downing*, 45 Neb. 549: 'We think both these cases are in line with the great weight of modern authority.' This is said in 1 Beach, Priv. Corp. 241, to be a 'general rule.' 'The only just and equitable rule.' Editorial note, *Conover v. Hull*, 45 Am. St. Rep. 835 [10 Wash. 673]. 'A general rule.' 17 Am. & Eng. Enc. Law, p. 122. 'The above case is clearly in accord with the weight of authority.' Editorial note to *Corey v. Wadsworth*, 23 L. R. A. 618 [99 Ala. 68]; *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* 86 Tex. 143 and 22 L. R. A. 802; *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 5 L. R. A. 378."

No satisfactory argument has been adduced to show that this court should depart from its settled doctrine, and certainly none which has not been met and successfully controverted in one or more of the decisions cited.

The fifteenth paragraph of the amended answer avers that "Corey is the owner and possessor of a large indebtedness of the building supply company, which was existing at the time of the assignment; and that the same has been assigned and transferred to him, and that it amounts to about \$5,000, besides \$1,500 mentioned in the original answer, and he claims to be a creditor," etc. The prayer is that the answer be taken as a cross bill, and that he be allowed to share in the distribution. To the cross bill the complainant demurred, and among others, assigned substantially, as a ground of demurrer, that the claims set up in the cross bill were not described with sufficient definiteness to enable the complainant to tell whether the claims were by account or note, nor from whom nor when obtained. The demurrer to the cross bill was well taken, and properly sustained.

The evidence of the respondent that the corporation was indebted to him, other than the debt due the Exchange Bank, is not clear or satisfactory. He testified, in a general way, that the property purchased by him was in payment of advances and loans made by him, but when these advances were made, in what amounts, and how evidenced, is not stated, though he was interrogated thereto. The most that could be obtained from him, as to the price of the goods, was that he did not remember, but that the books of the company would show. The account taken from the books, and the testimony of Poley, who kept the books in part, and was an officer, does not sustain Corey. We are satisfied that the decree of the chancery court has done the appellant no injury, and that there is no error of which he can complain.

CONNECTICUT SUPREME COURT OF ERRORS.

Guy LAMKIN.

v.

BALDWIN & LAMKIN MANUFACTURING COMPANY.

(.....Conn.....)

1. Debts of the partnership must be postponed to those contracted by the corporation after its organization, where a corporation is organized to continue the business of a partnership whose assets are transferred to it upon its undertaking to pay the partnership debts, and the corporation becomes insolvent.
2. The insertion in a deed conveying the assets of a partnership to a corporation organized to continue the business, and which has agreed to pay partnership debts to a certain amount, of a clause obligating it to pay "all the liabilities" of the partnership, will not operate to extend its liability beyond the amount specified, unless the insertion of such clause was authorized or ratified by the corporation.
3. To entitle a creditor of a partnership to payment out of assets of a corporation which was organized to continue the partnership business, and received a conveyance of the partnership assets upon undertaking to pay a specified amount of the partnership liabilities, which proves to be less than all, he must show that his claim was among those estimated in fixing the amount so specified.
4. Taxes against the real estate of a corporation will be entitled to preference in payment in case the corporation goes into the hands of a receiver.
5. Real estate of a corporation which has passed into the hands of a receiver is properly listed for taxation in the name of the corporation, where the right of possession only, and not the title, vests in the receiver.
6. Taxes due by a partnership whose business a corporation is organized to continue, which receives the partnership assets upon undertaking to pay its liabilities, are not, in case the corporation becomes insolvent, entitled to preference out of assets in the hands of its receiver, where the statute gives such preference to taxes assessed against the insolvent debtor.
7. That an organization never became more than a de facto corporation will not relieve it from liability for the debts of a partnership whose business it was organized to continue, and whose assets it received upon undertaking to pay its liabilities.
8. In an action by a creditor of a partnership to recover his debt from a corporation which was organized to continue the partnership business and received its assets upon undertaking to pay its debts, evidence is admissible to show the true character of the transaction out of which his equity arose, as compared with the form which it assumed in the proceedings incident to the organization of the corporation.
9. The de facto character of a corporation will not be varied by the fact that it was insolvent from the beginning.

NOTE.—On the question of the liability of a corporation formed by the consolidation of other companies, for their debts, see note to 44 L. R. A.

10. The vote of the directors of a corporation assuming payment of the debt of a third person, duly recorded, is a sufficient memorandum in writing, and the signature of the recording officer in attestation of the minutes a sufficient signing of the party to be charged, to satisfy the statute of frauds.

(June 8, 1899.)

RESERVATION by the Superior Court for New Haven County for the opinion of the Supreme Court of Errors on questions arising in proceedings for the appointment of a receiver for the defendant corporation as to the priority of the lien of the town of Milford for taxes upon funds which went into the receiver's hands. *Priority allowed in part and denied in part.*

Statement by Baldwin, J.:

The finding stated these facts: The defendant is a corporation organized under the general law, in February, 1898, to take up and carry on the business theretofore conducted by a partnership. The members of this partnership were the principal subscribers to the capital of the corporation. One of them, Albert A. Baldwin, conveyed his interest in the firm assets, real and personal, to the other, Guy Lamkin; one of the conveyances stating as part of the consideration that Lamkin agreed to assume and pay all the partnership debts and liabilities. Lamkin then conveyed to the corporation, upon the same consideration, pursuant to a vote of the directors that such conveyances, together with \$17,060 in cash, should be received in full payment of 80 per cent of his subscription to 632 out of the 750 shares of \$100 each, which constituted its capital, and should be taken subject "to obligations of said partnership of Baldwin & Lamkin in amount \$61,000, which said obligations the Baldwin & Lamkin Manufacturing Company assumes and agrees to pay." This vote recited that the partnership property to be so conveyed was "appraised at the actual value" of \$94,500, leaving, after deduction for the obligations assumed, its "actual value" \$33,500. Of the property so bargained for, a part, to which a value of \$69,500 was thus assigned, was worth less than half that sum, and the rest, valued at \$15,000, was worth several hundred dollars less than that; while the partnership liabilities were several thousand dollars in excess of \$61,000,—all of which Lamkin then well knew. The partnership business had been run at a loss for several years prior to the transfer. A suit is pending against Lamkin in favor of the receiver to recover an alleged balance due on his stock subscription, on the ground that what the corporation accepted in payment was not payment in fact.

The claim of the town presented to the receiver was for taxes assessed against the partnership, in 1894, 1896, and 1897, on

Chicago & I. Coal R. Co. v. Hall (Ind.) 23 L. R. A. 231; also Southern R. Co. v. Bouknight (C. C. App. 4th C.) 30 L. R. A. 823.

property, real and personal, which passed to the corporation and came into his hands, and also for taxes assessed against the corporation upon its real estate in 1898, pending the receivership. No tax liens had been filed by the collector.

The town offered evidence that when the transfers from Baldwin to Lamkin, and also those from Lamkin to the corporation, were made, the partnership was insolvent; that Lamkin never paid anything on his stock subscription, except by said transfers, save that he agreed to pay, and did pay, \$23,500 of the firm indebtedness which the corporation had assumed, and also paid \$4,900 for the running expenses of the business from January 19 to February 14, 1898, to which former day the books of the corporation were dated back; that most of the other stock subscriptions were made by creditors of the partnership, who paid no cash upon them, but took the stock in liquidation of the debts so due them; and that an organization certificate was duly executed and recorded February 18, 1898, stating that the corporation had a capital stock of \$75,000, of which \$15,000 had been actually paid for in cash. This evidence was objected to by the receiver as immaterial and irrelevant, because the facts stated did not affect the existence of the corporation, because they were not in issue or relevant to this proceeding, and because the claimant was estopped from attacking the validity of the corporation,—especially at this stage of the proceedings.

The court found that, if the evidence was admissible, the facts were established which it went to prove. A time was limited for the presentation of claims against the corporation, which has expired. During the time so limited no claim, except that now in question, was presented for any liability incurred before February 14, 1898. Claims amounting to \$28,000 have been presented and allowed for debts incurred by the corporation since that date.

The receiver was appointed in a suit brought by Lamkin against the corporation, under the statute, as the principal stockholder, to wind up its affairs and dissolve it on account of its financial embarrassment.

The receiver claimed: As to the taxes assessed against the partnership: (1) That they were not a claim against the corporation, and could not be proved in this proceeding; (2) that they were not a preferred claim, being, if anything, for a debt assumed, and not for taxes assessed against it; (3) that any claim was for the taxes upon the personal property only; (4) that the evidence objected to by the receiver, as hereinbefore set out, was inadmissible. As to taxes assessed against the corporation: (1) That they should not be allowed, being laid upon property in custody of the law; and (2) that they did not constitute a lien against the property, and that the same could be sold by the receiver, free from any such lien. The town claimed: (1) That the receiver, having taken into his possession all the property upon which the taxes were assessed, was bound by the contract upon which said property was sold; (2) that

said taxes were privileged claims; (3) that the payment of said debts, including said taxes, was the consideration upon which said property was conveyed, and the receiver was bound to perform the contracts; (4) that said contract was for the benefit of the town, and could be enforced by it; and (5) that said corporation was never legally organized, and that the receiver was in fact the receiver of said partnership, and could not avoid the partnership agreements to the injury of the town and benefit of said corporation. All questions arising on these claims were reserved for the advice of this court.

Mr. W. B. Stoddard, for town of Milford:

Where a party obtains title to property upon an agreement to pay certain debts, the grantee is bound to perform his contract, both in law and equity.

Randall v. Latham, 36 Conn. 50; *Foster v. Atwater*, 42 Conn. 250.

Where one purchases property, and in consideration therefor promises to pay the grantor's debts to a third party, such promise may be enforced by the creditor.

Bassett v. Bradley, 48 Conn. 224; *Root v. Wright*, 84 N. Y. 74, 38 Am. Rep. 495; *Lawrence v. Foa*, 20 N. Y. 268; 1 Jones, *Mortg.* § 749.

The rule is different where the grantee only purchases the equity of redemption, and assumes an outstanding mortgage.

Meech v. Ensign, 49 Conn. 191, 44 Am. Rep. 225.

The taxes are privileged in order of payment.

Re E. S. Greeley & Co. 70 Conn. 498.

Owing to the public interest in the payment of taxes, it is the duty of the receiver to pay the same.

Smith, Receiverships, 287; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 436, 29 L. ed. 963; *Central Trust Co. v. New York City & N. R. Co.* 110 N. Y. 250, 1 L. R. A. 260.

Where the property is in the hands of a receiver the lien of the state for taxes has priority over all other liens and claims except judicial costs.

20 Am. & Eng. Enc. Law, p. 236, note 1.

The receiver has only such rights and title as the corporation had in the property.

Smith, Receiverships, 138; *Greene v. A. & W. Sprague Mfg. Co.* 52 Conn. 361.

There must be a full compliance with all the provisions relating to the organization before the corporation comes into such legal existence as enables it to make contracts with third persons.

Naugatuck Water Co. v. Nichols, 58 Conn. 408, 8 L. R. A. 637; *Johnston v. Allis*, 71 Conn. 214.

If the subscribing stockholders do not legally complete the organization they remain unincorporated persons associated in business.

New Haven Wire Co. Cases, 57 Conn. 394, 5 L. R. A. 300.

Messrs. E. P. Arvine and George E. Beers, for the receiver:

There are several reasons why this receiver

ership cannot be treated as a receivership over the partnership.

The partners must be parties to the suit, and notice must be given to them.

Bostwick v. Isbell, 41 Conn. 305.

The court would have no jurisdiction to appoint a receiver of a partnership upon the facts disclosed by the complaint.

Tomlinson v. Ward, 2 Conn. 396.

The appointment is under a law which provides for the winding up of a corporation and the appointment of a receiver of its estate.

Greene v. Sprague Mfg. Co. 52 Conn. 330; *New Haven Wire Co. Cases*, 57 Conn. 352, 5 L. R. A. 300.

The defendant is a corporation.

As it is a body formed under a law providing for incorporation, and as there has been at least a colorable compliance with the terms of that law, and as it has exercised corporate functions, it is at least a corporation *de facto*.

McTigue v. Macon Constr. Co. 94 Ga. 306, 32 L. R. A. 208; *Re Gibbs*, 157 Pa. 59, 22 L. R. A. 276.

There are only two requisites to the existence of a corporation *de facto*,—viz., either a charter or a general law under which a corporation with the powers assumed might have been created, and the assumption of such powers.

Methodist Episcopal Union Church v. Piokett, 10 N. Y. 482; *Finnegan v. Noerenberg*, 52 Minn. 239, 18 L. R. A. 778.

The members of a *de facto* corporation are not liable as partners.

2 Morawetz, Priv. Corp. §§ 746-748; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443.

The corporation is not liable for the debts of the firm because it succeeded to the business.

The claimant has no standing because of the assumption of liability in the bills of sale.

The town of Milford was a total stranger to the contract.

No fund was put in the hands of the corporation to be handed over or divided.

The case cannot be brought thus within the exception suggested by the cases of some other courts, where assets are received which in equity belong to a third person.

The assets which were transferred were a minus quantity.

A man cannot acquire rights under a contract to which he is not a party.

Price v. Easton, 4 Barn. & Ad. 433; *Anson*, Contr. Huffcut's ed. 279, 280; *Holland*, Jurisp. 5th ed. 242; *Baxter v. Camp*, 71 Conn. 245, 42 L. R. A. 514; *Clapp v. Lawton*, 31 Conn. 95; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Mellen v. Whipple*, 1 Gray, 317; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Second Nat. Bank v. Grand Lodge of F. & A. A. Masons*, 98 U. S. 123, 25 L. ed. 75; *Borden v. Boardman*, 157 Mass. 410; *Prentice v. Brimhall*, 123 Mass. 291; *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1; *Linneman v. Moross*, 98 Mich. 178; *Chung Kee v. Davidson*, 73 Cal. 522; *Buckley v. Gray*, 110 Cal. 339, 31 L. R. A. 862.

44 L. R. A.

There was no consideration for the assumption.

The contract between Lamkin and the new company was fraudulent.

Fraud is a necessary legal inference from gross and known overvaluation of property conveyed in payment of stock subscriptions.

Kelly v. Fourth of July Min. Co. 21 Mont. 291, 42 L. R. A. 621; *Whitney v. Cady*, 71 Conn. 186; *Lathrop v. Atwood*, 21 Conn. 117; *Treat v. Stanton*, 14 Conn. 445.

The only paper, so far as appears, evidencing the agreement to pay debts, is the bill of sale, which is not signed by the party sought to be charged.

Gen. Stat. 1366.

The agreement is hence void by the statute of frauds.

Clapp v. Lawton, 31 Conn. 95; *Dillaby v. Wilcox*, 60 Conn. 71, 13 L. R. A. 643; 6 Thomp. Corp. § 7740; 1 Reed, Stat. Fr. § 340.

The fact that a suit for the appointment of a receiver is an equitable proceeding does not vary the rule.

Keller v. Ashford, 3 Mackey, 444; *Baxter v. Camp*, 71 Conn. 245, 42 L. R. A. 514.

Taxes are not preferred in a receivership proceeding.

The right of the state to be preferred rests exclusively upon statute.

United States v. State Bank, 6 Pet. 29, 9 L. ed. 308; *Middlesex County Freeholders v. State Bank*, 29 N. J. Eq. 268, Affirmed in 30 N. J. Eq. 311; 1 Kent, Com. 248; *State v. Harris*, 2 Bail. L. 598.

Such statutes as interfere with the equal distribution of the debtor's assets among his creditors, the great principle of the insolvency laws, are strictly construed.

Com. v. Phoenix Bank, 11 Met. 129.

Being a mere assumed debt, liability does not extend to taxes.

A debt due a county or town is not a debt due to the state, within the meaning of the insolvency law.

Hargrove v. Lilly, 69 Ga. 326.

One who pays taxes is not subrogated to the rights of the state or municipality in bankruptcy proceedings.

Re Parker, 6 Ben. 286.

When taxes are collected by the collector the state has not a preferred claim against his estate.

Hargrove v. Lilly, 69 Ga. 326; *Wallace's Estate*, 59 Pa. 401; *Bent v. Hubbardston*, 138 Mass. 99.

When these were laid, the property was in *custodia legis*.

Walsh v. Raymond, 58 Conn. 251; *Brooks v. Hartford*, 61 Conn. 112.

Baldwin, J., delivered the opinion of the court:

A corporation known as the Baldwin & Lamkin Company acquired, in payment of subscriptions to its capital stock, certain real and personal property formerly belonging to the firm of Baldwin & Lamkin, under conveyances, part of the consideration for which was its undertaking to pay certain of the partnership debts. The company is now in the hands of a receiver, who holds the

property. But one claim against the partnership has been presented to him for allowance, and that is a bill for taxes due the town of Milford. Other claims to a large amount have been presented for liabilities contracted by the corporation in the course of its business after receiving the conveyances in question. The corporation stepped into the shoes of the partnership in respect to certain property and certain debts. There is no legal objection to such a contract, and the receiver is bound to fulfil its obligations so far as he has assets which are equitably applicable to the purpose. *Waterman's Appeal*, 26 Conn. 96, 108. No right of action at common law was given to the creditors whom it was designed to secure. *Clapp v. Lacton*, 31 Conn. 95; *Baxter v. Camp*, 71 Conn. 245, 42 L. R. A. 514. If the town of Milford be one of them, it has only an equitable claim derived from the partners, who made this provision for it. But their manifest object in the conveyances from Baldwin to Lamkin and Lamkin to the corporation was to shift the firm liabilities, in whole or part, upon a corporation which should succeed to its property and continue its business. It was to be little more than the partnership under a new form. To accomplish this it was necessary (Gen. Stat. §§ 1947, 1948) to represent it to the world as possessed of a certain capital, of which 20 per cent had been paid in in cash; and this was done. Upon the credit of this capital the corporation afterwards contracted debts of its own to a considerable amount, which have been allowed by the receiver. These must be satisfied in full before anything can be paid on the partnership debts.

The provisions as to the latter, in the deeds of conveyance, created no specific charge in terms upon the property conveyed. They were referred to as part of the consideration; but the title transferred was absolute. No equity to such a charge followed it, unless in favor of the partners; and those now claiming under them must work through their equities, and can have no rights superior to theirs. *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370. It is plain that neither Baldwin nor Lamkin could divert to the discharge of his own liabilities property on the faith of which the corporation, with his aid and consent, had gained credit for itself, and which was necessary to satisfy the indebtedness thus contracted. The partnership creditors must be postponed under the same rule. *Ashmead's Appeal*, 27 Conn. 241, 247. Subject to such postponement, so many of their claims are prima facie entitled to be allowed as were embraced in those amounting to \$61,000, which the corporation assumed by vote of the directors on February 14, 1898. The conveyance to it by Lamkin, its principal stockholder, made the next day, in which it is part of the expressed consideration that it shall assume and pay all the liabilities of the partnership, cannot avail in his favor, or in favor of those claiming through him, to enlarge its obligation, in the absence of proof that the insertion of this clause was authorized or ratified by the corporation.

44 L. R. A.

It is found that the firm in fact owed a sum exceeding \$61,000 by several thousand dollars. The burden is upon the town of Milford to show that its claim for taxes was included in the debts estimated at \$61,000. Unless that be shown, its claim for the taxes assessed against the partnership should be disallowed. If that be shown, this claim should be treated as if it had been presented by Lamkin after he had paid the amount due upon it to the town. The equities that might arise in that event between him and the receiver we cannot fully determine upon the facts found. It may be that the latter could properly set up as a defense in whole or in part the falsity of the estimates upon which the capitalization of the corporation was based.

The taxes assessed against the corporation upon the real estate in the hands of the receiver should be allowed, and are entitled to a preference. As to them, the only effect of the receivership was to change the mode of collection. To levy a warrant upon property thus in the custody of the court would be inadmissible; but this is because the fund is already in course of judicial administration, and may be said to be held by the receiver in equitable execution. *Re Tyler*, 149 U. S. 164, 183, 37 L. ed. 689, 695. In the settlement of the estate of an insolvent debtor, in the court of probate, "all lawful taxes" are entitled to a priority of payment. Gen. Stat. § 532; Pub. Acts 1889, p. 20. If such an estate is settled in a court of equity through the agency of a receiver, the same rule must be applied. The principles which determine the rights of creditors cannot be varied because presented in one forum rather than another, under the same government. *Re Waddell-Entz Co.* 67 Conn. 324, 338; *Re E. S. Greeley & Co.* 70 Conn. 494.

The title to the land remained in the corporation, only the possession passing to the receiver. It was therefore properly listed for taxation in the name of the corporation. Gen. Stat. § 3805.

As to cash realized by a receiver from sales, and held temporarily to await an order of distribution, a different rule may, under certain circumstances, be applied. *Brooks v. Hartford*, 61 Conn. 112.

This preference can in no event extend to the claim founded on the taxes due from the partnership. The statute refers only to taxes assessed against the insolvent debtor. It is not one to be extended by construction beyond the plain meaning of its terms. Taxes assessed against third parties, which the insolvent debtor has promised them to pay, may be a proper foundation of a claim against his estate; but the claim itself will be simply on his own contractual obligation.

The form in which the town presented its claim was not well adapted to express the real matter in demand. There should have been a statement that the taxes against the partnership were assumed by the corporation, and that Lamkin, with whom the contract was made, has presented no claim upon it against its estate. For want of this, the equity which the town intended to set up was left without any proper support. No

exception on this score, however, having been taken to the claim, the informality is to be treated as waived. *Cothren's Appeal*, 59 Conn. 545.

The evidence offered by the town and objected to by the receiver was relevant and admissible. It went to show the true character of the transaction out of which the equities in favor of the town accrued, as compared with the outward form which it assumed in the proceedings incident to the organization of the corporation.

It did not follow from the facts proved that the corporation never came into existence. There was at least a corporation *de facto*, and it is immaterial, as respects the claims of the town, whether it was or was not one *de jure* also. *Canfield v. Gregory*, 66 Conn. 9, 17. A corporation *de facto* is, in plain English, a corporation in fact. It can incur obligations as a corporation which do not bind those who associated to constitute it in their individual capacities, and from which they cannot, by procuring the appointment of a receiver, enable it to escape. Every liability of the Baldwin & Lamkin Company is the proper subject of a claim against its estate in the present action. The receiver is its receiver, not that of the partnership; nor is he bound to fulfil the partnership obligations, except so far as they may have been assumed by the corporation. That liability rests on a mere personal contract, and is secured by no lien upon the property which it received. The town, so far as the partnership taxes are concerned, must claim under the contract of the corporation, and has no claim, unless there was a corporation capable of contracting with it. As to its demand for taxes assessed against the corporation, that rests equally upon the existence of the corporation as a holder of the legal title to the land assessed. They are due from the corporation or its representatives, and the claim was properly presented against its estate, and against that only.

That the partnership was insolvent did not show that the corporation originally was, since some of the partnership creditors were

subscribers to its capital, and thus converted their claims into stock. But had it been insolvent from the beginning, this would not have varied its character as a corporation *de facto*, nor the relations of the receiver to the property which came down from the partnership, so far as concerns the claims for taxes presented in this proceeding.

The receiver claims that in no event could the corporation be bound to respond to the partnership obligations, because of the statute of frauds. Gen. Stat. § 1366. The vote of the directors of a corporation, duly recorded, is a sufficient memorandum in writing, and the signature of the recording officer in attestation of the minutes a sufficient signing by the party to be charged. It is found that the vote of the directors of the Baldwin & Lamkin Company was passed at a meeting at which all of them were present. It thereupon became the duty of the clerk of the board to record it, and at a proper time verify the record by his signature. The law presumes, in the absence of evidence to the contrary, that all this was done. *Lane v. Brainerd*, 30 Conn. 565; *Chase v. Tuttle*, 55 Conn. 455, 468.

The superior court is advised that the taxes assessed against the corporation on the list of 1898 should be paid next after the expenses of executing the trust and settling the estate, agreeably to the rule prescribed in Gen. Stat. § 532, that the claim for taxes assessed against the partnership is not a lien or charge upon any of the property in the hands of the receiver, and can in no event be a preferred claim, or paid at all until after all claims, other than those founded on the assumption by the corporation of the partnership obligations, have been paid in full, and that whether it should be allowed at all should be determined upon the principles laid down in the foregoing opinion, with the aid of any further evidence which may be necessary to present all the material facts.

The other Judges concurred, except Hamersley, J., who dissented.

GEORGIA SUPREME COURT.

PULLMAN'S PALACE-CAR COMPANY,
Plff. in Err.,
v.

L. H. HALL.

(.....Ga.....)

*1. A sleeping-car company is not liable to a passenger for the loss by theft of personal effects taken into the car by the passenger for his own use, and of which he retains possession, either under the rules which apply to an innkeeper for the loss

of the goods of his guest, or those of a carrier for the loss of baggage intrusted to it to transport. Such a company owes to a passenger the duty of exercising reasonable care to guard the property of the passenger from theft; and if, through the want of such care, the personal effects of the passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor. But if such reasonable care shall have been used, and such personal goods are stolen by one not its employee, such company is not responsible for the loss.

2. The company having shown in this case that after the car had gone about one mile from the station, and in crossing another road, the speed had been reduced

*Headnotes by LITTLE, J.

NOTE.—As to liability of sleeping-car companies, see also *Mann-Boudoir Car Co. v. Dupre* (C. C. App. 5th C.) 21 L. R. A. 289, and *note*; 44 L. R. A.

also *Ball v. Chesapeake & O. R. Co.* (Va.) 32 L. R. A. 792; and *Pullman's Palace Car Co. v. Martin* (Ga.) 29 L. R. A. 498.

to about five or six miles an hour, that the rear door was securely locked, that the conductor and porter were guarding the open door in front, when it appears that a thief on the outside caught on to the moving car, and, standing on a rod underneath the car, took the valise from the seat and drew it through the window, the loss of the valise is not to be attributed, under the circumstances of the theft, to the want of reasonable care exercised by the company for its protection. The company not being an insurer of the goods against theft, or having the exclusive custody of the valise for transportation, and showing its servants to be on watch at the only open entrance to the car at the time, reasonable care would not require it also to specially guard the windows of a moving train.

†3. In view of the admitted facts upon which this case was tried before a jury in a justice's court, and the legitimate inferences that may be drawn therefrom, as well as in view of an absence of proof on material points which the admission leaves in doubt, there was testimony authorizing the conclusion that the defendant company had not overcome the burden resting upon it, to show it was in the exercise of reasonable care in protecting the property of the passenger from theft. Such questions being peculiarly for the jury, and the only error assigned in the petition for certiorari being that the verdict was contrary to law and evidence, the judge of the superior court did not abuse his discretion in overruling the petition.

(March 16, 1899.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of plaintiff in an action brought to hold defendant liable for the loss of plaintiff's valise while he was a passenger in one of defendant's cars. *Reversed.*

The facts are stated in the opinions.

Messrs. Dorsey, Brewster, & Howell, for plaintiff in error:

Under the law and facts there is no liability in this case. Can it be said that the employees failed to exercise that degree of care which under the circumstances they were bound to exercise, and were therefore negligent?

Pullman Palace Car Co. v. Martin, 92 Ga. 164.

It is the unexpected that happened; and a man can look back, and tell better what would have prevented the theft than one can reasonably contemplate a protection against some unforeseen occurrence.

Perhaps Hall was negligent in thus leaving his baggage anyway.

Whitney v. Pullman's Palace Car Co. 143 Mass. 243; *Pullman Palace Car Co. v. Martin*, 92 Ga. 162, 95 Ga. 314, 29 L. R. A. 498.

If the passenger retains the custody of his baggage, the carrier is liable only in cases where the loss is due to the negligence or misconduct of its servants or agents.

Pullman Palace Car Co. v. Gaylord, 6 Ky. L. Rep. 279, 23 Am. L. Reg. N. S. 788: 3 Am. & Eng. Enc. Law, 2d ed. pp. 547, 548; *Welch v. Pullman Palace Car Co.* 1 Sheldon, 457, 16 Abb. Pr. N. S. 352.

†Paragraph 3 by LEWIS, J., dissenting.

44 L. R. A.

In the ordinary railway car a passenger may sleep, but it is at his own risk that he does so. He is the custodian of the property retained in his possession, and he must look out for it. Is there any difference where a passenger is in a sleeper, and awake?

Dargan v. Pullman Palace Car Co. 2 Tex. App. Civ. Cas. (Willson) 607; *Hutchinson*, Carr. §§ 677-719.

Mr. W. J. Speairs, for defendant in error:

If the plaintiff in error so negligently watched while the passenger slept as to allow her money and jewels to be stolen, he was liable.

Pullman Palace Car Co. v. Martin, 92 Ga. 161.

Smoking is as much the privilege of the passenger as sleeping,—a special room being assigned for that purpose. If the plaintiff in error watches so negligently while the passenger smokes that his valise is stolen, why shall he not be liable? He is paid to watch; he was in control of the valise, and put it in the place it was stolen from.

Pullman's Palace Car Co. v. Martin, 95 Ga. 314, 29 L. R. A. 498; *Kates v. Pullman's Palace Car Co.* 95 Ga. 810; *Pullman's Palace Car Co. v. Harvey*, 101 Ga. 733; Code, § 2935; *Rockwell v. Proctor*, 39 Ga. 105; *Bohler v. Owens*, 60 Ga. 185; *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. Rep. 754.

Negligence being a question for the jury, and the jury having passed upon this case, the verdict of the jury and judgment of the court below should not be disturbed,—especially inasmuch as they are both supported by the evidence.

Little, J., delivered the opinion of the court:

The defendant in error brought suit in a justice's court against the car company for \$30.50, being the value of a valise and its contents. Judgment in his favor was rendered for the amount for which he sued. The car company filed its petition for certiorari, after hearing which the judge of the superior court sustained the judgment rendered in the justice's court, and dismissed the certiorari. The car company excepted.

The case was tried in the justice's court on an agreed statement of facts, as follows: "It is agreed: That L. H. Hall, the plaintiff, was a passenger on the car Suwanee on October 25, 1894: said car leaving Cincinnati at 8 P. M. That said passenger, Hall, occupied room H, assigned him by porter; porter placing valise therein, in said car. Said passenger Hall took on board the articles set out in the bill of particulars attached to the suit; and it is agreed that the valuation therein placed on said articles is correct and reasonable. L. H. Hall was accompanied by W. C. Rawson. They engaged two lower berths in the same state room, and on going into the state room, found the window up, and put the window down. They together left their valises in the state room, and went forward to the smoking room, just before the train started. Afterwards, as they were leaving the station, and as they were passing through yard, and as train No.

3 on the Q. & C. (this being the train Hall was on), was slowing up at the C. H. & D. crossing about 1 mile from the Central Depot, from which they started, and from where plaintiff boarded the train, the porter, Wright, caught young man taking a large and small valise from the room H. When the thief saw the porter he dropped the large valise, but succeeded in getting away with the small valise; this being the valise of the plaintiff. At this point the porter ran forward to the smoking room and pulled the air cord, and was asked at that time by Mr. Rawson what he was doing that for, when he informed Rawson that someone had stolen a valise out of one of the state rooms. Rawson and Hall went back to see, and found that the thief had gotten Mr. Hall's and would have gotten Rawson's but for the efforts of the porter, who caught Rawson's valise as the thief was taking it through the window. One door of the car was locked, and the conductor and the porter stood at the open end of the car; and Rawson does not know how the thief could have gotten in the car, as everyone was required to show a ticket before entering station, and a sleeping-car ticket before getting on board the car. Valise was taken from open window in the side of car from room H; the thief being on outside, clinging to window, and standing on hog chain of car. The porter, Wright, was in the aisle of the car at the time, and saw two tramps hanging on the outside of car, and ran them off. Conductor's attention was immediately called to same, and train was stopped, but too late to get the valise. By the time the train was stopped the men had gotten too far away, and it was impossible to catch them. No suspicious person was noticed by the conductor or porter in the car. As train passed by Big Four yards, where the valise was stolen, it was going at the rate of from 5 to 6 miles an hour. Conductor and porter did all they could to save valise after thief was discovered."

1. Under these admitted facts the question arises, first, What is the liability of a sleeping-car company to its passengers for personal baggage which the passenger takes with him in the sleeping car? This court has, in two cases heretofore considered, ruled upon the liability of a sleeping-car company for the loss of goods of a passenger, when the same were lost at night, when the passenger was sleeping. In the case of *Kates v. Pullman's Palace Car Co.* 95 Ga. 810, the action was to recover the value of certain money and papers which it was alleged were taken from the pocket of the plaintiff's clothing at night. This court in that case did not undertake to define the precise relation which existed between a sleeping-car company and a passenger, but ruled that, from the character of the business in which the company was engaged, a duty on the part of the company was created, to exercise some watch and care over the passenger, and, within certain reasonable limits, over his property as well, and that if a loss occurs the burden of proof is on the company of showing that it exercised such reasonable care during the

hours of the night as was necessary to secure the safety of the passenger's property, and that the loss was not occasioned because of the failure on the part of the employees of the company to do so. The other case to which we refer is that of *Pullman's Palace Car Co. v. Harvey*, 101 Ga. 733. There this court was asked to reverse the ruling made in the *Kates Case*, 95 Ga. 810; but, after consideration, adhered to such ruling. Chief Justice Simmons, in rendering the opinion in the case, said that the law as to the liability of sleeping-car companies is not well settled. Courts in different states have laid down different rules as to their liability. And he suggests that legislation should be had, defining the exact liability of sleeping-car companies to a passenger for loss of goods. In determining the question now under consideration, it seems to be necessary to define and fix the rule of liability which attaches to a sleeping-car company for the loss of goods which were stolen by someone not in the employ of the company, and while the passenger was awake. A fair examination of the question renders it necessary to note that the passenger whose valise was taken from his berth, or state room, under the evidence in this case, had, on reaching the car, delivered to the porter of the car his valise, as is customary, and that the valise had been taken to the state room or berth which had been assigned to the passenger, and in his presence there deposited; that, finding the window to the berth or state room open, the passenger closed it, and then, leaving his valise, went forward to the smoking room; that in no other manner did the company, by its employees, have charge of such baggage. Also, the other facts, that the rear door of the car was locked, and the conductor and porter stood at the front door of the car; that while the car was in motion the valise was taken by a thief, who stood on a rod underneath the car, on the outside, and abstracted it through the window. In the case of *Blum v. Southern Pullman Palace Car Co.* 1 Flipp. 500, as cited in *Voss v. Wagner Palace Car Co.* 16 Ind. App. 271, a number of reasons are given why a sleeping-car company is not liable as an innkeeper. Among those reasons are the following: "The peculiar construction of sleeping cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections." That the innkeeper is given a lien upon the goods of his guests for the price of their entertainment. That the innkeeper is obliged to receive every guest who applies for entertainment, while the sleeping-car company receives only first-class passengers. That the innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount, while the sleeping-car company contracts to furnish a bed only. That the conveniences of the inn are imperative necessities to the traveler; a sleeping-car is not. That the inn-keeper has a right to exclude from his house all but his guests-

and servants; the sleeping-car company must admit the employees of the train to collect fares and control its movements. That the sleeping-car company cannot protect its guests in all particulars, because the conductor of the train has a right to put them off for nonpayment of fare or for a violation of rules. The court in that case then ruled that sleeping-car companies are not subject to a passenger, as an innkeeper. The cases of *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258, and *Pullman Palace Car Co. v. Gaylord* [6 Ky. L. Rep. 279], 23 Am. L. Reg. N. S. 788, held that a sleeping-car company is not liable for loss of the effects of a passenger, as a carrier, because it is not a carrier; that the railway company is the carrier; that the carrier's liability depends upon his possession of the goods; that a sleeping-car company does not have possession of the goods,—they are in the control of the passenger. It was also ruled in *Lewis v. New York Sleeping Car Co.* 143 Mass. 267, 58 Am. Rep. 135, that a sleeping-car company was not liable as a common carrier nor as an innholder. But each of these cases rules that it is a clear duty of the car company to use reasonable care to guard the personal effects of passengers from theft, and if, through want of such care, such as he might reasonably carry with him are stolen, the company is liable. The rule of liability is stated by the Texas supreme court in the case of *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, as follows: While a sleeping-car company does not assume towards personal baggage taken into a car by a passenger the duties and liabilities which the common law imposes upon common carriers as to ordinary freight, or upon an innkeeper as to guests, it is responsible in the same way as any common carrier for a failure to perform the duties which devolve upon a common carrier in relation to baggage of a passenger which is not given into its exclusive custody; and if, through a failure of the company to exercise reasonable care, the passenger's baggage is stolen, the company is liable therefor. In 2 Shearm. & Redf. Neg. 5th ed. § 526, the author, discussing this subject, says: "For obvious reasons the rule of absolute liability of a carrier of goods or innkeeper is not extended to cases of theft from passengers occupying berths in a sleeping car;" and, citing *Carpenter v. New York, N. H. & H. R. Co.* 124 N. Y. 53, 11 L. R. A. 759, says: "[It is properly held, in view of such arrangements [of berths], and of the powerlessness of a sleeping passenger to defend his property from theft, or his person from assault, that it is part of the contract of hiring the privilege of occupying a berth that protection should be afforded him by the car proprietor, with a degree of care and vigilance commensurate with the danger to which he is exposed." Mr. Wharton, in his *Law of Negligence*, 7th ed. § 610, says: "It has been urged that such a proprietor [sleeping-car company] is, if not a common carrier, at least an innkeeper, and therefore an insurer of the property of his guests. But it has been ruled in several cases that such a proprietor is not either a common carrier or an

innkeeper, but is a special bailee, who is not an insurer, but is charged with the duty of exercising in his business a degree of care and diligence proportioned to risks to which those engaging places in his cars are exposed." 4 Elliott, Railroads, § 1623, sums up from the rules in adjudicated cases as follows: "Our conclusion is that where the passenger takes his baggage into the coach with him, and does not place it in charge of the railroad company or of the sleeping-car company, that neither company is liable, unless the loss of the baggage was caused by the negligence of one of the companies." Ray, in his work on *Negligence of Imposed Duties, Passenger Carriers* (pp. 241, 242), citing authorities, says: "While it [the sleeping-car company] is not liable as a common carrier or as an innholder, as is said by some of the authorities, . . . it is its duty to use reasonable care to guard the passenger from personal injury and his property from theft; and if, through want of such care, . . . the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor." See also *Stevenson v. Pullman Palace Car Co.* (Tex. Civ. App.) 26 S. W. 112; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258; *Chamberlain v. Pullman Palace Car Co.* 55 Mo. App. 474; *Henderson v. Louisville & N. R. Co.* 20 Fed. Rep. 437; *Belden v. Pullman Palace Car Co.* (Tex. Civ. App.) 43 S. W. 22. While there are decisions of a number of courts which have held sleeping-car companies liable to a passenger for the loss of his baggage, as a common carrier, and others which apply the law of liability as that of innkeepers, the weight of authority, as we understand it, is that such companies are not liable as innkeepers nor as carriers for personal effects taken with the passenger into the car, and of which he retains possession. But it is the duty of such a company to use reasonable care to guard the property of the passenger from theft; and if, through the want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor.

2. Such being the rule, the question which next arises is, Was the property of the passenger stolen through the failure of the employees of the company to exercise reasonable care for the protection of his property? It will be borne in mind that the passenger was not sleeping when his goods were stolen. A higher degree of care to protect the goods of a sleeping passenger would seem to be required than that which it is necessary to exercise when the passenger is awake and able to protect it himself; and while extraordinary diligence is not, under the law, required in either case, because the passenger does not intrust his effects to the company, but retains possession himself, for his own comfort and convenience, yet, having engaged the accommodations offered by the company for the purpose of sleep during proper hours, and paid for the same, and the company having accepted him with the implied agreement that he should do so, the care which is rea-

sonable to protect the goods of a sleeping passenger must be exercised. And, while the same degree of care in the case of a passenger awake might not be required, yet in each case such care as is reasonable under the circumstances is required. For the want of it the company is liable. Having exercised it, it is not. The court of appeals of Missouri, in the case of *Chamberlain v. Pullman Palace Car Co.* 55 Mo. App. 474, held that, in a case where the porter in charge of the car was not directed to look after the effects of a passenger in his absence, "a passenger on a sleeping car, who leaves his watch in his berth while he is in the toilet room, is, as a matter of law, guilty of contributory negligence if it is stolen in his absence, and therefore cannot recover from the company for the loss." Whether or not the property of the passenger in the case at bar was stolen because of the failure of the company to exercise reasonable care for its protection must, of course, depend upon the manner in which, and by whom, the valise was stolen and the precautions used to prevent the theft. The agreed statement of facts found in the record is somewhat confused. When critically examined, however, it appears: That the train to which the sleeping car was attached had left the station where the passenger boarded the car, and proceeded about a mile on its journey. The train reduced its speed to 5 or 6 miles an hour when it approached the crossing of another railroad. At that time one of the car doors was locked, and the other guarded by an employee of the sleeping-car company. That the valise was taken from the seat of the passenger on which it had been placed, through an open window, by a thief who was on the outside, clinging to the window, and standing on the hog chain of the car. The porter of the car was in the aisle, and ran off two tramps whom he saw hanging on the outside of the car, and discovered that another thief had seized two valises. The porter caught one of the valises as the thief was taking it through the window. The other one he could not recover. Immediately the employees of the car pulled the air cord, and had the train stopped, but the thief had gotten away with one of the valises. The circumstances of the theft were remarkable, and showed the perpetrator to have been a very daring lawbreaker,—willing to incur, not only the risk of violating the law, but his personal safety as well. To guard all the windows of a moving car from rogues who did not hesitate to risk their lives in catching hold of a moving train, with the hope of abstracting valuables, would have required extraordinary diligence. Such acts ordinarily are not to be anticipated, and without such a degree of diligence could not have been prevented. To have securely fastened one of the doors of the car, and guarded the other, while another employee stood in the aisle, was certainly as much as any anticipated danger would have required. Such precautions, in our judgment, amounted at least to reasonable care; and no greater diligence than this being required, under the rule the company should not be held liable for the loss.

44 L. R. A.

For these reasons, it is our opinion that the certiorari should have been sustained, and the judgment rendered in the justice's court set aside.

Judgment reversed.

Lewis, J., dissenting:

Under the view I take of this case, the question decided by the first headnote is not involved. There is no error of law complained of on account of any ruling or view of the court below to the effect that a sleeping-car company is liable to its passenger for loss by theft of his baggage, to the same extent as an innkeeper would be for the loss of the goods of his guest or a common carrier for the loss of baggage entrusted to it by a passenger for transportation. The case was tried on an agreed statement of facts before a jury in a justice's court. The petition for certiorari complained simply that the verdict was contrary to law and evidence. The order of the judge overruling the certiorari does not indicate that he entertained a different view of the degree of diligence required of the company than is expressed by a majority of this court. That order is as follows: "After hearing and considering this case the verdict and judgment in the magistrate's court are affirmed and the certiorari dismissed. Negligence and diligence are peculiarly questions for the jury and they may not only consider the facts admitted but may draw inferences therefrom. Whether the porter was negligent in placing the valises where he did place them, whether the agents exercised due diligence in guarding the property, whether the window itself had proper catches or safeguards,—in fact, all questions touching the conduct of the company and its employees,—were for the jury. I think there was enough to sustain their finding."

In addition to the suggestions contained in the above judgment, attention is directed to the following points in the evidence: The sleeping-car porter placed the two valises in the state room of the two passengers. At this room was a window in the side of the car, which was open, and the passengers closed it down,—probably to protect their goods from thieves. They then went into the smoker, and never left there until after the larceny; hence, never opened the window. The inference is reasonable that it was opened either by the porter or the thief. If by the former, he voluntarily and unnecessarily removed the protection given the baggage by the passengers. If by the latter,—the evidence negating the fact that the thief was inside of the car,—he must have opened the window by force from the outside of the car, while it was in motion,—a very improbable theory; and, if that was done, it does seem that the porter, standing in the aisle, by the exercise of ordinary diligence would have had his attention attracted to the elevation of the window by the trespasser in time to have prevented the theft,—it being admitted that the porter was at the time standing in the aisle. The train started from the Central Depot of Cincinnati. It had gone but a mile, and was running at a slow

rate of speed, and the presumption is that it had not gone to the limits of a populous portion of that large city. Besides these facts, it does not appear where the conductor was at this time, and what he was doing. It is true, it is stated that he and the porter were at the door, where they were receiving passengers who were entering. If it refers to the entire time, then it contradicts other facts admitted. In one portion of the admission it is stated that the porter, at the time of the theft, was in the aisle and seized the larger valise; thus preventing the thief from getting that also. In another portion it is stated that at that time he saw two tramps on the outside of the car, and ran them off. It is difficult to understand how he could do so many things at the same time, and be in different places. As I understand it, it is conceded by my brethren that the burden of proof was on the company to show the exercise of reasonable care and diligence. Could not the jury have inferred, both from the evidence and the want of evidence, that this burden had not been successfully carried? I only allude to some of these points on the facts, with a view of showing, to say the least of it, that whether the company was negligent or not is a reasonably debatable question; and this should be an end of the matter, so far as the power of this court is concerned, after the jury have passed upon that issue, and the judge of the superior court, having carefully considered their finding and the evidence upon which it was based, has approved their verdict. I therefore believe that the judgment of the court below should be affirmed, and respectfully dissent from the decision rendered by a majority of the court.

W. T. BARTLETT, *Plff. in Err.*,
v.
City of COLUMBUS.

(101 Ga. 300.)

*A municipal corporation is not liable, in an action for false imprisonment, for damages alleged to have been occasioned to the plaintiff by reason of his imprisonment under

*Headnote by FISH, J.

NOTE.—*Liability of municipal corporations for false imprisonment and unlawful arrest.*

- I. Introduction.
- II. General rule stated.
- III. Application of the maxim *Respondet superior*.
- IV. Liability as affected by ratification.
- V. Reasons for the rule.
- VI. English and Canadian decisions.

As to the liability of municipal corporations for acts of policemen, see note to *Whitefield v. Paris* (Tex.) 15 L. R. A. 783.

I. Introduction.

The principal case is strictly in line with the earlier decisions upon this question. The cases unanimously hold that a municipality is not liable in damages for the acts of police officers in making an arrest, or for false imprisonment. 44 L. R. A.

See also 46 L. R. A. 215.

a judgment rendered against him by a municipal court for the violation of an ordinance, and this is true though such judgment may have been irregular, erroneous, or even void.

(May 21, 1897.)

ERROR to the Superior Court for Muscogee County to review a judgment in favor of defendant in an action brought to recover damages for alleged false imprisonment. *Affirmed*.

The case sufficiently appears in the opinion.

Messrs. C. J. Thornton and A. E. Thornton for plaintiff in error.

Mr. Francis D. Peabody, for defendant in error:

No writ of certiorari was ever sued out by Bartlett, to review the judgment of the recorder in the superior court, as was his right (Code 1882, § 4049); and until such judgment shall have been appealed from, it is conclusive between parties and privies, whether the judgment be right or wrong, or whether or not the ordinance, under which the conviction was had, be beyond the power of the city to pass.

Code 1882, §§ 2897, 3577, 3826, 3827; *Childs v. Hayman*, 72 Ga. 797.

For errors of judgment committed in the performance of judicial powers and duties, the corporation is not responsible.

Semmes v. Columbus, 19 Ga. 490; *Duke v. Rome*, 20 Ga. 635; *Rivers v. Augusta*, 65 Ga. 376; *Collins v. Macon*, 69 Ga. 544; *Gaskins v. Atlanta*, 73 Ga. 746; *Wright v. Augusta*, 78 Ga. 241; *Columbus v. Sims*, 94 Ga. 483; *Love v. Atlanta*, 95 Ga. 129; *Trescott v. Waterloo*, 26 Fed. Rep. 592; *Weathers v. Columbus* (U. S. C. C. W. D. N. D. Ga.) June Term, 1896, not yet reported; 1 Beach. Mun. Corp. § 767; 2 Dill. Mun. Corp. § 949; Tiedeman, Mun. Corp. § 324.

Fish, J., delivered the opinion of the court:

Bartlett sued the city of Columbus for false imprisonment, alleging that the defendant, without legal authority, imprisoned and detained him in the common jail of Muscogee county for forty-eight hours. Upon the close of the plaintiff's testimony, the court below granted a nonsuit, and Bartlett excepted.

as the duties cast upon such officers are of a public nature in the exercise of public governmental powers as agents or servants of the state, and not as agents or servants of the municipality. See *infra*, V.

If, however, the acts are done in the exercise of special corporate rights, and not in the interest of the public, the city will be liable.

In all cases, however, the liability depends upon the character of the service. *Woodhull v. New York*, 150 N. Y. 450, 453, *et infra*, II.

In the case of *BARTLETT v. COLUMBUS* one of the grounds upon which the decision was based was that no action can be maintained against a municipal corporation for an error in judgment in the exercise of its judicial functions where no corruption or malice is imputed.

II. General rule stated.

The current of authorities is almost uniform that a municipal corporation is not liable for

The plaintiff showed by his testimony that the office of recorder of the city of Columbus was duly and legally constituted, and that said officer was authorized to preside over the "mayor's court," and to try all persons charged with a violation of the ordinances of said city. It further appears from his testimony that he was tried, convicted, and sentenced by the recorder, in said court, for an alleged violation of an ordinance of said city, in carrying on the business of keeping a boarding house, taking transient guests, without first having registered, and obtained the city license prescribed therefor. This being true, it is not necessary to consider the grounds upon which the plaintiff in error contends that his trial by the recorder and the judgment rendered therein were illegal and void, because it is clear that a municipal corporation is not liable, in an action for false imprisonment, for damages alleged to have been occasioned to the plaintiff by reason of his imprisonment under a judgment rendered against him by a municipal court for the violation of a city ordinance; and this is true though said judgment may have been irregular, erroneous, or even void. In the case of *Duke v. Rome*, 20 Ga. 636, Lumpkin, J., says: "Can an action in any form be maintained against a municipal corporation for an error in judgment only when

exercising judicial functions, where no corruption or malice is imputed? We think not. Just as well, upon principle, sue this or any other court." A case that is exactly in point is that of *Trescott v. Waterloo*, which was tried in the circuit court of the United States for the northern district of Iowa, and is reported in 26 Fed. Rep. 592. In that case the court held that "a party who has been arrested for violation of an unconstitutional municipal ordinance, requiring a license fee to be paid by nonresident peddlers, and, on conviction, has served out his fine, cannot maintain an action against the municipal corporation for false imprisonment." The passage of the ordinance by the city council of Columbus, for the alleged violation of which the plaintiff in error was tried, convicted, and imprisoned, was an exercise of the legislative power, and his trial and sentence by the recorder was an exercise of the judicial power conferred by the state upon the municipal corporation. It is well settled that for errors of judgment committed in the exercise of either of these powers a municipal corporation is not liable in damages. *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787.

Judgment affirmed.

All the Justices concur.

a trespass or assault by a police officer; if he has authority to arrest, then nobody is liable, and if he has not, then he is acting willfully on his own responsibility. *Cook v. Macon*, 54 Ga. 468.

It has been stated that the nonliability of a municipal corporation for the wrongful acts of its police officers, constables, or marshal in making arrests or detaining prisoners is too well known to require discussion. *Gullikson v. McDonald*, 62 Minn. 278, 279, wherein it was sought to make the city liable for damages occasioned by the arrest and unlawful detention and imprisonment of the plaintiff in the village prison.

A distinction is drawn between the liability of a municipal corporation for acts of its officers in the exercise of powers which it possesses for public purposes and which it holds as part of the government of the country, and those which are conferred upon it for private purposes. Within the sphere of the former it enjoys the exemption of government from responsibility for its own acts and the acts of its officers deriving their authority from the sovereign power, whereas in the latter it is answerable for the acts of those who are in law its agents. *Stewart v. New Orleans*, 9 La. Ann. 461, 462, *et infra*.

In the case of *Woodhull v. New York*, 150 N. Y. 450, *et infra*, Reversing 76 Hun. 390, it is said that if the corporation appoints or elects the officers, and controls them in the discharge of their duties; if it continues or removes them or holds them responsible for the manner in which they discharge their duties; and if their duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest,—they must be regarded as its agents or servants, and the maxim *Respondent superior* applies.

If such officers are elected or appointed by the corporation in obedience to a statute to perform a public service, not local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution

of the powers of government, they are not to be regarded as the servants of the corporation, but as public or state officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondent superior* does not apply. *Woodhull v. New York*, 150 N. Y. 450, Reversing 76 Hun. 390; *McKay v. Buffalo*, 9 Hun. 401, 74 N. Y. 619; *Maxmillan v. New York*, 62 N. Y. 160, 20 Am. Rep. 468.

The same principles are recognized and adopted by the court in *Rusher v. Dallas*, 83 Tex. 151, 153. To the same effect, *Galveston v. Posnalsky*, 62 Tex. 132, 50 Am. Rep. 517; *Galveston v. Hemmis*, 72 Tex. 559.

Where a municipal body is simply exercising its police powers, any acts of its officers or agents, including the board of trustees or aldermen, in violation of and against the terms and spirit of the statute while acting as a legislative body, or as agents and officers executing the ordinance, are *ultra vires* and in excess of the power of the city, and for the acts of such officers whereby damage occurs to any citizen there is no remedy against the corporation. *Blake v. Pontiac*, 49 Ill. App. 543, 550, a case of illegal arrest and imprisonment.

A city is not liable for an arrest made by a police officer which is illegal for want of a warrant, or for unlawful acts of violence in the exercise of his official duties, in the absence of a state statute expressly creating such liability. *Royce v. Salt Lake City*, 15 Utah. 401, 407; *Calwell v. Boone*, 51 Iowa. 687, 33 Am. Rep. 154; *O'Dell Trustees v. Schroeder*, 58 Ill. 353; *Curran v. Boston*, 151 Mass. 505, 8 L. R. A. 243; *Peters v. Lindsborg*, 40 Kan. 654; *Culver v. Streator*, 130 Ill. 238, 6 L. R. A. 270, 271; *Pollock v. Louisville*, 13 Bush. 221, 26 Am. Rep. 260; *Cook v. Macon*, 54 Ga. 468; *Harris v. Atlanta*, 62 Ga. 290.

Cities are not liable in actions for false imprisonment for the acts of their officers while enforcing invalid ordinances or for other illegal and unauthorized acts, and where the provision in question is a police regulation, and the officers in enforcing it are exercising a public func-

tion, for the manner in which they exercise their powers and duties in that respect the city is not liable. *Caldwell v. Prunelle*, 57 Kan. 511.

If there is no authority in the mayor and marshal under an ordinance to make the arrest they are trespassers and may be held personally liable for false imprisonment or assault and battery, but for their acts in making such arrest under the city ordinance the city cannot be held liable. *Rusher v. Dallas*, 83 Tex. 152.

And the fact that the trustees of a town have knowledge of the false imprisonment will not in any manner render the town liable for the reason that when they have provided proper ordinances for the police of the town, they have performed their duty and are not required to give their personal attention to their enforcement. *Odell v. Schroeder*, 58 Ill. 353, 355.

So, the fact that a city has knowledge that the officer who makes the arrest was unfit and incompetent, and that the injury was caused by such unfitness, and still retains him in its service, does not take the case out of the rule relieving the city from responsibility for the act of police officers in their capacity as public officers for the benefit of the public at large. *Rusher v. Dallas*, 83 Tex. 152.

Again, the fact that the trustees of the town adopt an ordinance and appoint the town constable to see that it is executed will not render the town liable, in a case of false imprisonment, for the unauthorized, illegal, and oppressive acts of such constable, for the reason that the trustees as representatives of the town only empower him to do what the ordinance requires, and not to oppress citizens of the place. *Odell v. Schroeder*, 58 Ill. 353, 355.

And the bare allegation, in an action against a municipal corporation in damages for false imprisonment and malicious arrest, that the marshal and recorder committed a trespass upon the person of the plaintiff, though done *colore officii* does not make a prima facie case against a municipal corporation, since it is not liable for any and all voluntary, malicious, and unauthorized acts and trespasses of its officers. *Worley v. Columbia*, 88 Mo. 106, 110.

It has been frequently held that a municipality is not liable for acts of police officers in making arrests for alleged violations of law or of local ordinances. *Dargan v. Mobile*, 31 Ala. 469, 70 Am. Dec. 505; *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Fox v. Northern Liberties*, 3 Watts & S. 103; *Elliott v. Philadelphia*, 75 Pa. 347, 15 Am. Rep. 591; *Odell v. Schroeder*, 58 Ill. 353; *Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154; *Buttrick v. Lowell*, 1 Allen, 172, 79 Am. Dec. 721; *Worley v. Columbia*, 88 Mo. 106; *Kansas City v. Lem-en*, 12 U. S. App. 640, 57 Fed. Rep. 905, 906, 6 C. C. A. 627.

And in *Culver v. Streater*, 130 Ill. 238, 6 L. R. A. 270, 271, the court relied upon authorities holding that a city is not liable for an arrest made by police officers which is illegal for want of a warrant. In that case, however, the action was for the unlawful acts of the police in enforcing an ordinance relating to dogs. *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260; *Cook v. Macon*, 54 Ga. 468; and *Harris v. Atlanta*, 62 Ga. 290, *infra*, were relied upon.

A person who has been arrested for the violation of an unconstitutional municipal ordinance requiring a license fee to be paid by nonresident peddlers, and who has on conviction served out his fine, cannot maintain an action against the municipal corporation for false imprisonment. *Trescott v. Waterloo*, 26 Fed. Rep. 592.

And a city is not liable for the malicious arrest and false imprisonment of a person for the violation of an ordinance, neither is it liable for the act of the council in passing the ordi-

nance, or for the act of the marshal in issuing the warrant, nor for the acts of the marshal and his deputy in making the arrest, as the acts are done in a judicial capacity and within the scope of the jurisdiction. *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1, 3.

In this case the court adopted the doctrine as stated by the court of appeals of Maryland in the case of *Anne Arundel County Comrs. v. Duckett*, 20 Md. 476, 83 Am. Dec. 557, as follows: "With regard to the liability of a public municipal corporation for the acts of its officers, the distinction is between the exercise of its legislative powers which it holds for public purposes and as part of the government of the country and those private franchises which belong to it as a creation of the law. Within the sphere of the former it enjoys the exemption of the government from responsibilities for its own acts, and for the acts of those who are independent corporate officers deriving their rights and duties from the sovereign power."

And a demurrer to the cause of action was sustained, upon the ground that the city could not be held responsible for wrongful arrest and imprisonment, in *Stedman v. San Francisco*, 63 Cal. 193, where the plaintiff was arrested by members of the police department and imprisoned under an ordinance of the board of supervisors.

An action for false imprisonment and unlawful and forcible arrest for the violation of a city ordinance does not lie against a municipality, even though it may be unauthorized. *Grumbine v. Washington*, 2 MacArth. 578, 20 Am. Rep. 626, 628.

In *Attaway v. Carteraville*, 68 Ga. 740, the city was held not liable for the arrest and imprisonment of the plaintiff by the marshal and a policeman of the city unlawfully and without authority of law. To the same effect, *Cook v. Macon*, 54 Ga. 468.

The same principles were applied in *McElroy v. Albany*, 65 Ga. 388, 389, 38 Am. Rep. 791, where the party making the arrest was a night watchman or quasi policeman of the town, and the town was not liable under the doctrine of *respondet superior*.

So, the nonsuit of the plaintiff was upheld, so far as the city was concerned, in *Harris v. Atlanta*, 62 Ga. 290, which was an action against the city and certain keepers of the guard house and jail, for imprisonment and unreasonable compulsory detention.

In *Odell v. Schroeder*, 58 Ill. 353, it was held that the town was not liable for the wrongful imprisonment of a person by a constable on an execution.

The city was not liable, in the case of *Blake v. Pontiac*, 49 Ill. App. 543, 550, for the acts of its officers in arresting the plaintiff and incarcerating him in a calaboose, as the act for which redress was sought was one which the city had to perform in its public capacity in the exercise of police power, and not in the nature of corporate acts, and the persons officially charged with the execution and enforcement of such powers and regulations were *quoad hoc* police officers.

And the city was freed from liability in *Laurel v. Blue*, 1 Ind. App. 128, an action for false imprisonment, where the plaintiff was arrested by the town marshal without a warrant under the provisions of an ordinance which was without authority and void.

In the case of *Vaughtman v. Waterloo*, 14 Ind. App. 649, 652, the plaintiff as acting marshal of the town sought to recover from the city the loss he had sustained in an action for false imprisonment. The real question was whether the city would have been responsible for the arrest of the party by the plaintiff if

suit had been brought against it therefor. The plaintiff's action failed for the reason that officers appointed to execute laws and ordinances are not agents engaged in corporate duties, but are public officers appointed at the command of the legislature by the corporate authorities.

Again, in *Kansas City v. Lemen*, 12 U. S. App. 640, 57 Fed. Rep. 905, 906, 908, 6 C. C. A. 627, the city was not liable for damages for unlawfully interfering with the plaintiff's rights and preventing his exhibiting his show and hippodrome in the city, for which he had obtained a license, and for unlawfully arresting him and his employees.

So, the judgment was rendered in the city's favor in *Peters v. Lindsborg*, 40 Kan. 654, an action for damages for false imprisonment. The police officers of the city were not regarded as the servants or agents thereof, as their duties were of a public nature and their appointment was made by the city as a convenient mode of exercising a function of the government, which duties were to preserve the good order and provide for the safety of the people of the city. In these duties they acted as public servants of the state under the law, and not as mere agents of the city, and for that reason the relation of principal and agent does not exist between the city and the police officers.

And the city was exempt from liability in the case of *Caldwell v. Prunelle*, 57 Kan. 511, an action for false imprisonment brought against the city for an illegal arrest of the plaintiff for non-compliance with an ordinance of the city relating to license tax on traveling salesmen, for the refusal to pay which he was committed to the city prison, from which he was subsequently discharged upon habeas corpus.

In the above case the court relied upon *Peters v. Lindsborg*, 40 Kan. 654; *Trescott v. Waterloo*, 26 Fed. Rep. 592; *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805; and *Grumblin v. Washington*, 2 MacArth. 578, 29 Am. Rep. 628.

The same doctrine is announced in *Fox v. Richmond*, 19 Ky. L. Rep. 326.

In the above case the plaintiff recovered against the city the amount of his services rendered in working out a fine imposed upon him by police authorities, as the city had appropriated them to its own use. In that case, however, the court further held that he could not claim damages against the city for the trespass committed on his person, and his only remedy for this was against the police justice, who was alone personally responsible.

A city is not liable for an arrest made by police officers which is illegal for want of a warrant. *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260, 263.

And in *Taylor v. Owensboro*, 98 Ky. 271, the city was freed from liability for damages for an unlawful arrest, conviction, and imprisonment in the workhouse of the city for the violation of a penal ordinance relating to the public peace which was unconstitutional, as it inflicted a greater penalty than the state statute allowed.

Since, under the sanction conferred by the Louisiana statutes and the authority given by the Constitution itself, watchmen may be appointed as a necessary branch of the police of the city, and their duties are the preservation of public order and tranquillity, and the city in appointing them exercises a governmental function conferred upon it in its public or municipal character for public purposes exclusively, it is not liable for the acts of its officers. *Stewart v. New Orleans*, 9 La. Ann. 461, 462, 61 Am. Dec. 218. In this case action was brought against the municipality by the owner of a slave for the wrongful act of the police officers

in arresting the slave and inflicting injuries upon him, of which he died.

And in *Liberty v. Hurd*, 74 Me. 101, where the plaintiff had been unlawfully arrested for the nonpayment of a tax which had been previously paid, the city was held not liable, as the collector in making the arrest was not the agent of the town, but was a mere trespasser.

So, in *Dunbar v. Boston*, 112 Mass. 75, the city was held exempt from liability for the amount of a tax paid by the plaintiff under protest upon his illegal arrest by a constable and deputy clerk, since if the arrest was illegal no action could be maintained for the reason that the constable and deputy clerk serving the warrant of arrest did not act as servants or agents of the city, but as public officers of the law, and if they exceeded their authority the plaintiff's remedy was against them. In support of its contention the cases of *Buttrick v. Lowell*, 1 Allen, 172, 79 Am. Dec. 721; *Kimball v. Boston*, 1 Allen, 417; and *Rossire v. Boston*, 4 Allen, 57, were relied upon.

And a town cannot be made liable for damages for an assault and false imprisonment by reason of the plaintiff's arrest for the nonpayment of city taxes, where the illegal acts of its officers or agents are not done under its authority previously conferred, or subsequently ratified. *Perley v. Georgetown*, 7 Gray, 464.

And a town is not responsible for damages occasioned by an arrest and false imprisonment of the plaintiff for the violation of a void town ordinance where the marshal and recorder of the town are without authority, express or implied, general or special, from the town to do the acts complained of as tortious and injurious, and are not its agents or officers. *Worley v. Columbia*, 88 Mo. 106, 110.

In *Purcell v. Long Island City*, 84 Hun, 439, an action to recover damages for malicious prosecution, the facts showed that the plaintiff had been arrested and imprisoned upon a charge brought against him at the instance of one of the school trustees of the city, but as the evidence was not sufficient to connect the defendant corporation with the acts of the trustees judgment was rendered for the municipal corporation. In this case the court stated that it was not then necessary for it to decide whether such an action could be maintained against a municipal corporation for the reason that the facts failed to connect the defendant corporation with the prosecution in the case.

In *Woodhull v. New York*, 150 N. Y. 450, Reversing 76 Hun, 390, the city was held not to be responsible for damages for an alleged false imprisonment arising out of the arrest of the plaintiff by a police officer appointed by the trustees of the Brooklyn bridge under N. Y. Laws 1875, chap. 300, § 8, under which laws the trustees had power to appoint an adequate police force to regulate and direct the travel over the bridge with the same authority as policemen of the cities of New York and Brooklyn.

In *Coley v. Statesville*, 121 N. C. 301, 316, the charter and ordinance of the city authorized the police to arrest persons found intoxicated upon its streets, and hold them until they were fit for trial or sober enough to give bail, and it was held that if the city appointed suitable police it incurred no liability for their action in making the arrest. In this case the ordinance authorized the arrest of such persons without warrants.

A corporation is not liable when the policeman for whose wrongful acts compensation is sought is acting under a municipal ordinance, and in an attempt to enforce its provisions or to apprehend one accused of violating them. *Alvord v. Richmond*, 3 Ohio N. P. 136.

In *Elliott v. Philadelphia*, 75 Pa. 347, 15 Am.

Rep. 581, 582, it was sought to make the city responsible for a false arrest by a police officer which resulted in the loss of the plaintiff's horse and injury to his carriage. The court held that it was unnecessary to enter into any discussion of the question, inasmuch as it regarded it as settled adversely to the plaintiff by the case of *Fox v. Northern Liberties*, 3 Watts & S. 103, which was an action wherein the superintendent of the police had illegally seized the plaintiff's horse under the pretense that he had violated the ordinance, and the plaintiff brought action for damages for tort.

In the last-mentioned case the court stated that it was not conceivable how any blame could be fastened upon a municipal corporation because its officer, who was appointed or elected for the purpose of causing to be observed and carried into effect the ordinances duly passed by the corporation for its police, either mistakenly or wilfully, under color of his office, committed a trespass; for in such a case it could not be said that the officer acted under any authority given to him, either directly or indirectly by the corporation, but must be regarded as having done the trespass of his own will, and that he alone must be looked to for compensation by the party injured. *Fox v. Northern Liberties*, 3 Watts & S. 103.

Again, the city was relieved from liability for the acts of its officers in *Royce v. Salt Lake City*, 15 Utah, 401, 407, for the false imprisonment of the plaintiff for vagrancy, for which alleged offense he had been arrested without a warrant and placed in custody and set at work breaking rock by the city marshal, although there was no sentence of hard labor imposed upon him, and he was injured while performing such work, as the acts of its officers were *ultra vires*, and were not done by them as the agents of the city.

So, in *Corsicana v. White*, 57 Tex. 382, the city was not liable for the wrongful acts of its authorities in a course of criminal proceedings taken against the plaintiff for obstructing a street, under which he was arrested and imprisoned, and money extorted from him, as, if liability existed at all, it was a personal liability attaching to the parties committing the trespass. To the same effect, *Harrison v. Columbus*, 44 Tex. 418.

In *Rusher v. Dallas*, 83 Tex. 152, where the plaintiff was arrested by the police officer without warrant and without affidavit made as required by law, upon the assumption that he had violated the city ordinance which provided for the conviction and punishment of "persons who permitted disorderly conduct" in their places of business; the city was not liable for damages, and the facts that the officers used unnecessary violence, and that the ordinance was not violated and therefore the arrest was unauthorized, and that the officer was incompetent, and that such incompetency was known or ought to have been known to the city, were held not to strengthen the plaintiff's case.

In order to make a corporation impliedly liable for the wrongful acts of an officer, it must not only be shown that the officer was its officer either generally as respects the particular wrong complained of, and not an independent public officer acting under his own discretion as to the manner of discharging his duties, nor as a public agent, but also that the wrong was done by such officer in the legitimate exercise of some duty of a corporate nature which devolved upon him by law, or by the express direction or authority of the corporation, and within the scope of its chartered powers. *Royce v. Salt Lake City*, 15 Utah, 401, 407.

But if the ordinance or by-law is enacted for 44 L. R. A.

the sole benefit of a municipal corporation and of its citizens the city will be liable for the acts of its officers in enforcing such ordinance or by-law. *McGraw v. Marion*, 98 Ky. 673, 680, wherein the plaintiff had been imprisoned by the town marshal for failure to pay a fine imposed under an unconstitutional ordinance, and for the arrest and imprisonment the city was held liable.

In this case the court followed the ruling of the Massachusetts court in *Thayer v. Boston*, 19 Pick. 513, 31 Am. Dec. 157, which held that a city was liable in an action on the case where an act was done on its authority which would warrant a like action against an individual, provided such act was done by the authority and order of the city government, or of those branches of the city government invested with jurisdiction to act for the corporation upon the subject to which the particular act related, or where after the act had been done it had been ratified by the corporation or by any similar acts of its officers. In that case, however, the action was brought against the city of Boston for an obstruction of a passageway by the officers of the city.

And police commissioners were held liable in an action for false imprisonment brought against them for the wrongful arrest and imprisonment of a person for appearing on the streets wearing the uniform of a police officer, upon the ground that the act was not judicial or authorized by law. *Bolton v. Vellines*, 94 Va. 393.

III. Application of the maxim *Respondet superior*.

In *Taylor v. Owensboro*, 98 Ky. 271, 278, wherein it was sought to make the city responsible for an alleged unlawful arrest, conviction, and confinement in the workhouse of the city for violation of a city ordinance relating to riots and unlawful assemblages and breaches of the peace, the court relied upon the doctrine of *respondet superior* as announced in 2 Dill. Mun. Corp. § 974, to the effect that if the corporation appoints or elects the officers or servants or agents it can control them in the discharge of their duties, and continue or remove them and hold them responsible for the manner in which they discharge their trusts, and if such duties relate to the exercise of corporate powers, and are for the benefit of the corporation in its local or special interest, they may justly be regarded as the agents or servants of the corporation, and the maxim *Respondet superior* would apply. But if they are elected or appointed by the corporation in obedience to a statute to perform public services not peculiarly local or corporate, but because such mode of selection was deemed expedient by the legislature in the distribution of governmental power and if they are independent of the corporation as to the tenure of office and the manner of the discharge of duties, they cannot be regarded as the agents or servants of the corporation for whose acts or negligence the city would be liable, but they are in such a case to be looked upon as public or state officers with such powers and duties as the statute conferred upon them, and the doctrine of *respondet superior* would not apply. This principle is also sustained by the cases of *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 280; *Jolly v. Hawesville*, 89 Ky. 279; *Prather v. Lexington*, 13 B. Mon. 550, 56 Am. Dec. 585; *McGraw v. Marion*, 98 Ky. 673.

If the officers are elected or appointed by the city government in obedience to a statute or charter power to perform a public service not particularly local or corporate in its nature, but because the mode of selection is deemed ex-

pedient by the legislature in distributing the powers of government if they are independent of the corporation as to tenure of office and the manner of discharging their duties,—then they are not to be regarded as servants or agents of the corporation, for whose acts or negligence it is impliedly liable; they would be regarded as public or state officers with such powers and duties as the statute confers upon them, and the doctrine of *respondet superior* is not applicable. *Royce v. Salt Lake City*, 15 Utah, 401, 407, *supra*.

The following cases which are strictly in line follow the above doctrine in holding that in such cases the municipality is not liable for false imprisonment and unlawful arrest, upon the maxim *Respondet superior*: *Dargan v. Mobile*, 31 Ala. 469, 70 Am. Dec. 503; *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Cook v. Macon*, 54 Ga. 468; *McElroy v. Albany*, 65 Ga. 388, 389, 38 Am. Rep. 791; *Odell v. Schroeder*, 58 Ill. 353; *Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154; *Peters v. Lindsborg*, 40 Kan. 654; *Buttrick v. Lowell*, 1 Allen, 172, 79 Am. Dec. 721; *Curran v. Boston*, 151 Mass. 505, 8 L. R. A. 243; *Worley v. Columbia*, 88 Mo. 106; *Alamango v. Albany County Supers.* 25 Hun, 551; *Albany v. Cunliff*, 2 N. Y. 165; *Smith v. Rochester*, 76 N. Y. 506; *Stoddard v. Saratoga Springs*, 127 N. Y. 261; *Fox v. Northern Liberties*, 3 Watts & S. 103; *Elliott v. Philadelphia*, 75 Pa. 347, 15 Am. Rep. 501; *Rusher v. Dallas*, 83 Tex. 152; *Royce v. Salt Lake City*, 15 Utah, 401, 407; *Little v. Madison*, 49 Wis. 605, 35 Am. Rep. 793; *Kansas City v. Lemen*, 12 U. S. App. 640, 57 Fed. Rep. 905, 906, 6 C. C. A. 627.

As to when the maxim would apply, see the case of *Woodhull v. New York*, 130 N. Y. 450, 454, *supra*, II.

IV. Liability as affected by ratification.

It has been held that as a city has no power to authorize a police officer to commit an unlawful act, and cannot be held liable therefor, it cannot be held responsible for the same by ratification. *Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154.

In the above case it was sought to make a city responsible for the acts of a police officer in arresting the plaintiff under pretense of enforcing an ordinance of the city providing for the punishment of intoxicated persons. The plaintiff alleged that he was not drunk, but that nevertheless the city ratified the acts of the deputy marshal and caused him to be imprisoned maliciously, and without probable cause prosecuted him for the offense of which he was finally acquitted.

It is not within the power of a city to authorize its officers to perform an illegal act which will render them liable for an action of false imprisonment, and if the city has no power in the first place to authorize the commission of such act, it can have no power to ratify it after it has been performed. *Peters v. Lindsborg*, 40 Kan. 654.

And as a city has no power to authorize a police officer to commit an unlawful act, what it cannot do directly it cannot do indirectly by ratification. *Blake v. Pontiac*, 49 Ill. App. 543, 550, which was an action for false imprisonment and unlawful detention.

And it has been held that if a town does not authorize its treasurer to commit the plaintiff to prison for not paying a tax, he does not ratify the act of imprisonment by paying the collector's fees, and the city is not liable. *Perley v. Georgetown*, 7 Gray, 464.

In the above case the court further stated that even if the payment of the collector's fees 44 L. R. A.

for the commitment of the plaintiff, and the jailer's charges, had been paid by the town, such act would not render the town liable in an action for false imprisonment, as such payment might have been made for different purposes than that of ratifying or justifying the act of the officer.

V. Reasons for the rule.

The authorities place this kind of a servant on special grounds. He is a police officer; his duties do not lie in the line of special private duties or rights of the corporation, but they are duties connected with the public peace in which the state is interested, and in a very wide sense he is a state officer; many of his duties are connected with the prevention and punishment of crime, and as to such officers the ruling is almost universal that the corporation, though it appoints them, is not liable for torts committed by them. *Cook v. Macon*, 54 Ga. 468.

The nonliability of municipalities in such cases is based upon the ground that they are subdivisions of the state, created in part for convenience in enabling the state to enforce its laws in each locality with promptness, and simultaneously, when occasion requires it, in the different subdivisions within its boundaries, and that while enforcing those laws which pertain to the general welfare of the state, and to the people generally in all its subdivisions, the state acts through these subdivisions and uses them and their officers as its agents, for the purposes for which a state government is instituted and granted sovereign power for state purposes; and further, that the state has not made them the insurers of public or private interest, or liable for any careless or willful acts of its officers. *Alvord v. Richmond*, 2 Ohio N. P. 136.

In the distribution of the powers of government the legislature has made municipal corporations special public agents, and delegates to them the authority, to a limited extent, to enact and enforce prescribed police regulations within their respective localities, and in the execution of such laws the officers of the corporation discharge duties for the public rather than the corporation, and this is true whether the laws were enacted by the state or by the corporate authorities. Any officer of a municipal corporation whose duty in whole or in part is to enforce observance of any such laws or ordinances, while so engaged is acting for the public, and is not the agent of the municipality in its domestic or corporate character. *Laurel v. Blue*, 1 Ind. App. 128, *et supra*.

The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature, and in the enforcement of such by-laws officers act in their public capacity, and not as agents of the city. *Buttrick v. Lowell*, 1 Allen, 172, 79 Am. Rep. 721, 722.

The decisions are based upon the doctrine that all laws and ordinances intended to secure the peace and good order, or to preserve the health and morals, of the public, are in the nature of police regulations, and are essentially governmental in their character. Their enactment and enforcement are functions of the sovereignty, and they are designed for the benefit of the public as distinguished from the municipality. *Laurel v. Blue*, 1 Ind. App. 128.

And the duty imposed in enforcing an ordinance in the nature of a police regulation which the city has power to enact and which is passed as necessary for the good government of the city

or town, is one which is owed to the public. *Vaughtman v. Waterloo*, 14 Ind. App. 649, 652.

Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature and their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising the functions of government, but this does not render the city liable for their unlawful or negligent acts, as the detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which these officers and constables are intrusted, are derived from the law, and not from the city or town under which they hold their appointment, and for the mode in which they exercise their powers and duties a city or town cannot be held liable. *Buttrick v. Lowell*, 1 Allen, 172, 79 Am. Dec. 721, 722.

The above theories are further illustrated and adopted by the following cases: *Dargan v. Mobile*, 31 Ala. 469, 70 Am. Dec. 505, 510; *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1, 3; *Grumblin v. Washington*, 2 MacArth. 578, 29 Am. Rep. 626, 628; *Harris v. Atlanta*, 62 Ga. 290; *Odell v. Schroeder*, 58 Ill. 353; *Blake v. Pontiac*, 49 Ill. App. 543, 551; *Lafayette v. Timberlake*, 88 Ind. 830; *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Anderson v. East*, 117 Ind. 126, 2 L. R. A. 712; *Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154; *Peters v. Lindsborg*, 40 Kan. 654; *Kansas City v. Lemmen*, 12 U. S. App. 640, 57 Fed. Rep. 905, 906, 6 C. C. A. 627; *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585; *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260, 263; *Taylor v. Owensboro*, 98 Ky. 271, 278; *Curran v. Boston*, 151 Mass. 505, 3 L. R. A. 243; *Dunbar v. Boston*, 112 Mass. 75; *Kimball v. Boston*, 1 Allen, 417; *Rossire v. Boston*, 4 Allen, 57; *Gullikson v. McDonald*, 62 Minn. 278, 279; *Worley v. Columbia*, 88 Mo. 106, 109; *Woodhull v. New York*, 150 N. Y. 450, 454; *Rushier v. Dallas*, 83 Tex. 152; *Boyce v. Salt Lake City*, 15 Utah, 401, 407; *Fox v. Northern Liberties*, 3 Watts & S. 103; *Elliott v. Philadelphia*, 75 Pa. 347, 15 Am. Rep. 591; *Trescott v. Waterloo*, 26 Fed. Rep. 592, 593.

VI. English and Canadian decisions.

In *Clark's Case*, 5 Coke, 64a, which was an

action of false imprisonment, the defense was that the imprisonment was justified for the reason that power had been given the city to make the ordinance in question, for refusal to obey which the plaintiff was imprisoned. The court held that the mayor and city authorities had no power to make the by-law including the imprisonment, and that it was no plea that the by-law was made with the consent of the plaintiff and other citizens.

In *Walker v. Montreal*, 4 Leg. N. (Super. Ct.) 215, the plaintiff was arrested for indecent exposure under the Canadian vagrant act, 32 & 33 Vict. chap. 28, by a municipal policeman without a warrant some time after the offense had occurred. The city was held liable in damages as under the act the arrest, after the interval of time, was unauthorized and illegal.

In *McSorley v. St. John*, 6 Can. S. C. 531, the plaintiff had been arrested and imprisoned for nonpayment of an assessment made for street purposes under a statute relating to the streets of the defendant city. He brought action for the arrest and false imprisonment. It was held that the party who issued the warrant (the receiver of taxes) which was founded on a void assessment, committed a trespass, and that he was at the time a servant of the corporation and under its control, and specially appointed to collect and levy the amount of the assessment, the maxim *respondet superior* applied, and that therefore the city was liable.

In this case, however, there was a dissenting opinion by Chief Justice Ritchie, and also by Justice Taschereau, in which they inclined to the opposite opinion, and cited the case of *Maxmillian v. New York*, 62 N. Y. 185, 20 Am. Rep. 468, among other American authorities supporting the contrary contention.

In *Longuenil v. Brals*, 11 Rev. Leg. (Montreal Super. Ct.) 503, a barrier erected by a municipal corporation in a street not yet opened to the public was broken through by a person upon a claim of right to pass through the street. He was arrested on the spot by a constable and afterwards liberated on account of the informality in the warrant subsequently preferred. His action against the municipality for false imprisonment and illegal arrest failed inasmuch as the erection of the barrier was within its rights. E. W.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois, *ex rel.*
Charles S. DENEEN, State's Attorney,
App't.,

v.

Robert M. SIMON.

(176 Ill. 165.)

1. Judicial power is not conferred upon a registrar of deeds within the prohibition of a constitutional provision separating the departments of government by a statute requiring him to make certain entries when it appears to him that the person intending to create a charge on property "has the title and right to create such charge," and that the person in whose favor it is to be made "is entitled by the terms of the act to have the

same registered,"—especially where a party aggrieved is given the right to apply to a court of equity for relief.

2. A statute permitting a registrar of deeds to record a transfer of land held in trust upon the written opinion of two examiners that the transfer is in accordance with the true intent and meaning of the trust, which registration shall be conclusive in favor of the grantee, merely abrogates the rule which requires the purchaser of trust property to see to the application of the purchase money, and does not confer judicial power upon the registrar.
3. The rule of law as to the notice afforded by the registration of a transfer of property which is subject to a condition or trust may be changed by the legislature.
4. A statute providing for the registration of land titles after they are established in a court of equity may be upheld as against all upon whom service of process

NOTE.—As to the constitutionality of Torrens registration acts, see also *People, Kern, v. Chase* (Ill.) 36 L. R. A. 103, and *State, Monnett, v. Guilbert* (Ohio) 38 L. R. A. 519.
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is properly made, although it contains a void provision permitting judgment against a resident of the state notified only by publication.

5. A landowner is not deprived of his property without due process of law by a statute which provides that after the title has been judicially determined and registered, the tenure of the owner, the right of transfer, and encumbrance, and all rights subsequently accruing shall be determined in accordance with the rules prescribed by that statute.
6. A statute making a judicial determination of title to land forever binding and conclusive upon all persons after the lapse of two years may be given effect against parties to the proceeding and persons who must bring legal proceedings to establish their rights, although it would be void in favor of persons in possession of all they claim who were not parties to the proceeding.
7. A statute will be construed as a limitation law if it can be upheld by such construction while a literal construction of it would destroy vested rights.
8. That a statute is to take effect only after a favorable vote by the counties does not make it void as an attempt to delegate legislative power or as making the law a special one.

(Boggs, J., dissents.)

(October 24, 1898.)

APPEAL by relator from a judgment of the Criminal Court for Cook County in favor of respondent in a quo warranto proceeding to determine by what authority respondent was exercising the powers and duties of the office of registrar of titles in and for the County of Cook. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles S. Deneen, with **Messrs. Pence & Carpenter, Shope, Mathis, Barrett, & Rogers**, for appellant:

The act of the general assembly entitled "An Act Concerning Land Titles," approved May 1, 1897, is unconstitutional because it purports to vest the registrar or the registrars and examiners of titles with judicial power.

People, Kern, v. Chase, 165 Ill. 527, 36 L. R. A. 105.

Equitable liens arising in various ways, based upon facts *dehors* the record and which it is impossible to have appear upon the record, are attempted to be covered by conferring upon the registrar judicial power to pass upon the validity of such claims, and that, too, upon *ex parte* affidavits.

The power of the registrar touching all these subjects is a judicial power which affects the rights of individuals.

State, Atty. Gen., v. Guilbert, 56 Ohio St. 575, 38 L. R. A. 519.

Section 46 of the act reads: "The bringing of land under this act shall imply an agreement which shall run with the land, that the same shall be subject to the terms of the act and all amendments and alterations thereof."

This cannot amount to a stipulation to 44 L. R. A.

submit all controversies to the arbitration of the registrar.

The act of registration is only a declaration by the registered owner, and not a covenant or agreement.

The covenantor binds no one but himself, and may revoke his act prior to the time when any other person obtains rights thereunder.

Hamilton v. Chicago, B. & Q. R. Co. 124 Ill. 235.

An agreement to arbitrate, if this be an agreement, cannot be specifically enforced, and any party in interest may revoke the same.

1 Am. & Eng. Enc. Law, pp. 664, 667: *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Scott v. Avery*, L. R. 5 H. L. Cas. 811; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915; *Greenhood*, Pub. Pol. 468.

Even if this proceeding could be held to be an arbitration, still it could have no force, inasmuch as no notice is required to be given to the parties in interest.

Ingraham v. Whitmore, 75 Ill. 31; *Hoagland v. Creed*, 81 Ill. 506; *Klokke v. Dodge*, 103 Ill. 125; *Leman v. Sherman*, 117 Ill. 657.

The registrar's determination as an officer is given the force and effect of a judgment: the judgment is required to be entered of record and a certificate is issued upon the basis of such judgment, and it is notice to all the world.

Judicial power cannot be conferred by consent, either upon an individual or upon a court not invested with it by law.

Hoagland v. Creed, 81 Ill. 506; *Fahs v. Darling*, 82 Ill. 142; *Bishop v. Nelson*, 83 Ill. 601; *Cobb v. People*, 84 Ill. 511; *Fleischman v. Walker*, 91 Ill. 318; *Richards v. Lake Shore & M. S. R. Co.* 124 Ill. 516.

There is no reference in the act that he is to sit as arbitrator, but it does appear from the act that parties were entitled to expect from the registrar valid, judicial action as an authorized court. Consent cannot empower him to exercise these powers.

Fahs v. Darling, 82 Ill. 142; *Richards v. Lake Shore & M. S. R. Co.* 124 Ill. 516.

The statute is unconstitutional because the proceedings providing for initial registration do not constitute "due process of law."

A decree undertaking to bind persons residing within the state, and who do not conceal themselves, upon substituted service, and not upon actual service of summons, is a nullity, and cannot bind such parties.

People, Atty. Gen., v. Guilbert, 56 Ohio St. 575, 38 L. R. A. 519; *Brown v. Leves Comrs.* 50 Miss. 468; *Bardwell v. Collins*, 44 Minn. 97, 9 L. R. A. 152; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918; 6 Am. & Eng. Enc. Law, p. 43; *Cooley*, Const. Lim. 5th ed. (*404,) 500; *Webster v. Reid*, 11 How. 459, 13 L. ed. 770; *Cook v. Union Bank*, 14 New South Wales, L. R. (Eq.) 230; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Blatchford v. Neuberry*, 99 Ill. 11.

A statute which requires that the owner of property in actual possession, who has

never been cut off by any judicial proceedings, may be deprived of his estate unless he shall find out about such judicial proceedings and bring suit within two years thereafter, is not a limitation law but an act of confiscation, and it is unconstitutional. It is an effort to divest property by act of the legislature.

Dingey v. Paaton, 60 Miss. 1038; *Baker v. Kelley*, 11 Minn. 480; *Groesbeck v. Seeley*, 13 Mich. 329; *Cooley*, Const. Lim. *366; *Harding v. Butts*, 18 Ill. 503; *Newland v. Marsh*, 19 Ill. 376; *Higgins v. Crosby*, 40 Ill. 260; *Paullin v. Hale*, 40 Ill. 274; *Steele v. Gellatly*, 41 Ill. 39; *Orthwein v. Thomas*, 127 Ill. 569, 4 L. R. A. 434; *Newell v. Montgomery*, 129 Ill. 58; *Miller v. Pence*, 132 Ill. 149; *Eldridge v. Kuehl*, 27 Iowa, 160; *Wain v. Shearman*, 8 Serg. & R. 357.

Section 39 of this act provides that the first certificate of registration shall for two years be prima facie evidence that the provisions of the law have been complied with, and that the same has been issued in compliance with a valid order or decree, and that the title to the land is as therein stated; and after that it shall be conclusive evidence of the same facts.

This throws upon the real owner, who may be in adverse possession, or who may be in constructive possession, the burden of disproving the legal effect of the certificate, and of proving by the preponderance of evidence his own title, thus changing that rule inherent in the maxim "due process of law" which has always presumed the defendant to be innocent or in the right until the contrary is proved.

Wynehamer v. People, 13 N. Y. 445; *State Bd. of Edu. v. Bakewell*, 122 Ill. 339; *Cummings v. Missouri*, 4 Wall. 328, 18 L. ed. 364; *Plimpton v. Somerset*, 33 Vt. 283; *King v. Hopkins*, 57 N. H. 334; *Copp v. Heniker*, 55 N. H. 179, 20 Am. Rep. 194; *Francis v. Baker*, 11 R. I. 103, 23 Am. Rep. 424; *State v. Benwick*, 13 R. I. 211, 43 Am. Rep. 26; *People v. Lyon*, 27 Hun, 180; *Hand v. Ballou*, 12 N. Y. 543.

The presumption of innocence is one of those fundamental and unchangeable rules of the common law comprehended in the phrase "due process of law" and cannot, therefore, be changed by legislation.

Wynehamer v. People, 13 N. Y. 445; *State Bd. of Edu. v. Bakewell*, 122 Ill. 339; *Plimpton v. Somerset*, 33 Vt. 283; *King v. Hopkins*, 57 N. H. 334.

The statute was a delegation of legislative power, and it was unconstitutional for the legislature to provide it should go into effect by counties only after a favorable vote of the electors of each county.

Cooley, Const. Lim. 5th ed. *191 (228); *Opinions of the Justices*, 160 Mass. 586, 23 L. R. A. 113; *People, Grinnell, v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793.

It is not a general, but a special, law.

People, Klokke, v. Wright, 70 Ill. 388; *People, Miller, v. Cooper*, 83 Ill. 594; *People, Grinnell, v. Hoffman*, 116 Ill. 598, 56 Am. Rep. 793.

All classification must be based upon sub-
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stantial distinctions which make one class really different from another.

State, Richards, v. Hammer, 42 N. J. L. 436; *Millet v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Frorer v. People, School Fund*, 141 Ill. 171, 16 L. R. A. 492; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79.

Being a special law it is unconstitutional because upon subjects as to which special legislation is prohibited, and because in some particulars obnoxious to special grants of the Constitution.

People v. Loomis, 96 Ill. 377; *Klokke v. Dodge*, 103 Ill. 125.

If the purpose of a law "is to accomplish a single object only, and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without the aid of the invalid portion.

People, Miller, v. Cooper, 83 Ill. 595; *Cooley*, Const. Lim. 6th ed. 211, 212.

On petition for rehearing.

If we concede that the acts of the registrar under §§ 47, 68, and 69 are ministerial in their character, then they may be disputed and set aside in a proper judicial proceeding, and any statute which makes such acts conclusive is of itself unconstitutional.

United States v. Stone, 2 Wall. 525, 17 L. ed. 765; *Ballance v. McFaddon*, 12 Ill. 317; *Townsend v. Radcliffe*, 63 Ill. 9; *Andrews v. People*, 75 Ill. 605; *Larson v. Dickey*, 39 Neb. 478; 6 Am. & Eng. Enc. Law, 2d ed. pp. 1050, 1051.

The legislature cannot indirectly dispose of a man's title by prescribing conclusive rules of evidence.

6 Am. & Eng. Enc. Law, 2d ed. pp. 1050, 1051; *Curry v. Hinman*, 11 Ill. 420; *Andrews v. People*, 75 Ill. 605; *Larson v. Dickey*, 39 Neb. 463; *Wantlan v. White*, 19 Ind. 470; *Blackwell, Tax Titles*, 100 *et seq.*; also 5th ed. §§ 847-1120; *Marx v. Hanthorn*, 148 U. S. 172, 37 L. ed. 410.

Any statute which undertakes to deprive the courts of judicial power in any particular case is so far unconstitutional, null, and void.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9; 1 Am. & Eng. Enc. Law, pp. 664-667; *Leman v. Sherman*, 117 Ill. 657.

Mr. Harvey B. Hurd, for appellee:

A part of a statute may be declared valid while another part of the same statute may be held to be void.

Quincy v. Bull, 106 Ill. 337; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141; *Hinze v. People*, 92 Ill. 406; *Meyers v. People*, 67 Ill. 503.

There are many acts that are of a quasi judicial nature which may be done by other than the judiciary.

People, Grinnell, v. Hoffman, 116 Ill. 587, 56 Am. Rep. 793; *Johnston v. District of Columbia*, 118 U. S. 19, 30 L. ed. 75; *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680; *Mills v. Brooklyn*, 32 N. Y. 498; *Springer v. Walters*, 37 Ill. App. 332; *Wright v. Chicago*, 48 Ill. 286; *Crawford v. People*, 82 Ill. 557; *Lake v. Decatur*, 91 Ill. 597; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *Own-*

ers of Lands v. People, Stookey, 113 Ill. 296; *People, Longenecker, v. Nelson*, 133 Ill. 565; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683; *Reid v. Morton*, 119 Ill. 118.

The trial of right of property before a sheriff with a jury is not a judicial proceeding.

Rowe v. Bowen, 28 Ill. 116.

The act is permissive and not compulsory, and does not deprive anyone of his property without "due process of law" against "the law of the land," nor is it class legislation.

Burdick v. People, 149 Ill. 600, 24 L. R. A. 152.

The act is general and not "special" or "local."

People, Klokke, v. Wright, 70 Ill. 388; *People, Miller, v. Cooper*, 83 Ill. 585; *People, Grinnell, v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793; *West Chicago Park Comrs. v. McMullen*, 134 Ill. 176, 10 L. R. A. 215; *Williams v. People*, 121 Ill. 84; *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *People, Meyer, v. Hazelwood*, 116 Ill. 319.

The contention that the legislature is under some necessity to except the rights of infants and others under disability from the operation of limitations or the binding effect of rules of evidence is without foundation.

Meeks v. Vassault, 3 Sawy. 206; *Bozeman v. Browning*, 31 Ark. 364; *Rogers v. Brown*, 61 Mo. 187; *Swearingen v. Robertson*, 30 Wis. 462.

A statute of limitations is at least good as a shield, and when possession has been taken by or under the person in whose favor it has run, it may be used as a sword even against the patent owner.

Newland v. Marsh, 19 Ill. 376; *Hinchman v. Whetstone*, 23 Ill. 185; *Paullin v. Hale*, 40 Ill. 274; *Hale v. Gladfelder*, 52 Ill. 91; *Meacham v. Winstanly*, 77 Ill. 269; *McDuffee v. Sinnott*, 119 Ill. 449; *Gage v. Hampton*, 127 Ill. 87, 2 L. R. A. 512; *Gage v. Smith*, 142 Ill. 191.

The question of what shall sustain the running of a statute of limitation is a question for the legislature and not for the courts, provided always the terms and conditions of the bar are reasonable.

Stearns v. Gittings, 23 Ill. 387.

While the time and opportunity for the assertion of the right must be reasonable, and while the act cannot transfer title, yet the Constitution has not prescribed, nor can the courts prescribe, the provisions which such an act must contain.

The burnt records act can only be sustained, as to many persons, upon the same theory.

Bertrand v. Taylor, 87 Ill. 235; *Mulvey v. Gibbons*, 87 Ill. 367; *Heacock v. Lubuke*, 107 Ill. 396; *Bradish v. Grant*, 119 Ill. 606; *Heacock v. Hosmer*, 109 Ill. 245; *Gage v. Caraher*, 125 Ill. 447; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909.

Messrs. Oliver & Mecartney, also for appellee:

If there are vested interests in a class, there is a class in existence competent to 44 L. R. A.

maintain or defend an action and represent the class not ascertained.

A decree of court operating upon such class in existence will bind the class not ascertained, and if there is no class in being to represent such class not ascertained, it is because there are "no vested interests to be protected."

In such cases neither decrees of court nor acts of legislatures take away vested rights.

Miller v. Texas & P. R. Co. 132 U. S. 662, 33 L. ed. 487; *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015.

There can be no valid objection to any act of the legislature that it deprives a person of what he does not possess.

Price v. Sessions, 3 How. 624, 11 L. ed. 755; *Van Inwagen v. Chicago*, 61 Ill. 31; *Weidenger v. Spruance*, 101 Ill. 278.

There is no rule inherent in the maxim "due process of law" that rules of evidence concerning burden of proof must remain unchanged.

Meadowcroft v. People, 163 Ill. 56, 35 L. R. A. 176; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 683; *Gage v. Caraher*, 125 Ill. 447.

The provision that the act should go into effect by counties only after a favorable vote of the electors of each county is not a delegation of legislative power.

Barto v. Himrod, 8 N. Y. 483; *Smith v. Janesville*, 26 Wis. 291; *State v. Parker*, 26 Vt. 357.

The law is general because it operates alike upon all brought within the relations provided for, and extends to all persons doing an act which brings them into that relation.

People, Grinnell, v. Hoffman, 116 Ill. 587, 56 Am. Rep. 793; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338; *People, Klokke, v. Wright*, 70 Ill. 388.

The act complained of is a general law, but it is sufficiently local in its operation and application to particular districts or localities to render it proper and constitutional to be submitted to the voters of any particular county for final adoption.

Opinions of the Justices, 160 Mass. 586, 23 L. R. A. 113; *People v. Reynolds*, 10 Ill. 1; *Potwin v. Johnson*, 108 Ill. 76; *Home Ins. Co. v. Swigert*, 104 Ill. 653; *People, Wilson, v. Salomon*, 51 Ill. 37; *Erlinger v. Boneau*, 51 Ill. 94; *Guild v. Chicago*, 82 Ill. 472.

Laws which bear alike upon all members belonging to the same class are general laws, and are laws which are equal in effect and uniform in operation, according to the construction of the courts.

Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338.

Cities, towns, and villages may be classified according to population.

People, Klokke, v. Wright, 70 Ill. 388; *Potwin v. Johnson*, 108 Ill. 70; *People, Grinnell, v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793.

The legislature could provide that our very circuits or the judges or one or more of

them could perform the duties of registrar and hear evidence, etc., and follow the exact methods of ordinary cases at law, and all this would not be an exercise of judicial power.

United States v. Ferreira, 13 How. 40, 14 L. ed. 42; *Donahue v. Will County*, 100 Ill. 94; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Missouri P. E. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463.

Messrs. George W. Smith and Theodore Sheldon, with *Mr. Robert S. Iles*, also for appellee.

Wilkin, J., delivered the opinion of the court:

This action originated in the court below upon an information in the nature of a quo warranto against appellee, requiring him to show by what authority of law he was exercising the powers and duties of the office of registrar of titles in and for the county of Cook. In answer to the information, the defendant set up the act of the legislature entitled "An Act Concerning Land Titles," approved and in force May 1, 1897, commonly known as the "Torrens Law." Laws 1897, p. 141. The relator filed a general demurrer to this answer, which was overruled, and the information dismissed. The ground of the demurrer was that the act under which the respondent sought to justify is unconstitutional and void, and that is the question now presented for our decision. The act is very voluminous, and some of its provisions are not skilfully drafted. Its validity is attacked on numerous grounds, and the briefs and arguments on either side are very extended. We will endeavor to consider the objections raised to the law, in the order in which they are discussed by counsel.

It is first insisted that the act confers judicial powers upon the registrar of titles, or upon him and the examiners of title, in violation of the Constitution of this state. A somewhat similar act, passed in 1895, was held invalid, on that ground, in *People, Kern, v. Chase*, 165 Ill. 527, 36 L. R. A. 105. By the provisions of the law of 1895, the registrar was clothed with power to determine the ownership of land when application was made for the initial registration thereof, and to issue his certificate accordingly. The present act provides that the ownership shall be determined by a decree in equity entered in a court of competent jurisdiction, upon which decree the registrar shall issue the first certificate of registration. In this regard his duties under the present law are clearly ministerial only, and the fatal objection to the former act is therefore removed. But it is insisted that the law is still vulnerable, in that it vests judicial power in the registrar in the performance of his duties as to subsequent registrations. Waiving the question whether this would, if true, necessarily vitiate the whole act, is the position tenable? Like a mere recorder, the registrar is required to file all deeds, mortgages, leases, and other instruments affecting the title to land, and make proper notations upon the instruments and upon the record. He is to keep a record, to be known as the 44 L. R. A.

"Register of Titles," in which must be entered the original and all subsequent certificates of title, and such notations as to liens, encumbrances, and the like as are requisite to show the true condition of the title. When any instrument is filed with him which is intended to create a charge, lien, or encumbrance upon land, it is made his duty, by § 60, to enter a memorial upon the register, and also upon the original certificate. Thus far his duties are clearly and simply ministerial. But it is contended this § 60 authorizes him to determine the validity of liens, encumbrances, or charges, and the argument is that this is an exercise of judicial power, which, under our Constitution, can be conferred upon no officer or tribunal save those which belong to the judicial department. The language of the section applicable to this question is as follows: "It appearing to the registrar that the person intending to create the charge has the title and right to create such charge, and that the person in whose favor the same is sought to be created is entitled by the terms of this act to have the same registered, he shall enter upon the proper folium of the register, and also upon the owner's certificate, a memorial of the purport thereof," etc. It will be noticed that the provisions in case of a transfer of the property are substantially the same. Section 47 says: "Upon its being made to appear to the registrar that the transferee [evidently intending transferor] has the title or estate proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided, a new certificate," etc. Article 3 of the Constitution of 1870 reads as follows: "The powers of the government of this state are divided into three distinct departments,—the legislative, executive, and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Rev. Stat. p. 60. The question therefore is, Can the legislature devolve the duties named upon an officer not a member of the judicial department?

That the duties mentioned are judicial in their nature may be admitted, but it does not necessarily follow that their exercise is prohibited by the constitutional provision to all but officers belonging to the judicial department. Numerous instances may be cited, as is done in *Owners of Lands v. People, Stookey*, 113 Ill. 296 (referred to in *People, Kern, v. Chase*, 165 Ill. 527, 36 L. R. A. 105), where executive and legislative officers are authorized to exercise powers which in a sense are judicial, and the laws imposing such duties held not to be in violation of the constitutional provision quoted. These duties or powers are generally and properly termed "quasi judicial," to distinguish them from those which are "judicial," in the sense of belonging to the judicial department exclusively. In theory, all governmental power is divided into the three named divisions, and upon a casual consideration the division

would seem to present no difficulty, but in the practical application of the principles involved courts have been compelled to observe that the line of the demarcation between the exclusive powers of the three departments is far from clear. 6 Am. & Eng. Enc. Law, 2d ed. p. 1007. Judge Cooley, in his work on Constitutional Limitations on the Legislative Branch of the Government, has given a definition of "judicial power." It is this: "The power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws." As a general definition of the functions of the judicial department, it is sufficiently accurate, and we adopted it in the case of *People, Kern, v. Chase*, 165 Ill. 527, 36 L. R. A. 105. We then thought, and are of the opinion still, that it was applicable to that case; the functions of the registrar, under the act of 1895, being not quasi judicial, merely, but strictly so, and such as are usually exercised by the courts alone, constituting the exercise of judicial power within the constitutional prohibition. Under the present act, his duties more nearly resemble those frequently exercised by members of the executive department. The definition given by Judge Cooley does not attempt to mark the line between those quasi judicial functions, which may be vested elsewhere, and those strictly judicial, which can be reposed nowhere save in the courts; and for that reason it cannot be properly adopted in this case. As we said in another case: "It may in many cases be a matter of difficulty to determine the precise line which divides the executive and judicial functions. It has been said that where the functionary hears, considers, and determines, then he performs judicial acts. This definition is not strictly accurate. . . . It embraces cases that are not judicial, and hence is too comprehensive." *Donahue v. Will County*, 100 Ill. 94, on page 108. And, appreciating the difficulty of defining the limits of the several departments of government, we also said, in an earlier case: "Nevertheless, when we come to apply them to actual controversies growing out of the varied relations which the citizens sustain to the state and to one another, we encounter doubts and difficulties of the gravest character. Just where the dividing line is to be drawn between judicial and legislative power, with respect to certain subjects, often presents questions about which enlightened courts and eminent jurists widely differ. So, while the powers of courts seem so very simple and clearly defined, yet, in the application of them to actual cases, their proper limits are often difficult to determine." *Dodge v. Cole*, 97 Ill. 338, on page 357. Also: "The 1st and 2d sections of the first article of the Constitution [of 1818] divide the powers of government into three departments,—the legislative, executive, and judicial,—and declare that neither of these departments shall exercise any of the powers properly belonging to either of the others, except as expressly permitted. This is a declaration of a fundamental principle, and, although one of vital importance, it is to be understood

in a limited and qualified sense. It does not mean that the legislative, executive, and judicial power should be kept so entirely separate and distinct as to have no connection or dependence the one upon the other; but its true meaning, both in theory and practice, is, that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many." *Field v. People, McClelland*, 3 Ill. 79, on page 83. Judge Story, in his work on the Constitution, says: "But when we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principles of a free Constitution." 1 Story, Const. 5th ed. § 525. "Notwithstanding the memorable terms in which this maxim of a division of powers is incorporated into the bills of rights of many of our state Constitutions, the same mixture will be found provided for, and indeed required, in the same solemn instruments of government. . . . Indeed, there is not a single Constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it. Id. p. 395, § 527. In the case of *Den, Murray, v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372, in discussing whether the issuing of a distress warrant by the solicitor of the treasury was the exercise of executive or of judicial power, the Supreme Court of the United States (page 280, 15 L. ed. 376) says: "It is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. . . . We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding, and the question is, Whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy, and we are of opinion it is not."

From these authorities, it is apparent that the mere fact that the registrar is required by this act to inquire into the existence of certain facts, and to apply the law

thereto, in order to determine what his official conduct shall be, and that his action may affect private rights, does not constitute the exercise of judicial power, strictly speaking. It is not the intention of these two sections (60 and 47) to provide a tribunal for the adjudication of disputes concerning land titles. The primary purpose is the issuing of the certificate, and the exercise of the judgment of the registrar is incidental. The prohibition in question "has never been applied to those cases where judgment is exercised as incident to the execution of a ministerial power." *Owners of Lands v. People, Stookey*, 113 Ill. 296. The powers exercised by the registrar under this law are analogous to those exercised by the commissioner of patents. A power of decision is given to that officer in many matters, not only between the government and the patentee, but also between different claimants, as to priority, patentability, and like matters, and in the performance of these duties it has never been considered that he was encroaching upon the judicial domain. They are also, in a measure, like the duties performed by officers of the land office. Duties of a similar nature, involving judgment or discretion, and the application of the law to the facts, are devolved both under the state and Federal laws upon many other executive officers, legally. In some instances, it is even held that in the exercise of such judgment the officer is free from judicial interference. But in the case of the registrar this act provides that any person feeling himself aggrieved by the act or neglect of this officer, in any matter pertaining to the duties required of him, may file a petition in equity in the proper court, making the registrar and other persons interested parties defendant, and that the court may proceed therein as in other cases in equity, and may make such order or decree as shall be according to equity in the premises and the purport of the act. This, with the well-known jurisdiction of the courts in mandamus, injunction, rescission, cancellation, bills of relief, and the like, will effectually protect the citizen against any arbitrary conduct on the part of the officer.

Recurring to the duties of the registrar, we find that in case of a tax sale or judgment, or levy under an attachment or execution, or in case of a mechanic's lien, the registrar, upon the filing of the proper certificate, enters a memorial thereof upon his record, and, in case the lien ripens into a title, the former certificate of title is canceled, and a new one issued to the proper party. These duties do not differ in character from those already mentioned, and what has been said is equally applicable thereto, also. Particular stress, however, is laid by counsel for appellant upon the contention that the duties of the registrar as to the subsequent registration of land held in trust upon conditions or limitations are the exercise of judicial power, in violation of the terms of the Constitution. The act requires, where the land is subject to a trust, condition, or limitation, that the original certificate issued shall contain the words "in trust," "upon conditions," or "with limita-

tions," as the case may be. When such land is to be transferred, it is provided that the registrar shall not issue a new certificate, nor shall any transfer of or charge upon or dealing with the land be made, unless pursuant to the order of some court, or upon the written opinion of the two examiners that such transfer, charge, or dealing is in accordance with the true intent and meaning of the trust, condition, or limitation, whereupon he shall proceed to register the title; and such registration is to be conclusive in favor of the grantee, and those claiming under him in good faith and for a valuable consideration, that such transfer, charge, or other dealing is in accordance with the true intent and meaning of the trust, condition, or limitation. Sections 68, 69. If the registration be made pursuant to the order or finding of a court of competent jurisdiction, the acts of the registrar are purely ministerial; but, if made upon the opinion of the two examiners, he is required to exercise a judgment of his own. These duties do not differ materially from those already examined, except that here the decision is made conclusive, in favor of the person taking the transfer in good faith and for a valuable consideration, that the transfer or charge is in accordance with the true intent and meaning of the trust, condition, or limitation. This does no more than abrogate the rule in equity which requires the purchaser of trust property to see to the application of the purchase money, and the inclination of courts now is to withdraw from that rule. We recently said, quoting from Judge Story: "These are some of the most important and nice distinctions which have been adopted by courts of equity upon this intricate topic, and they lead strongly to the conclusion, to which not only eminent jurists, but also eminent judges, have arrived, that it would have been far better to have held in all cases that the party having the right to sell had also the right to receive the purchase money, without any further responsibility on the part of the purchaser as to its application." *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, on page 424. This statute also changes the rule of law as to notice. We know of no reason why the legislature might not change either or both of these rules without violating the Constitution. Certainly, as to the future, all trusts could be entirely abolished by the legislature, as was done in cases of uses by the statute of uses. As the law now stands, cases frequently arise in which bona fide purchasers take property free from existing trusts, and are not held bound to see to the application of the consideration.

The second point insisted upon in the argument is that the provisions of the act permit the taking of private property without "due process of law." In the initial registration the provisions are for an application to a court of chancery, and that the fee must be first registered. To this application the following persons are to be made defendants: The occupant, if the land is occupied by any other person than the applicant; the holder of any lien or encumbrance; other persons having any estate or claiming

any interest in the land, in law or in equity, in possession, remainder, reversion, or expectancy. Section 11. All other persons are to be made parties defendant, by the name and designation of "all whom it may concern." Section 16. Summons is to issue against all persons mentioned as defendants, and is to be served as in other cases in chancery. Notice is also to be published and mailed to such defendants, substantially as in other chancery cases, and the court may direct further notice to be given. Sections 18-21. Upon a failure to answer, default may be entered, and, upon the hearing, a decree entered, finding in whom the title is vested, and declaring the same subject to such liens, encumbrances, trusts, or interests, if any, as are shown to exist, and directing the registration to be made. Sections 23, 25. The exception taken to these provisions is that they authorize judgment to be taken against a resident of the state upon mere constructive service. It is certainly fundamental that no man shall be condemned unheard or without notice. While a substituted service is permitted in some instances, particularly in case of nonresidents, this is because of the necessities of the case. The act does contemplate, in some contingencies, at least, actual personal service, and the general law provides for publication as to unknown owners and persons in interest, and nonresidents. An applicant may proceed in this way, and in strict accordance with the act obtain a decree or finding as to his title which will be binding beyond all question, so that, even if the proper construction of the provision were that it attempted to authorize judgment against a resident notified only by publication, yet the law can be given practical effect, in which event only the particular provision would fail, and not the whole law.

It is further insisted that, by proceedings subsequent to the initial registration, an owner may be deprived of his property without due process of law. In the consideration of this point it must be remembered that the right to alienate or inherit property is always dependent upon the law. So long as vested rights are not disturbed, the law may at any time change the tenure upon which land is held, and may alter the conditions under which it may be alienated, and modify the rules of evidence by which the title is to be determined. The true theory of this act, as we understand it, is that all holders of vested rights shall be subjected to an adjudication in a court of competent jurisdiction, upon due notice, in order that the true state of the title may be ascertained and declared, and that thereafter the tenure of the owner, the right of transfer and encumbrance, and all rights subsequently accruing shall be determined in accordance with the rules now prescribed. "A state may, by statute, prescribe the remedies to be pursued in her courts, and may regulate the disposition of the property of her citizens, by descent, devise, or alienation." 3 Washb. Real Prop. 4th ed. p. 187. "The right of ownership which an individual may acquire must therefore, in theory, at least, be held to be derived from the state, and the state has

the right and power to stipulate the conditions and terms upon which the land may be held by individuals." Tiedeman, Real Prop. 2d ed. § 19. "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted." *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, on page 321, 134 U. S., and page 919, 33 L. ed. "The power of the legislature in this respect [as to changing the rules of evidence as to the burden of proof], whether affecting proof of existing rights, or as applicable to rights subsequently acquired, or to future litigation, so long as the rules of evidence sought to be established are impartial and uniform in their application, is practically unrestricted." *Gage v. Caraher*, 125 Ill. 447, on page 455. It being true that the law may prescribe rules of property and rules of evidence by which the title is to be shown, we see no reason why the transfer of real estate may not be made in the way contemplated, and why it may not be made compulsory to make it in that way, if the legislature so determines. In our view of the case, the indemnity fund feature of the law need not be considered. The law can, as we think, stand and accomplish its purpose without it.

Objection is also made that by § 26 any person who has any interest in the land, whether personally served, notified by publication, or not served at all, must, within two years after the entry of the decree, appear and file an answer, and that, after the expiration of that term of two years, the decree shall (with certain exceptions) be "forever binding and conclusive upon all persons." This provision seems to attempt to make a decree binding upon persons not parties to the suit, and, if given effect literally, would deprive persons of vested rights without due process of law. A limitation may be placed upon the time within which a person who has a mere right of action shall bring it, but "limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims." *Cooley, Const. Lim. p. 366*. To the extent that the act attempts to transfer property without due process of law, it cannot be upheld. On all parties to the suit properly before the court the decree may, after the lapse of two years, become conclusive and forever binding, and as to all who have merely a right of action the expiration of two years may complete the bar. Even though the language of this section may be broad enough to amount to an attempt to transfer an estate by the law or by decree, yet it is possible to carry out the purposes of the act without violating the Constitution in the respect complained of. Such objectionable features, or those calling for construction, must be left to future legislation, or determination by the courts in cases where the conflict is apparent and the question directly involved. We are also of the opinion that §§ 26 and 40 can be sustained by construing them as a limitation law.

"Whenever an act of the legislature can be so construed and applied as to avoid conflict with the Constitution, and give to it the force of law, such construction will be adopted by the courts. Therefore, acts of the legislature in terms retrospective, and which, literally interpreted, would invalidate and destroy vested rights, are upheld by giving them prospective operation only; for, applied to and operating upon future acts and transactions only, they are rules of property, under and subject to which the citizen acquires property rights, and are obnoxious to no constitutional limitation, but as retroactive laws they reach to and destroy existing rights, through force of the legislative will, without a hearing or judgment of law. So will acts of the legislature having elements of limitation, and capable of being so applied and administered, although the words are broad enough to and do, literally read, strike at the right itself, be construed to limit and control the remedy,—for as such they are valid, but as weapons destructive of vested rights they are void,—and such force only will be given the acts as the legislature could impart to them." *Newland v. Marsh*, 19 Ill. 376, 384.

The recent case of *State, Atty. Gen., v. Guilbert*, 56 Ohio St. 575, 38 L. R. A. 519, is relied upon by counsel for appellant in support of the position taken by them on both of the above points. We have given that case careful consideration. With its conclusion, *viz.*, that the Ohio statute was unconstitutional, we agree, but what is said in argument cannot be adopted as applicable to this case. The main ground upon which that decision rests is that the statute, in providing for the initial registration, attempts to give jurisdiction to the court without service of summons, and this, it is held, falls short of that due process of law guaranteed by the Constitution. The only notice which that act required was to be given by the applicant himself, and in the application it was unnecessary to name any person claiming an adverse interest as party defendant. On the other feature of the case, *viz.*, as to what constitutes the exercise of judicial power, the opinion is not clear. In the reasoning on that point, Judge Cooley's definition of "judicial power" is adopted, which we have seen does not serve to distinguish between such quasi judicial powers as may be properly exercised by executive or ministerial officers and those powers which belong solely to the judicial department.

The third point made against the law is that the provision which says that the law shall take effect only after a favorable vote by counties is an attempt to delegate legislative power; and the fourth is that the law is not a general, but special, law. It is unnecessary to discuss these points. It is sufficient to say that both have been decided adversely to the contention of appellants in the case of *People, Grinnell, v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793. That decision has become the rule of law in this state, and we see no sufficient reason for overruling it.

We are not impressed with the soundness of the objections to those sections of the 44 L. R. A.

statute which relate to the descent of lands on the death of a registered owner, and to the sale and mortgage of real estate belonging to minors or others under disability. They are, however, objections which do not go to the validity of the entire law. They involve a construction of those sections, and can only be satisfactorily determined if cases shall arise involving their validity. It would be alike impracticable and unprofitable to attempt now to give a construction to every provision of this law. The question here is, Does the act violate the Constitution so far as to render it void, and therefore furnish no justification for the exercise of the acts of the respondent challenged? In the determination of that question every reasonable doubt must be resolved in favor of the validity of the law.

We have endeavored to give the case that deliberate consideration its importance demands, and have reached the conclusion that *the judgment of the Criminal Court should be affirmed.*

Boggs, J., dissents.

Rehearing denied December 19, 1898.

Daniel HOGAN, *Appt.*,
v.
Loren D. STOPHLET.

(179 Ill. 150.)

1. A request that the court hold that under the law of the case the plaintiff could not recover is in the nature of a demurrer to the evidence, and preserves the question of law for review on appeal.
2. A sheriff cannot claim a reward for making an arrest within his county of a resident thereof for a felony committed therein which it was his official duty to make.
3. Extraordinary efforts and the incurring of expense not covered by legal fees will not entitle an officer to a reward for making an arrest which it was his legal duty to make.

(April 17, 1899.)

APPEAL by plaintiff from a judgment of the Appellate Court, Fourth District, reversing a judgment of the Circuit Court for Alexander County in plaintiff's favor in a suit brought to recover a reward offered for the apprehension and conviction of an alleged criminal. *Affirmed.*

Statement by **Magruder, J.**:

This is a suit originally brought by appellant against appellee before a justice of the peace of Pulaski county to recover a reward offered for the apprehension and conviction of a criminal. The justice of the peace rendered a judgment against appellee for \$50

NOTE.—As to rewards to officers, see also *Morris v. Kassling* (Tex.) 11 L. R. A. 398, and note; also *Lees v. Colgan* (Cal.) 40 L. R. A. 355; and *Smith v. Gentry* (Ky.) 42 L. R. A. 302.

(the amount of the reward offered by him), and costs. Appellee appealed from this judgment to the circuit court of Pulaski county, and the venue was changed to the circuit court of Alexander county. In the latter court the case was tried before the court, by agreement, without a jury; resulting in judgment against appellee for \$50 and costs. An appeal was taken from this judgment to the appellate court; and the latter court reversed the judgment of the circuit court, with a finding of facts, and refused to remand the case to the circuit court. The appellate court has granted a certificate of importance. The present appeal is from the judgment of the appellate court.

The facts are substantially as follows: On the night of January 6, 1896, the storehouse of appellee, in Mound City, was burned by an incendiary fire. On the next day appellee and several other citizens, including appellant, signed a paper publicly offering the amounts set opposite their respective names as a reward for the apprehension and conviction of the person who burned the building. In March or April, 1896, one Harry Howard, who then, and at the time of the burning, was, and ever since has been, a resident of Pulaski county, was arrested in said county by one Lafayette Collins, a deputy sheriff of said county, on a warrant issued by a justice of the peace of the county, sworn out by one Mrs. Newman, charging Howard with burglary and larceny in breaking and entering her storehouse, in said county. At the time the reward was offered and the arrest was made, and at the time of the conviction hereinafter mentioned, appellant was the sheriff of said Pulaski county, and Collins was his deputy. While Howard was in jail under the charge of burglary and larceny, he was indicted by the grand jury of Pulaski county for burning appellee's storehouse, and at the April term, 1896, of the circuit court of said county he was convicted of the crime of arson, and sentenced to the penitentiary therefor. After Howard was arrested and imprisoned in jail on the warrant charging him with burglary and larceny, appellant claims to have expended certain moneys for traveling expenses, and fees paid to witnesses to procure their attendance from the state of Missouri, for the purpose of indicting and convicting Howard of burning appellee's building.

The following is the finding of facts made by the appellate court, as embodied in their judgment: "On the night of January 6, 1896, appellant's store building at Mound City, Pulaski county, in this state, was feloniously set on fire and burned. The day following the fire, appellant publicly, and in writing, offered a reward of \$50 for the apprehension and conviction of the person or persons who committed the offense. About two months thereafter, appellee, who was the sheriff of Pulaski county, through one of his deputies, arrested Harry Howard, in said county (and who resided there), for the offense; and at the April term, A. D. 1896, of the circuit court of said county, Howard was indicted, tried, convicted, and sentenced for the crime." In the statement of facts which

precedes their opinion the appellate court say: "The arrest was made under and by virtue of a warrant issued by a justice of the peace of Pulaski county on the complaint of a Mrs. Newman, charging Howard with the crime of burglary and larceny, and Howard was committed to jail on this charge. The charge was mainly, if not entirely, for the purpose of holding Howard until the matter of the burning of appellant's store could be investigated." Upon the trial, appellant, when on the witness stand, was asked the following question, and made the following answer: "State whether or not you did anything towards the apprehension or the conviction of anyone in pursuance of the offering of this reward?" "Yes, sir; after considerable effort on my part, I caused the arrest of this Harry Howard."

On the trial, defendant requested the court to hold the following proposition as the law of the case: "The defendant requests the court to hold the law of this case to be, under the evidence in this case, the plaintiff is not entitled to recover, and the finding should be for the defendant." But the court refused to so hold, and the defendant took an exception.

Messrs. L. M. Bradley and Wall & Bristow for appellant.

Messrs. Lansden & Leek for appellee.

Magruder, J., delivered the opinion of the court:

The submission by the defendant to the trial court, to be marked "Held" or "Refused," of the proposition that the finding in this case should be for the defendant, was in the nature of a demurrer to the evidence, and preserved for the court of review the question of law, whether the evidence tended to show a right to recover. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296. 26 L. R. A. 230; *Smith v. Billings*, 169 Ill. 294.

The appellate court has found in its finding of facts, as embodied in its judgment, that the Harry Howard who was arrested was so arrested for the offense of setting on fire and burning the store building of appellee, and for the apprehension and conviction of the party committing this offense the reward was offered. The finding of facts thus made by the appellate court is binding upon this court; and whether the appellate court found the facts correctly or not, cannot be considered on appeal in this court. *Hawk v. Chicago, B. & N. R. Co.* 147 Ill. 399; *Ererts v. Laucher*, 165 Ill. 487. We deem it immaterial, however, whether Howard was originally arrested by the appellant and imprisoned upon a charge of burglary and larceny, or whether he was arrested for the burning of appellee's store building, so far as the determination of the questions involved in this case is concerned. The reward was offered for the apprehension and conviction of the person or persons who burned or caused the building to be burned. It thus appears that the reward was offered, not for the conviction alone, but for the apprehension and conviction of the guilty party. Appellant is entitled to recover for both, or he cannot recover at all. The reward cannot

be apportioned; that is to say, there can be no apportionment of it between what is due for the apprehension and what is due for the conviction. The offer must be enforced as an entirety, or not at all. In *Pool v. Boston*, 5 Cush. 219, it was said: "The principal object of the reward offered was to obtain the detection of the offender. The conviction was required, to ascertain who was the offender. But, to entitle the plaintiff to the reward, he must show that he is so entitled, as well for the detection as for the conviction of the offender. The reward cannot be apportioned." *Jones v. Phœnix Bank*, 8 N. Y. 228; *Blain v. Pacific Exp. Co.* 69 Tex. 74; *Furman v. Parke*, 21 N. J. L. 310. The word "arrest" has been defined as "the apprehension or detaining of the person in order to be forthcoming to answer to an alleged or suspected crime. The word 'arrest' is more properly used in civil cases, and 'apprehension' in criminal." *Montgomery County v. Robinson*, 85 Ill. 174. Black, in his Law Dictionary, defines the word "apprehension" as follows: "The seizure, taking, or arrest of a person on a criminal charge. The term 'apprehension' is applied exclusively to criminal cases and 'arrest' to both criminal and civil cases." If, therefore, the fact that Howard was arrested upon a charge of burglary and larceny should be held to negative the idea that he was arrested upon a charge of burning the building then appellant did not secure the apprehension of the guilty party; and in such case he would not be entitled to the reward, as the reward was offered both for the apprehension and the conviction. If, however, the appellant is to be regarded as having secured the apprehension of Howard for the offense of burning the building, in that case, also, he would not be entitled to the reward, for the reasons hereinafter stated.

The appellant was the sheriff of Pulaski county. The arrest of Howard was made in Pulaski county, and for a felony committed by Howard in that county; Howard also being a resident of that county. It was therefore appellant's duty to make the arrest. That such was his duty will appear by reference to §§ 1, 2, 3, and 4 of division 6, and §§ 3 and 6 of division 7, of the Criminal Code, and §§ 15, 16, 17, and 18 of chapter 125 of the Revised Statutes, in regard to sheriffs. 1 Starr & C. Anno. Stat. 2d ed. pp. 1374-1377; 3 Starr & C. Anno. Stat. 2d ed. p. 3769. In addition to this § 211 of division 1 of the Criminal Code provides that "if any judge, justice of the peace, sheriff, coroner, constable, police officer, clerk, or other officer, state, county, town, or municipal, executive, ministerial, or judicial, shall wilfully or corruptly receive or take any fee or reward to execute or do his duty as such officer, except such as is or shall be allowed by law, or if any such officer shall wilfully or corruptly ask or demand as a condition precedent to the performance of his duty as such officer any fee or reward, except such as shall be allowed by law, every such officer so offending shall be fined not exceeding \$200, and may be removed from office." Section 213 of division 1 provides that "if any officer authorized 44 L. R. A.

by law to charge or receive fees, salary, or pay, shall charge, claim, demand, or take any greater fee, salary, or pay, than such as is by law allowed to him for the service performed, or shall charge, claim, demand, or take any fee, salary, or pay, or shall knowingly charge any fee, salary, or pay, when no fee, salary, or pay is allowed him by law, or when the services for which such fee, salary, or pay is charged, have not been performed by him, or by some other person for him, he shall, on conviction under this section for the first offense, be fined in any sum not less than twenty-five dollars (\$25), nor more than two hundred dollars (\$200), and upon conviction for a second or any subsequent offense under this section, he shall forfeit his office, and shall be confined in the county jail not less than thirty days, nor more than one year." 1 Starr & C. Anno. Stat. 2d ed. pp. 1329, 1330. The Constitution provides that the sheriff and other officers shall "receive, as their only compensation for their services, salaries to be fixed by law, which shall in no case be as much as the lawful compensation of a judge of the circuit court of said county, and shall be paid, respectively, only out of the fees of the office actually collected." Const. art. 10, § 9. The legislature has fixed a scale of fees which sheriffs are authorized to charge for services performed by them in the discharge of their official duty. 2 Starr & C. Anno. Stat. 2d ed. pp. 1911-1913. It being true that it was the official duty of the appellant, as sheriff, to make the arrest of the guilty party, and that the fees which he is entitled to charge for the performance of his official duties are fixed by law, it follows, upon well-established principles, that the appellant was not entitled to the reward sued for in this case. It is against public policy to allow a man to recover a reward for doing his duty as a public officer. It is also against public policy, and illegal, for a sheriff to receive, for services for which fixed compensation is prescribed by law, any other or further fees, although extraordinary diligence may have been exercised by him in the discharge of his duty. *Pool v. Boston*, 5 Cush. 219; *Murfree, Sheriffs*, § 1070. A promise to pay an officer a reward for doing what it is his duty to do under the law is a promise without any consideration to support it.

In *Re Russell*, 51 Conn. 577, 50 Am. Rep. 55, the facts showed that an inhabitant of the city of Hartford, whose house was broken into in the night, offered a reward for the detection of the burglar; that certain policemen, during the hours allotted them for rest, discovered the burglar, and obtained information which led to his conviction; that policemen in that city were required by law to report all violations of law, and to arrest without warrant persons guilty of criminal offenses, where the offenders were taken in the act, or on the speedy information of others, to render all possible assistance to the ministers of the law, and to exert themselves to prevent the commission of crime, etc. And it was held by the court that to allow them to receive the reward would be both in violation of the city ordinances and against

public policy. In that case the court said: "It has been held from a very early period that a promise to pay an officer a sum of money for doing a thing which the law will not suffer him to take anything for is merely void, however freely and voluntarily it may appear to have been made. . . . And it is now well settled that a public officer, whose compensation is fixed or whose fees are prescribed by law, cannot legally contract for or demand a larger compensation or higher fees in the form of a reward or in any other form, for services rendered in the line or scope of his official duties." In *Pool v. Boston*, 5 Cush. 219, it was held that a watchman of the city of Boston, who, while in the discharge of his duty as such, discovered a person setting fire to a building, and prosecuted him to conviction, was not entitled to claim a reward offered by the city government for the detection and conviction of the incendiary. In *Davies v. Burns*, 5 Allen, 349, it was held that an officer of the customs of the United States, who found smuggled goods while assisting the inspectors in charge of a vessel, and examining the passengers and their luggage, although he was not in discharge of the specific duty assigned to him, could not maintain an action to recover a reward offered by the owners of the vessel to any person giving information to their agents or officers of any goods smuggled or concealed, or intended to be smuggled, therefrom. In the latter case the decision of the court was put upon the broad ground of public policy, which forbids an officer to receive extra compensation for doing what his official duty requires him to do. In *St. Louis, I. M. & S. R. Co. v. Grafton*, 51 Ark. 504, where certain parties, who acted as the *posse comitatus* of a sheriff, to aid him in preventing interference with trains during a railroad strike, claimed a reward offered by the railroad company for the arrest and conviction of persons thus offending, it was held that such parties were not entitled to the reward, although they claimed to have acted as individuals, independently of the sheriff; and the court there says: "The policy of the law forbids a public officer, or those called to aid him in the discharge of a public duty, receiving any reward or compensation for his services, outside of that allowed by law. The plaintiffs were assisting the sheriff's deputies—and in fact some of the plaintiffs were his regular deputies—in making these arrests; and they were paid for their services as a sheriff's *posse* by Miller county. Public policy and the laws forbid that they receive other reward for the same. 'The rewards of officers are established by law, their services are to be performed for these legal rewards, and other private rewards for acts which are required from them, as public duties, by the laws of their country and the obligations of their stations, must be regarded as corrupt and illegal exactions.' . . . A promise of a reward for performing a duty is illegal and without consideration. . . . 'The statute makes it the duty of a sheriff to keep and preserve the peace of his county, for which purpose he is empowered to call to his 44 L. R. A.

aid such person or persons of his county as he deems necessary. . . . The conclusion is, if the arrest is made by the sheriff or his deputies, he or they were but doing their duty, and are not entitled to a reward.'" In *Lees v. Colgan*, 120 Cal. 262, 40 L. R. A. 355, where a captain of police of the city and county of San Francisco apprehended a murderer in such city and county for a murder committed in another county, it was held that the captain made the arrest of the murderer in the line of his official duty, and that it was against sound public policy to receive a reward offered by the government of the state for the arrest and conviction of the murderer; and in that case the court says: "The courts, both in this country and in England, are practically unanimous in declaring that a public officer, working for a fixed compensation, or whose fees are prescribed by law, cannot demand or contract for a reward for services rendered in the line or scope of his official duty." See also *Marking v. Needy*, 8 Bush, 22; *Ex parte Gore*, 57 Miss. 251; *Monroe County v. Bell* (Miss.) 18 So. 121; *Thornton v. Missouri P. R. Co.* 42 Mo. App. 58; *Kick v. Merry*, 23 Mo. 74, 68 Am. Dec. 658; *Weaver v. Whitney*, Hopk. Ch. 13; *Hatch v. Mann*, 15 Wend. 45.

The claim that extra services have been rendered furnishes no warrant in such cases for the charge of extra compensation. In *Hatch v. Mann*, 15 Wend. 45, it was said: "That a public officer, whose fees are prescribed by law, may maintain an action to recover an additional sum promised him by a party for doing his official duty, is a monstrous proposition, fraught with every kind of mischief. The pretense that it is for extra services would cover any conceivable corruption or extortion. . . . If a constable, for making 'extraordinary efforts' to perform an ordinary official act, may not only receive, but may also collect by law, a compensation beyond what the statute allows for the act, any other officer may do the same; and sheriffs, legislators, and judges might, and soon would, put their 'extraordinary efforts' in the market, to be had by the highest bidder. This is a sickening and revolting view of the subject."

There are some decisions which hold to the contrary of the views herein expressed, but these decisions will be found upon examination to be cases where the officer arrested the offender beyond his territorial jurisdiction, or cases arising under particular statutes which did not make it the duty of the officer to make the arrest. Many of these decisions are reviewed in the very able opinion delivered by the supreme court of Connecticut in *Re Russell*, 51 Conn. 577, 50 Am. Rep. 55, and are there distinguished from such cases as that which is presented by the present record.

The principles announced by the authorities above referred to have always been recognized as sound by this court. In *Stacy v. State Bank*, 5 Ill. 91, the bank offered a reward of \$10,000 for the detection of the person who had robbed a branch of the bank; and a director of the branch bank, who de-

tected the robber, sued to recover the reward. But this court held that he was not entitled to claim the reward, upon the ground that it was his duty in such a case, whether he was paid for his services or not, if he obtained any information which would in any manner lead to the recovery of the money taken, or the detection of the person taking it, to communicate it promptly to the bank without reward. We there say: "He has done nothing more in the present case than his duty as director imposed on him. The fact of his receiving no compensation for his services as director does not alter the case. He has voluntarily assumed the duties of the station, and he was bound as faithfully to discharge them as if he was to be liberally paid for his services." The principle here announced has been applied to promises made to persons not public officers. Thus, it was said by Chancellor Kent: "Every seaman is bound, from the nature and terms of his contract, to do his duty in the service to the utmost of his ability; and therefore a promise made by the master, when the ship is in distress, to pay extra wages, as an inducement to extraordinary exertion, is illegal and void." *Pool v. Boston*, 5 Cush. 219.

The fact that the officer may have incurred expenses in the performance of an official duty which are not covered by the legal fees he is authorized to charge does not entitle him to extra compensation. In *People v. Pearson*, 4 Ill. 270, we held that a sheriff, who, in executing an attachment for contempt sued out of this court, went out of his own county, and expended ten days' time, and \$66.75 in money, in arresting and returning the defendant, was only entitled to recover the regular fees for serving the process and for mileage. In *Irvin v. Alexander County*, 63 Ill. 528, where a statute provided that counties shall pay the expense of conveying insane paupers to the asylum for the insane, and fixed the compensation of the sheriff for such services, we held that the sheriff was not allowed to charge for his necessary expenses anything in addition to the mileage and *per diem* provided by the statute; and in that case we said: "The sheriff takes the office *cum onere*; and the general assembly, in fixing the various items of fees for his compensation, may and very probably have fixed some items too low, but others are very high, when time, labor, and skill are considered. . . . We have never known a claim made for additional compensation because the actual cost of serving a summons was more than the fees in a particular case, or in fact in any other specific service rendered by the sheriff. . . . If this were allowed, additional costs would have to be paid whenever the sheriff should lose money in the performance of any specific duty. . . . We are clearly of the opinion that the sheriff was not entitled to his traveling expenses in addition to his mileage and *per diem*." In *Hall v. Hamilton*, 74 Ill. 437, this court held that judges were authorized to hold branch courts for the superior court

of Cook county, or the circuit court, for that or any other circuit, but that § 40 of the chapter entitled "Courts," of the Revised Statutes of 1874 (p. 331), which provided for compensation being paid to a judge holding a branch court out of his circuit, in addition to his salary, was unconstitutional and void. In *Hall v. Hamilton*, 74 Ill. 437, this court, speaking through the late Mr. Chief Justice Walker, said: "The 40th section of that chapter provides for compensating judges who shall hold court or a branch court for another judge out of his circuit or judicial district, by authorizing an appropriation of \$10 per day to such judge out of the county treasury. The 16th section of the judiciary article of our Constitution is this: 'From and after the adoption of this Constitution, judges of the circuit courts shall receive a salary of \$3,000 per annum, payable quarterly, until otherwise provided by law. And after their salaries shall be fixed by law, they shall not be increased or diminished during the terms for which said judges shall be respectively elected; and from and after the adoption of this Constitution no judge of the supreme or circuit courts shall receive any other compensation, perquisite, or benefit, in any form whatsoever, nor perform any other than judicial duties, to which may belong any emoluments.' This language is as full, clear, and comprehensive as could be well conceived, to prevent supreme and circuit judges from receiving any other compensation than their salaries, under any name or pretense whatever, for the discharge of any duty pertaining to their offices. And it is prohibitory on the judges from receiving the compensation for the performance of such duties except their salary. It also prohibits the general assembly from providing any other." Section 40, above referred to, is still retained, and appears as § 23 of the act in regard to courts. It is as follows: "Where a judge shall hold court, or a branch thereof, for another judge out of his circuit or judicial district, as provided in the preceding section (except in cases of interchange with each other), it shall be competent for the county board of the county, in which he shall so hold court, in their discretion to cause him to be paid out of the county treasury not exceeding \$10 per day for the time he shall so hold the same." Although this section still appears in the statute, yet this court, in the discharge of a high and solemn duty imposed upon it by the Constitution, has decided such section to be unconstitutional; and therefore no board of county commissioners can lawfully pay, nor can any judge of a circuit court lawfully receive, the \$10 per day authorized to be paid by that section for the performance of judicial duties.

For the reasons above stated, the judgment of the Appellate Court is affirmed.

Mr. Justice Boggs took no part in this decision.

INDIANA SUPREME COURT.

Philip C. SIZOR, *Appt.*,

v.

City of LOGANSFORT.

(151 Ind. 626.)

Mentioning a meander line on the bank of a river as a boundary will convey the property at least to the water line with riparian rights, if not to the thread of the stream, unless a contrary intent clearly appears from the deed itself.

(May 13, 1898.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Cass County in favor of defendant in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. Frank Swigart, for appellant:

Where two adjoining landowners cause a line between them to be surveyed and established, such survey is conclusive between them and all parties who claim under them.

Main v. Killinger, 90 Ind. 165.

If surveyors surveyed the land deeded to the Cass County Agricultural, etc., Association, with the consent of both parties, before the deed was made, and the deed was made according to that survey, it was proper to show that fact by parol testimony, and the court, refusing to allow the appellant to give his testimony upon this point to the jury, erred.

In ascertaining boundaries, visible monuments control other designations not so obvious to the senses, such as admeasurements, course and distance, and quantity of land called for in the deeds.

Emmons v. Kiger, 23 Ind. 483; *Simonton v. Thompson*, 55 Ind. 87; *Allen v. Kersey*, 104 Ind. 1; *Shepherd v. Nave*, 125 Ind. 226.

In the trial of a cause before court and jury, if there is any evidence to support the plaintiff's cause of action, no matter how slight, the court cannot direct the jury to return a verdict for the defendant.

Crookshank v. Kellogg, 8 Blackf. 256; *Haynes v. Thomas*, 7 Ind. 38; *Adams v. Kennedy*, 90 Ind. 318; *Wolfe v. McMillan*, 117 Ind. 587.

When a meander line is made by the parties to a deed one of the lines of the land therein conveyed, that fixes the limit of the land conveyed; and the fact that a meander line is named as one of the boundary lines by the parties gives the grantee no right beyond that line.

Silver Creek Cement Corp. v. Union Lime & Cement Co. 138 Ind. 297; *Brophy v. Richeson*, 137 Ind. 114; *Tolleston Club v. State*, 141 Ind. 197; *Edwards v. Ogle*, 76 Ind. 302.

Messrs. Quincy A. Myers, George C. Taber, and Frank M. Kistler for appellee.

NOTE.—As to meander lines, see also *Northern Pine-Land Co. v. Bigelow* (Wis.) 21 L. R. A. 776; *Noyes v. Collins* (Iowa) 26 L. R. A. 609; *Faller v. Shedd* (Ill.) 33 L. R. A. 146. 44 L. R. A.

Monks, J., delivered the opinion of the court:

Appellant brought this action to recover possession of certain real estate, and quiet his title thereto as against appellee. Appellee filed a general denial, and upon the issue so joined the cause was submitted to a jury, and after appellant had closed his evidence in chief the court instructed the jury to return a verdict in favor of appellee, and over a motion for a new trial judgment was rendered that appellant take nothing by his said action. The only error assigned which presents any question for our determination is that the court erred in overruling appellant's motion for a new trial. There are many other errors assigned, but they are all causes for a new trial, and therefore present no question. The evidence shows that in 1848 the trustees of the Wabash & Erie Canal executed a deed conveying to Mary Long the fractional N. E. $\frac{1}{4}$ of section 29, township 27 N., range 2 E., and that Eel river was the north boundary of the said real estate. On September 18, 1872, Mary Long, by deed, conveyed said real estate to appellant, and he, on June 13, 1873, conveyed a part thereof—about 35 acres—to the Cass County Agricultural, Horticultural, & Mechanical Association. The real estate conveyed to said association was described by metes and bounds, and the north line was described as follows: "Thence north parallel with the east line of said section fourteen (14) chains and 70 links to the meander line on the south bank of Eel river; thence westward along said meander line to the northwest corner of said fractional quarter section, being also the northeast corner of J. B. Richardville reserve." Appellee derived its title through the conveyance last mentioned, and by the same description. When the real estate on Eel river was first surveyed by the government surveyors, they ran a meander line along the south side of said river, and it is contended by appellant that such meander line as so located is the north boundary of the real estate conveyed to appellee, and that said meander line is, as the river now runs, over 100 feet south of the south margin or water line of said river at the northeast corner of said tract and in the south edge of the water at the northwest corner of said tract. Appellee, on the other hand, contends that the description carries the title of appellee at least to the water line, on the south side of said river, if not to the thread of the stream. If appellee's contention is correct, the cause must be affirmed; if appellant is correct, the cause must be reversed. In *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 19 L. ed. 74, which was a case where the land was adjoining a navigable stream, the Supreme Court of the United States, at page 286, 19 L. ed. 78, said: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks

of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the watercourse, and not the meander line as actually run on the land, is the boundary. Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the centre of the stream."

This case has been uniformly followed by the courts. *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428; *Sphung v. Moore*, 120 Ind. 352, 356; *Knudsen v. Omanson*, 10 Utah, 124; *Lamprey v. State*, 52 Minn. 181, 18 L. R. A. 670; *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82 (Gil. 59) 88 Am. Dec. 59; *Freeman v. Bellegarde*, 108 Cal. 179, and cases cited. In *Boorman v. Sunnucks*, 42 Wis. 233, the court, on page 243, said: "Another rule applicable to this case is, that if the meandered line and the actual water line differ, the latter is the true line of a lot bounded in terms by the meandered line." It is therefore held in many cases that a meander line on a lake or watercourse extends to the line of the shore or bank although the courses and distances of the survey be not coincident with the water line. *Everson v. Waseca*, 44 Minn. 247; *Ladd v. Osborne*, 79 Iowa, 93; *St. Paul, S. & T. F. R. Co. v. First Div. of St. Paul & P. R. Co.* (Minn.) 49 N. W. 308. It was said by the supreme court of Minnesota, in *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 59: "There is no such thing as a meander line in such case, distinct and separate from the line of the river. It is merely an accurate survey of the river, and neither party in this case could be permitted to show that the river is in a different place from that designated by the field book and plat." In *Knudsen v. Omanson*, 10 Utah, 124, the court said: "In making the survey, the water line was approached as nearly as possible, and the west line of these lots is shown by the government surveyors to be waters of the lake, and is what is called 'a meander line.'" It is also held that, when a deed describes land as bounded by a bank, or as on the west side of a river not navigable, or by lines running to a stake or line on the bank, thence up or down the stream to another monument on the bank, the thread of the stream is the boundary. *Kent v. Taylor*, 64 N. H. 489; *Rumion v. Alley*, 19 Ky. L. Rep. 268; *St. Clair County v. Livingston*, 23 Wall. 40, 23 L. ed. 59; *Luce v. Carley*, 24 Wend. 451, 35 Am. Dec. 637; *Seneca Nation of Indians v. Knight*, 23 N. Y. 498, 500; *Lunt v. Holland*, 14 Mass. 150; *Cold Springs Iron Works v. Tollard*, 9 Cush. 492; *Newton v. Eddy*, 23 Vt. 319; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Stanford v. Mangin*, 30 Ga. 355; 2 Devlin, Deeds, 2d ed. §§ 1028a, 1028b; 1 Jones, Real Prop. §§ 477, 485, 488, 490, 491, 493.

It is clear from the authorities that the meander line was run by the government surveyors as near the water line as possible, and was intended to mark the water line, 44 L. R. A.

See also 46 L. R. A. 748.

and the same is shown on the official plats prepared from the field notes to be the water or border line of the stream. We think, therefore, that in all conveyances where the meander line is mentioned it must be held to be the actual water line, unless the contrary clearly appears from the deed itself. The description in this case carried appellee's title at least to the water line, with riparian rights, if not to the thread of the stream.

Judgment affirmed.

Rehearing denied.

Rosena M. BARMAN, Appt.,
v.
Robert J. SPENCER.

(.....Ind.....)

1. A guest at a private residence is not guilty of negligence in attempting to go from the house to the privy after dark, without inquiring as to the safety of the way or requesting a light, where at the time of a previous visit the way was safe, and no knowledge on her part of a change in condition exists.
2. A lessor who removes the platform from a well in order to put it in proper condition as required by his lease, and leaves the well open and unguarded at a distance of about three feet from the kitchen door, near a path that leads to a privy, is liable to a guest of the tenant, who falls into the well in the night while attempting to go to the privy without knowing that the platform has been taken off from the well.

(January 8, 1898.)

A PPEAL by plaintiff from a judgment of the Superior Court for Grant County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. H. J. Paulus and Gordon & Marshall for appellant.

Messrs. R. T. St. John and W. H. Charles, for appellee:

The appellant was guilty of such contributory negligence as will preclude a recovery.

It was a duty plaintiff owed herself to have made inquiry as to the condition and safety of her procedure.

No inquiry was made, no right asked, but she went out into the dark night, careless and negligent of her own safety, and was injured.

McAunich v. Mississippi & M. R. Co. 20 Iowa, 338; *Beach*, Contrib. Neg. § 26; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 187; *Newhouse v. Miller*, 35 Ind. 463; *Hathaway v. Toledo, W. & W. R. Co.* 46 Ind. 25.

Mere negligence of the defendant cannot excuse the contributory negligence of the plaintiff.

NOTE.—As to the liability of a landlord for injuries to the guests or servants of a tenant, caused by defects in the premises, see *note to McConnell v. Lemley* (La.) 34 L. R. A. 609.

St. Louis & S. E. R. Co. v. Mathias, 50 Ind. 66; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185; *Cincinnati & M. R. Co. v. Eaton*, 53 Ind. 307.

Where the negligence of two persons is contemporaneous, and the fault of each operates directly to cause the injury, the plaintiff cannot recover if by the exercise of ordinary care on his part he might have avoided the injurious results of the defendant's negligence.

Evans v. Adams Exp. Co. 122 Ind. 362, 7 L. R. A. 678; *Mayhen v. Burns*, 103 Ind. 323.

The appellee, although the owner of the premises when the injury complained of is alleged to have occurred, owed no duty to the appellant.

So far as the appellee is concerned she was but little better than a trespasser.

Barnes v. Shreveport City R. Co. 47 La. Ann. 1218; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365.

The owner of land or a building does not owe to persons coming there for their own convenience or as mere licensees the duty of keeping it in a safe condition.

Plummer v. Dill, 156 Mass. 426; *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 54 Am. Rep. 718; *Sterger v. Van Sioklen*, 132 N. Y. 499, 10 L. R. A. 640; *Roseman v. Townsend*, 17 Wis. 96, 84 Am. Dec. 733; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621.

Actionable negligence grows only out of a want of ordinary care and skill in respect to a person to whom the defendant is under obligation or duty to exercise such care and skill.

Gibson v. Leonard, 143 Ill. 182, 17 L. R. A. 588; Ray, Neg. 24, 25.

The well-considered cases in this court clearly support the appellee's contention.

Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 60 Am. Rep. 783. See also *Brucer v. Covington*, 69 Ind. 33, 35 Am. Rep. 202; *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399; *Faris v. Hoberg*, 134 Ind. 269; *Bedell v. Berkey*, 76 Mich. 435; *South Bend Iron Works v. Larger*, 11 Ind. App. 367; *Thiele v. McManus*, 3 Ind. App. 132; 16 Am. & Eng. Enc. Law, p. 436, § 7, p. 411, note 4, p. 412, note 3.

On rehearing.

Messrs. Byron K. Elliott and William F. Elliott, also for appellee on petition for rehearing:

An agreement on the part of the landlord to repair cannot inure to the benefit of a stranger. It creates no duty to him, and in no way affects the question of the liability of the landlord to him.

Feary v. Hamilton, 140 Ind. 45.

Under the modern authorities there are no different degrees of negligence; and there is no such thing as gross negligence in this state.

Pennsylvania Co. v. Meyers, 136 Ind. 242; *Parker v. Pennsylvania Co.* 134 Ind. 673, 23 L. R. A. 552; *Indianapolis & V. R. Co. v. McClaren*, 62 Ind. 566; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185; *Meredith v. Reed*, 26 Ind. 334; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 491, 23 L. ed. 374, 44 L. R. A.

There can be no actionable negligence unless the injury complained of is proximately caused by the violation of a legal duty which the defendant owes to the person injured.

Faris v. Hoberg, 134 Ind. 269; *Cleveland, C. C. & St. L. R. Co. v. Stephenson*, 139 Ind. 641; *Thiele v. McManus*, 3 Ind. App. 132; *Lary v. Cleveland, C. C. & I. R. Co.* 78 Ind. 323, 41 Am. Rep. 572; *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Roberts & W. Liability of Employers for Injuries to Workmen*, 22.

If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie.

1 Shearm. & Redf. Neg. 4th ed. § 8; *Milner v. Woodhead*, 104 N. Y. 471; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621, 16 Am. & Eng. Enc. Law, p. 415; *Gilson v. Delaware & H. Canal Co.* 65 Vt. 213, 36 Am. St. Rep. 802, note 813.

A landowner owes no duty to a licensee, except not willfully to injure him.

Faris v. Hoberg, 134 Ind. 269; *Cleveland, C. C. & St. L. R. Co. v. Adair*, 12 Ind. App. 569; *Parker v. Pennsylvania Co.* 134 Ind. 673, 23 L. R. A. 552; *Cleveland, C. C. & St. L. R. Co. v. Stephenson*, 139 Ind. 641; *Schmidt v. Bauer*, 5 L. R. A. 580, note, 80 Cal. 565; *Cleveland, C. C. & St. L. R. Co. v. Phillips*, 24 U. S. App. 489; *Cleveland, C. C. & St. L. R. Co. v. Tarit*, 64 Fed. Rep. 825, 12 C. C. A. 618.

Even a fireman or policeman who comes upon the landowner's premises in the discharge of duty is a mere licensee.

Woodruff v. Bowen, 136 Ind. 431, 22 L. R. A. 198; *Pennsylvania Co. v. Meyers*, 136 Ind. 242; *Beehler v. Daniels*, 18 R. I. 563, 27 L. R. A. 512; *Gibson v. Leonard*, 143 Ill. 182, 17 L. R. A. 588.

One of two things is always essential to the implication of an invitation, and even then an invitation will not always be implied. There must at least be some enticement, allurement, or inducement by the party sought to be charged, or there must be mutuality of interest in the business or purpose for which the visitor comes.

3 Elliott, Railroads, § 1249.

The appellant did not come upon business with the appellee, nor even upon any business with anybody. Her visit did not benefit the appellee in any way, and the appellee did not even know of her presence.

Plummer v. Dill, 156 Mass. 426.

One who enters premises of another, to see or inquire about a servant who is supposed to be working there, is a mere licensee.

Faris v. Hoberg, 134 Ind. 269; *Woolcine v. Chesapeake & O. R. Co.* 36 W. Va. 329, 16 L. R. A. 271; *Galveston Oil Co. v. Morton*, 70 Tex. 400; *Plummer v. Dill*, 156 Mass. 426; *Lachat v. Lutz*, 15 Ky. L. Rep. 75; *Wright v. Rawson*, 52 Iowa, 329, 35 Am. Rep. 275.

So, one who enters upon the premises of another in search of work is a mere licensee. *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 54 Am. Rep. 718; *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L. R. A.

714; *Heinlein v. Boston & P. R. Co.* 147 Mass. 136.

The following authorities are directly in point:

Moore v. Logan Iron & S. Co. (Pa.) 4 Cent. Rep. 505; *McConnell v. Lemley*, 48 La. Ann. 1433, 34 L. R. A. 609; *Miller v. Woodhead*, 104 N. Y. 471; *Cahill v. Layton*, 57 Wis. 600, 46 Am. Rep. 46; *Ganley v. Hall*, 168 Mass. 513; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 605.

McCabe, J., delivered the opinion of the court:

The appellant sued the appellee to recover \$10,000 damages alleged to have been sustained by plaintiff through the negligence of the defendant. The superior court sustained a demurrer to the complaint for want of sufficient facts to constitute a cause of action. The plaintiff declining to amend her complaint, and electing to stand upon the same, the court rendered judgment that the plaintiff take nothing by her said suit, and that the defendant recover his costs. That ruling is called in question by the assignment of errors, and is the only question presented by this appeal.

The substance of the complaint is as follows: That on the — day of September, 1895, the defendant was, and long before said time and ever since, has been, the owner in fee simple of a certain described lot in the city of Marion, in Grant county; that on said day the defendant entered into a contract with Frank Barman, by the terms of which the defendant rented or leased said real estate, including the buildings thereon, to the said Barman, by the month, for the rental of \$15 per month, payable monthly in advance, to be used by the said Barman as a residence for himself and family; the said defendant agreeing in said contract to keep said premises in proper repair and fit for safe use from time to time and to furnish said Barman free gas, a cistern, and a good well of water, all of which were to be furnished on said real estate, said defendant reserving the right to enter upon said real estate at any time to make said necessary repairs; that in pursuance of said contract, on said day, plaintiff paid said defendant the sum of \$15, and at the time of such payment took possession of said real estate, and ever since has had possession thereof, and used, and still uses, the same as a residence for himself and family under said contract; that on the — day of September, 1895, the defendant entered upon said real estate above described, for the purpose of repairing said well of water, pursuant to said contract; that, in order to make said improvement by furnishing said good well of water, the defendant took up the platform that covered said well, and at all times thereafter while said defendant was engaged in repairing said well,—to wit, until the 1st day of December, 1895,—said defendant at all times carelessly and negligently left said well open and exposed, uninclosed, unguarded, unprotected, and unsafe; that on November 17, 1895, this plaintiff, who was then and now is a sis-

ter-in-law of said Frank Barman, was visiting said Frank and family by the express invitation of said Frank, and in going from the dwelling to the privy on said real estate on said day, in the night-time, said night being dark, and no light near said open well, the same being about 3 feet from the kitchen door, and located on the path that leads to said privy from said dwelling house, and the plaintiff not knowing the dangerous condition of said well, while properly and necessarily going to said privy, and without any fault or negligence on her part, she accidentally fell into said well; that plaintiff had on two other occasions previous to said November 17, 1895, visited said Frank Barman and family on said real estate, and had gone to said privy on both of said occasions, and was acquainted with the location of said privy and well; that the said well was at both of said times in a safe and proper condition; that plaintiff was greatly injured by said fall; that two of her ribs were broken; that the joint of one of her limbs at the knee became fractured to such an extent as to make it stiff, so she has but little use thereof; that one of her shoulders was bruised and strained, and her spine strained and fractured, to such an extent that it made her almost helpless; that her entire nervous system is now shocked and greatly injured; that, by reason of the foregoing facts plaintiff was injured in her health and constitution, and suffered great pain of mind and body; that plaintiff has, ever since receiving said injuries and because of the same, been confined to her room, and entirely helpless. Plaintiff further avers that all the injuries, the disability, pain, and suffering aforesaid, were caused wholly by the aforesaid carelessness and negligence of the defendant, and without any fault on the part of the plaintiff; that, by reason of the aforesaid injuries, plaintiff has been damaged in the sum of \$10,000; wherefore, etc.

The first objection urged against the sufficiency of the complaint by appellee's learned counsel, and in support of the ruling of the trial court, is that it discloses that the plaintiff was guilty of contributory negligence. This negligence, it is claimed, consisted of her failure to make inquiry as to the condition and safety of the well, and ask for a light to enable her to see and avoid the same. But it is alleged that she had no knowledge that the platform had been removed from and left off of the well; that is, she was ignorant of the dangerous condition of the well, and that, when she visited there before, it was in a safe condition. The demurrer admits the truth of these allegations. Thus, it appears that she had no means of knowing anything about the dangerous condition of the well. It would be requiring extraordinary care to require persons to anticipate and guard against dangers of which they are ignorant. Ordinary care is all that the law requires at the hands of anyone to exempt him from the imputation of negligence. *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15-20, 7 L. R. A. 588. Besides, the complaint broadly alleges that the plaintiff's injuries were caused solely by the negligence of the defendant,

and without any fault or negligence of the plaintiff. That is sufficient to admit any and all evidence tending to prove the plaintiff's freedom from contributory negligence. As was said by this court in *Pittsburgh, O. & St. L. R. Co. v. Wright*, 80 Ind. 182: "So long as the facts stated do not force the legal conclusion that there was contributory fault the averment that there was no such fault entitles the plaintiff to have it submitted to the jury as a question of fact, whether there was such negligence." To the same effect are *Pittsburgh, O. C. & St. L. R. Co. v. Burton*, 139 Ind. 357, 362, and cases there cited; *Evansville & T. H. R. Co. v. Krapf*, 145 Ind. 647-651; *Howe v. Ohmart*, 7 Ind. App. 32. In our opinion, the complaint was amply sufficient to show the plaintiff's freedom from contributory negligence.

It is next contended that the facts alleged show that appellant was nothing more than a mere licensee, and that mere licensees and trespassers must take the premises as they find them, and cannot recover for injuries received by them through defects in the premises. *Faris v. Hoberg*, 134 Ind. 269, is a case where the injured party was a mere licensee, and it was there said: "The owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission. In such case the licensee goes there at his own risk, and, as has often before been said, enjoys the license with its concomitant perils." The rule is confessedly different where the person injured goes upon the defective premises on invitation, express or implied, from the owner or occupant, to transact business in which such owner or occupant is interested. But the present case falls within neither of the classes mentioned. It is a case where the complaining party went upon the premises by the express invitation of the occupant, for friendly and social purposes as his guest.

In support of appellee's contention, we are referred to *Hart v. Cole*, 156 Mass. 477, 16 L. R. A. 557, where it is said: "How far an implied invitation is held out under all conceivable circumstances, and whether an implied invitation to come as a guest for friendly intercourse can create a liability greater than that to an ordinary licensee, it is not easy to decide. No case in this country involving these questions has been brought to our attention. In *Southcoate v. Stanley*, 1 Hurlst. & N. 247, it is said, in substance, that the liability of an owner of a dwelling house to a visitor who is there on his express invitation is no greater than that to a licensee. The ground taken by Chief Baron Pollock and his associates seems to be that a guest gratuitously enjoying hospitality by express invitation at the house of his friend must be presumed to have accepted the invitation with an understanding that he is to enjoy only such things as his host possesses, and that to such a guest the host owes no legal duty to furnish him with anything better than he has for himself. In the late case of *Indermaur v. Dames*, L. R. 1 C. P. 274, Willes, 44 L. R. A.

J., treats a guest as a mere licensee, and says, on pages 287, 288, that the protection in ordinary cases depends 'upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns himself. . . . The class to which the customer belongs includes persons who go, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.' In Pollock on Torts, at p. 147, the author says: 'With regard to the person, one acquires this right to safety by being upon the spot, or engaged in work on or about the property whose condition is in question, in the course of any business in which the occupier has an interest.' In Campbell on Negligence, at p. 64, 2d ed., is this statement: 'Invitation, therefore, in the technical sense of the word as employed in this class of cases, differs from invitation in the ordinary sense,—implying the relation between host and guest. In the case of host and guest, it would be thought hard that the hospitality of the former should expose him to the responsibilities implied by business relations. The guest must take the premises as he finds them, with any risk owing to their disrepair, although the host is bound to warn his guest of any concealed danger upon the premises known to himself.' This sweeping language would seem to support appellee's contention and the ruling of the superior court. Such language can be found in many of the American cases, but, like the case from which we have quoted, none of them that have fallen under our notice involved the question. The opinion from which the above quotation is taken proceeds to say: "It seems to be the rule in England that an ordinary guest in a dwelling house, although expressly invited, has no greater rights than a licensee. The case at bar does not require us to decide whether that rule should be applied in Massachusetts, for the plaintiff was not on the defendant's premises under an invitation, express or implied. . . . We do not doubt that such relations of friendship or social intimacy may exist between individuals as to warrant a finding of an implied invitation to come as a friend at any time, and that one in such relations visiting his friend would have the same rights as if expressly invited, whatever those rights may be." The court held, upon the facts in the case, that, the plaintiff not being a guest by invitation, express or implied, she was a mere licensee; and hence the general statement in the opinion as to the law in case of an invited guest is mere *obiter dictum*, and not authority in the court pronouncing the judgment, nor in any other court.

There was one question involved in that case, and decided, which is involved here. The defect in the premises in that case was the steps which were used as a means of access to the tenements, one of which was occupied by a tenant of the defendant: and plaintiff, who visited the tenant, received

the injuries complained of through a defect in such steps. It was there said: "These steps were in the possession of the defendant, and it was her duty to keep them in a reasonably safe condition for the use of her tenants, and of other persons who were using them by her invitation, express or implied." In the case now before us the allegation is that, in the contract of renting, the defendant obligated himself to repair the well, and reserved the right to enter upon the premises for that purpose; and, while thus engaged and in possession of the well, it was negligently left open and unguarded. There would be no question that the owner would be free from liability for the defective premises while the same were occupied by a tenant unless the owner had obligated himself to repair. Taylor, Land. & T. § 175, and authorities there cited; Shearm. & Redf. Neg. 3d ed. § 502. But if he has undertaken to repair he may be liable for injuries resulting from his failure to repair or negligence in making such repairs. See same authorities last cited.

But the question remains as to his liability to an invited guest. Shearm. & Redf. Neg. 3d ed. § 499a says: "The precise ground and degree of liability of a landowner to an invited guest having no business relations with him are not yet thoroughly settled. Chief Baron Pollock, with whom it was a favorite notion that all members of a family were subject to the rule which restricts the right of a servant to recover from his master for injuries caused by negligence, held that a guest also fell within this rule, and could not recover from his host for an injury caused by a defect in the construction of the house, although owing to the negligence of the host. Baron Alderson concurred in this view. Baron Bramwell held that the host was liable for any misfeasance, but not for mere nonfeasance. But we are not satisfied with either theory. No attempt was made to sustain either by any process of reasoning, and we cannot see how any satisfactory reasons could be assigned. In our judgment the same rule should be applied in such a case that would be applied if the property were personal instead of real. The host should be held responsible to the guest for gross negligence,—that is, for such want of care as would justify the belief that he was indifferent to the safety of his guest." In *Hart v. Cole*, 156 Mass. 477, 16 L. R. A. 557, the court said: "The defendant is liable to a visitor of the tenant for the condition of the steps, if the tenant himself would have been liable had the steps been included in the tenement let, and not otherwise." Accordingly, this court, in *Brunker v. Cummins*, 133 Ind. 443, held that "a landlord who leases premises so far invites its use by all persons whose known relations to the tenant are such as to entitle them to enter and depart from the demised premises as to impose upon him the duty of refraining from any negligent act that makes the use of the premises unsafe." Therefore the decision of the question before us depends on the answer to the question whether the tenant would be liable in the absence of an agreement of the

landlord to repair. This brings us back to the question of whether the owner or occupant is liable to an invited guest for an injury through a defect in the premises unknown to the guest. The principle stated by Shearm. & Redfield seems a just and reasonable solution of the vexed question, and which at that writing was not settled by any adjudication that had fallen under the notice of the learned authors. We think it eminently just to hold the host responsible to the guest for gross negligence at least; that is, in the language quoted, such want of care as would justify the belief that he was indifferent to the safety of his guest; and in this case we have seen that the landlord, covenanting to repair, is liable as the host would be for like negligence. The act of removing the platform off of the well, and leaving it open and unguarded so long, was certainly the grossest negligence, evincing a total indifference as to the safety of the tenant, his family, and his guests.

Though the precise ground and degree of liability of a landowner to an invited guest for negligence was not at the time Shearm. & Redfield wrote thoroughly settled, yet several adjudications have since taken place, holding the owner liable in cases in all material respects like the present. *Monteith v. Finkbeiner*, 50 N. Y. S. R. 453; *Brady v. Valentine*, 3 Misc. 19; *Peil v. Reinhart*, 127 N. Y. 381, 12 L. R. A. 843; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Lindsey v. Leighton*, 150 Mass. 285. Our appellate court, in an able opinion, held, in *Howe v. Ohmart*, 7 Ind. App. 32, that an invited guest may recover against the owner of defective premises through which such guest received a personal injury. The case of *Hamilton v. Feary*, 8 Ind. App. 615, is not inconsistent with the first case cited, because the latter case was a suit by the tenant, as the court construed the complaint (the same judge delivering the opinion in both cases), to recover against her landlord for a breach of a covenant to repair. The court in the latter case, speaking of the other view of the case, said: "Still another instance of liability on the part of the owner is where he, though not bound to do so, undertakes to make repairs, and makes them in so negligent or unskilful a manner as to produce injury to the tenant."

But our attention has been directed to the case in this court of *Feary v. Hamilton*, 140 Ind. 45, as probably announcing a contrary doctrine. In that case it was difficult to determine whether the complaint was one against the landlord for a breach of a covenant to repair, or for negligence in failing to repair, by which the plaintiff (the tenant) suffered a personal injury; and that question was left undecided, and the complaint was held bad on the sole ground that, by the death of one of the parties to the transaction (the defendant), the cause of action died with the death of such party, under the statute. And, after so holding, it was there said: "Neither do we wish to be understood as holding the complaint otherwise sufficient. There are a number of authorities which declare that the covenant to repair

does not include any liability for personal injury or death from nonrepair." Then a list of cases is cited. But we need not pursue these authorities, even if they do hold, as is stated, that the covenant to repair does not include any liability for personal injury or death for breach of the covenant for failure to repair. The cases there cited were actions for breach of the covenant to repair in failing to repair. Such failure was mere nonfeasance, for which Shearman & Redfield say the landlord is not liable for a resulting personal injury. The case before us was not one for the breach of the covenant to repair,—a mere nonfeasance; but it was for a misfeasance,—misconduct, an affirmative act of negligence in discharging the duty assumed to repair. The obligation assumed by the landlord to repair gave him no right to leave the platform off of the well at night, unguarded, where he knew persons ignorant of the situation were liable to fall into it, any more than it would a person employed by the tenant to make said repairs and do said work. Had he gone there, in the absence of a contract, to repair, and removed the platform off of the well, and left it so, it could hardly be said with any show of reason that he would not be legally liable to any one rightfully on the premises, who, without negligence, fell into the well in the dark. His agreement to repair did not protect him against his misconduct, any more than if he had done the wrongful act in the absence of such a contract. *Feary v. Hamilton*, 140 Ind. 45, is in no way inconsistent with the defendant's liability on the facts stated in the complaint and admitted by the demurrer in the case at bar.

Our attention has also been invited to the case of *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255. Neither is that case at all inconsistent with the conclusion we reach in the present case. The whole ground of the decision against the plaintiff in that case is there stated thus: "We are satisfied that the authorities warrant us in adjudging that, where a stairway connected with apartments hired in a tenement house occupied by several tenants is rendered unsafe by temporary causes, such as the accumulation of snow and ice, the landlord is not liable to the tenant who uses such a stairway with full knowledge of its dangerous condition, unless there is a contract on the part of the landlord to keep the premises in repair and fit for safe use." We need scarcely say that to hold the defendant liable in the case now before us in no way infringes upon the rule laid down in the case from which we have just quoted. The rule laid down in the case just quoted is in harmony with the law as laid down by an eminent author on Negligence, as follows: "Defects Ordinarily Incident to Houses. Defects in a house, such as are incident to the ordinary wear of housekeeping, but which are the cause of injury to a lawful visitor, attach no liability to the owner or occupier of the house." Wharton, Neg. § 825. And the same author in § 817, says: "An owner being out of possession and not bound to repair is not liable in this action for injuries received in conse-

quence of his neglect to repair. But where the nuisance existed when the property was leased to the tenant the landlord may be held liable. So, the tenant is liable for the nuisance thus retained by him, even though the nuisance was on the premises when leased to him. And both landlord and tenant under the circumstances are jointly and severally liable for the continuation of the nuisance, supposing the nuisance to be on the property when leased, or to be put there with the landlord's connivance." And in § 826 the same author says: "Gross Defects Known to Owner, the Natural Consequence of Which is Injury to Visitors. If a man has such defects in his house, it is negligence for him to invite or even permit visitors who are not warned of such defects, to enter it. 'If a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby to any other person entering upon the premises by his invitation or procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care.' . . . It is on this principle, assuming in each case that the defect is one of which the occupier of the house ought to be cognizant, and the natural consequence of which is to produce injury to visitors, that the following cases can be sustained." Accordingly, it was said by the supreme court of New York, in *Monteith v. Finkbeiner*, 50 N. Y. S. R. 453: "Upon this evidence we think the court was right in refusing to dismiss the complaint. As was said by Mr. Justice Barrett in *Alperin v. Earle*, 55 Hun, 212: 'The landlord is responsible for injuries to his tenants resulting from the dangerous condition of those parts of the building which he reserves for the common use, and over which he retains control, but only when he has been guilty of actual negligence with regard thereto. To bring him within this rule, "it must appear," as was said in *Henkel v. Murr*, 31 Hun, 30, "that with some notice of the condition of things, or under some circumstances equivalent to notice, such as an unreasonable omission to ascertain the condition, he had failed to make the necessary repairs or changes called for by the condition or exigency."' This case cited of *Henkel v. Murr*, is also authority for the proposition that the same measure of liability for injuries sustained by negligence of the landlord extends to one socially visiting or calling upon a tenant as protects the tenant himself, because the use of the hall and staircase for the purpose of enjoying such visits and calls is by necessary implication, where not expressly provided for, within the reasonable intent of the demise of the rooms. The plaintiff's intestate here was visiting one of the tenants, and was injured by reason of the defective condition of a portion of the premises with respect to which the obligation of keeping it in a safe condition was imposed upon the landlord."

Our holding that liability exists is not on the ground that the landlord contracted to repair since that contract but excused the landlord for going upon the premises. His liability is for an affirmative wrong in cre-

ating a dangerous condition. The same liability would have arisen if he had been a stranger to the parties and to the premises.

The judgment is reversed, and the cause remanded, with instructions to overrule the

demurrer, and for further proceedings not inconsistent with this opinion.

Appeal dismissed after order for rehearing granted.

IOWA SUPREME COURT.

Earl WHEELER, by Next Friend,

v.

City of BOONE, Appt.

(.....Iowa.....)

1. A tricycle is not within the scope of an ordinance prohibiting the use of "all varieties of vehicles known by the general name 'bicycles.'" on sidewalks.
2. A tricycle in which a person unable to walk is traveling on a sidewalk is not within the scope of an ordinance against leading, riding, or placing "any beast of burden or vehicle on any sidewalk," or an ordinance prohibiting riding or driving other than between curb lines of the street.
3. The duty of a city to keep a sidewalk in suitable condition to walk over extends to a person rightfully riding on the walk in a tricycle; and the test of the city's liability to him is the same as if he had been walking.
4. An instruction as to the recovery of damages for future pain and suffering is improper in the absence of any evidence to warrant it.

(April 8, 1899.)

APPEAL by defendant from a judgment of the District Court for Boone County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Whitaker & Dale, for appellant:

The defect in the sidewalk was not apparent to the ordinary observer, but it required a close investigation to discover that the plank was loose. Its existence was not known to the inhabitants of the city generally.

It cannot be said, in view of these facts, that the city was negligent in failing to ascertain the existence of the defect before the injury occurred.

Cook v. Anamosa, 66 Iowa, 427.

In legal contemplation the bicycle is to be regarded as a carriage or a vehicle.

4 Am. & Eng. Enc. Law, 2d ed. p. 16.

Sidewalks are intended for the use of pedestrians, and not for use by persons in vehicles.

Mercer v. Corbin, 117 Ind. 450; *Reg. v. Plummer*, 30 U. C. Q. B. 41; *O'Laughlin v. Dubuque*, 42 Iowa, 539; *Alline v. Le Mars*, 71 Iowa, 654; *Ely v. Des Moines*, 86 Iowa, 55, 17 L. R. A. 124; 1 Addison, Torts, 28.

NOTE.—As to bicycles on sidewalks or bridges, see also *Twilley v. Perkins* (Md.) 19 L. R. A. 632, and note; and *Com. v. Forrest* (Pa.) 29 L. R. A. 365.
44 L. R. A.

Whenever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit.

1 Sutherland, Damages, 55; *McDonald v. Snelling*, 14 Allen, 292, 92 Am. Dec. 768.

Mr. R. F. Jordan, for appellee:

The verdict necessarily amounted to a finding that the walk was unsafe, and that such a condition existed for a length of time which by ordinary diligence would have enabled the defendant appellant to discover it and remedy it. It is the duty of the jury, when there is no actual notice, to determine whether the defect existed for a sufficient length of time to have placed the city upon notice by construction.

8 Am. & Eng. Enc. Law, 1st ed. p. 406.

It cannot be said, where the element of pain and suffering is involved, and where the boy has been by this injury a helpless invalid for a period of two months or more, and where he has been the source of a great deal of worry and anxiety to his parents, that the amount allowed by the jury is excessive, or is the result of either passion or prejudice.

Allen v. Ames & C. R. Co. 106 Iowa, 602.

The answer in this case does not plead the ordinances referred to, or any one of them. Where a corporation desires to avail itself of a defense because of a violation of some of its rules and regulations, such a rule or regulation must be specially pleaded.

Strong v. Iowa C. R. Co. 94 Iowa, 380;

Nicholaus v. Chicago, R. I. & P. R. Co. 90 Iowa, 85; *Independent Dist. v. Merchants' Nat. Bank*, 68 Iowa, 343; *Mayes v. Chicago, R. I. & P. R. Co.* 63 Iowa, 562.

While sidewalks are primarily designed for the use of pedestrians, yet the lame and the blind have a right to use the highways, including sidewalks.

Elliott, Roads & Streets, 470.

In a case where the defendant was prosecuted for violating a town ordinance against bicycles on sidewalks, where it appeared from the evidence that at the point where defendant rode on the sidewalk the street was impassable owing to a large mud hole therein, the wheelman was justified in taking to the sidewalk.

Law Notes, p. 31, May, 1898.

The use of a velocipede on the public streets is not necessarily unlawful.

Purple v. Greenfield, 138 Mass. 1.

Granger, J., delivered the opinion of the court:

The plaintiff, Earl Wheeler, is a boy fourteen years of age, and is afflicted by a stiff-

ening of the muscles and joints through what is called "callositation." Because of this he is moved about in a tricycle. About April 8, 1897, he was going to school with his brother, a boy two years his junior, to draw or push the tricycle and on one of the walks of defendant city, because of a defect in the walk, he was thrown from the tricycle and injured; and this action is for the damage suffered. The walk on which the accident occurred was 4 feet in width, made of boards placed on three stringers. The defect, as shown, was in one of the boards, about 8 inches wide, being broken so that on one side of the walk it was from $1\frac{1}{2}$ to 2 inches below the surface; and when stepped upon it would go down, and then spring back, so as to be as we have described. This was at a place where the walk descended in the direction the boys were going; and it appears from their testimony that they were going quite fast down the hill; and the younger brother, who had been pulling the vehicle with a rope, because of its speed, left the front, and went behind it to hold it back; and just as he reached there the front wheel went into the hole in the walk, and Earl fell out and was injured. It is urged to us that the evidence does not justify a finding of negligence on the part of the city, nor that the boy was injured because of the defect in the walk. We cannot agree with appellant as to either. We would be better satisfied with a finding for the city on both questions, but it is not to be well said that there is not a substantial conflict, as to both propositions, in the evidence. As to the condition of the walk, and how long it had been out of repair, there was affirmative proof that the walk had been for some time—two months or less—in the condition we have described, so that the city, in exercise of ordinary care, would have known it. There is a strong showing from those who used the walk and ought to have known of the defect if it was there, that they did not know of it; but, with the affirmative proof of the fact, this want of knowledge does not destroy the conflict. As to how the injury occurred, the boys both say the wheel of the tricycle went into the hole, and Earl was thrown out. It is true, they do not agree as to some particulars that might be considered in weighing the evidence, but nothing so overcomes their statements as to nullify the finding of the jury.

2. The city has an ordinance prohibiting the use of its sidewalks of "all varieties of vehicles known by the general term 'bicycles.'" Defendant offered the ordinance in evidence, and it was rejected, and rightly so, for it was immaterial; a tricycle not being a bicycle. Nor are they known by the general term "bicycle." It is probably true that both are vehicles, but the ordinance is not against the use of vehicles, unless they come under the general term "bicycle."

3. The court also rejected as evidence an ordinance as follows: "Whoever shall lead, ride, or place any beast of burden or vehicle on any sidewalk or footway, otherwise than going in or out of premises owned or occupied by himself or his employer, or shall al-

low the same to stand or remain upon any street crossing, to the inconvenience of persons, shall be deemed guilty of a misdemeanor." The ruling was right. There is no more reason to think the ordinance was intended to prohibit the use of a tricycle, as this was made, than the use of a baby cab or invalid chair on wheels. It is very clear that it has no reference to vehicles used and propelled by individuals, like bicycles or tricycles. The court also excluded an ordinance prohibiting riding or driving other than between the curb lines of the street, but the ordinance was manifestly intended to prohibit riding or driving beasts other than between the curb lines. This conclusion arises from construing the several provisions together. The ordinance as to bicycles was evidently intended to cover the subject of vehicles of that general nature. Whatever may be said as to general rules of law prohibiting vehicles, including bicycles, on sidewalks, we have yet to learn of any general or local law prohibiting the use of carriages operated by hand on sidewalks for the convenience of those unable to walk; and no law should be given such effect by construction.

4. The court instructed that, while the city was required to keep its walks in reasonably safe condition for pedestrians exercising reasonable care, it was not required to keep them in safe condition for people riding thereon in tricycles, and, as the accident in this case occurred while plaintiff was on a tricycle, the liability of the city must be tested by the same rule that would obtain had plaintiff been walking, and then been injured; that is, if the city was negligent in failing to keep the walk in suitable condition for people to walk over, and plaintiff while riding on the tricycle, in the exercise of due care, was injured because of such neglect, he could recover. We think the rule a correct one. It differs from the oft-expressed rule only in this, that persons who have a right to ride on the sidewalks in such vehicles may rely, the same as footmen may, on the walks being in a suitable condition for people to walk over, and have the same rights in case of injuries resulting from neglect. Such a rule places no additional burden on the public, and seems to be just as to the individual.

5. A complaint as to the fourteenth instruction given by the court is without merit. There is also a complaint as to the fifteenth instruction given. After verdict the court permitted plaintiff to so amend the petition as to claim damages for further pain and suffering. The court had by its instructions already permitted such a recovery, if the jury found for plaintiff, and error is now assigned on the giving of the instruction; and it is said the evidence was not such as to warrant the amendment, or a recovery for mental and physical pain in the future, unless the allegation of permanent injury would, by implication, include that of future pain. The petition contains no such averment, and in argument appellee attempts to sustain the instruction as given on that theory. The petition contains an

express allegation of physical and mental pain which plaintiff has suffered, but no averment that he will so suffer in the future. The case seems to have been tried on that theory, except as to the instruction given by the court; and it does not appear that the parties had in view such an issue until the question arose after verdict, when, to meet the conditions, the amendment was filed. The case is to be reversed, and what we have said will be sufficient to avoid any difficulty on another trial on this branch of the case. It is explicitly charged in argument that there is no evidence as a basis for a recovery for future pain, and appellant sets out the evidence to show that there could be no such a recovery. Appellee in no way attempts to meet this, and we find no evidence on which damages of this character could rest. So far as we find evidence bear-

ing on that question, it is against even a probability of such suffering. It is true that he will suffer pain because of his former ailment, and would but for his injuries complained of. If there is any evidence from which it could be found that the injuries would increase his suffering after the trial, we do not discover it; and we think, if there was such, it would have been, in view of appellant's claim, pointed out. The injury was early in April, and the trial was the first days of October following, when he seemed to be well of his injuries, in so far as they would cause him pain. It is true that there remained a permanent enlargement of the bone of the leg, but it does not appear that it would be painful. For the error in submitting the question of future pain and suffering, *the judgment must stand reversed.*

KENTUCKY COURT OF APPEALS.

James REED, Appt.,
v.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(.....Ky.....)

1. A railroad company is under obligation to stop a train and rescue a passenger who has been thrown or pushed therefrom without any fault on its part, where he is liable to perish or suffer great injury unless rescued, only when it can stop the train long enough to rescue him without endangering the safety of other passengers by collisions.
2. A petition against a railroad company for failure to rescue a passenger who fell or was thrown from a train is not sufficient when it does not allege that the train could have been stopped to rescue him without risk of collision with other trains, or that there were any means by which the trainmen could have procured others to rescue him.

(October 28, 1898.)

APPEAL by plaintiff from a judgment of the Circuit Court for Clark County in favor of defendant in an action brought to recover damages for defendant's negligence in leaving plaintiff to suffer unaided after having fallen from defendant's train. *Affirmed.*

The facts are stated in the opinion.

Messrs. Benton & Bush, S. A. Jeffries, and Beekner & Jonett, for appellant;

The relation is not terminated by the pas-

NOTE.—As to duty of railroad company to disabled passenger left on railroad track, see also *Cincinnati, I. St. L. & C. R. Co. v. Cooper* (Ind.) 6 L. R. A. 241, and *note*; also *Cincinnati, H. & D. R. Co. v. Kassen* (Ohio) 16 L. R. A. 674. 44 L. R. A.

senger falling or being thrown from the train.

2 Am. & Eng. Enc. Law, p. 745.

The rule certainly cannot be that while a passenger is on the train a carrier must afford him ample protection from all injury, and yet if he is thrown, or accidentally falls, from the train, and is rendered helpless, the carrier can leave him to suffer and to die, without being held to any responsibility.

Hutchinson, Carr. § 596; *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186; *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78.

If a passenger falls from a train, with the knowledge of persons in charge of the train, and is left in a position of peril, where he is likely to be killed or injured by another train, it is the duty of those in charge of the train from which he fell to notify the crew of the other trains so they can avoid injuring him.

Cincinnati, H. & D. R. Co. v. Kassen, 49 Ohio St. 230, 16 L. R. A. 674.

Messrs. Breckinridge & Shelby, for appellee:

After a person has been received as a passenger if the performance of the contract for transportation in the usual and proper way involves his leaving the vehicle of the company for any purpose and returning again, he is entitled to protection while leaving and when returning. But during the interval of his absence after his departure and before his return he is not regarded as a passenger.

Hutchinson, Carr. § 561a; *State v. Grand Trunk R. Co.* 58 Me. 176, 4 Am. Rep. 258; *Cincinnati, H. & D. R. Co. v. Kassen*, 49 Ohio St. 230, 16 L. R. A. 674; *Henderson v. Louisville & N. R. Co.* 20 Fed. Rep. 430.

Burnam, J., delivered the opinion of the court:

The facts upon which appellant seeks to recover damages from appellee in this action, as stated in his original and amended petitions, are that he was a passenger on one of appellee's trains from Winchester to Elkin, and that at a point between those places, while the train was moving rapidly and passing over a high trestle, he was thrown or pushed from the train, so that he fell a distance of from 40 to 50 feet; that he received the fall after dark, and that the defendant, through its employees in charge of the train, knew he had received the fall, and that he was either killed or had received such serious personal injuries as to render him helpless, but negligently failed to stop the train, and care for him, or procure others to do so; that, by reason of such negligence, he was compelled to, and did, lie where he had fallen until 7 o'clock the next day; that the place was about a mile from any dwelling house or habitation or highway, and not in sight of any highway or dwelling house or habitation; that these facts were known to defendant's agents in charge of the train; and that, as a result of the fall, he suffered serious injuries, and that a cold rain fell upon him where he lay exposed. Defendant filed a general demurrer to the petition as amended, which was sustained, and the petition was dismissed; and this appeal is taken from that judgment.

Two legal questions are presented: First, Is a railroad company under legal obligation to stop its train, and rescue a passenger who has been thrown or pushed therefrom without any fault on its part, under circumstances where, unless rescued, he is liable to perish or suffer great injury? and, second, Does the petition in this case allege such a state of fact as made it the legal duty of defendant to have done so in this instance? The precise question presented here is a novel one, and our attention has not been directed to a case in which it has been considered or passed upon. From the time the relation of carrier and passenger commences, the passenger is necessarily, in a large degree, under the protection of the carrier, and it is bound to exercise the strictest vigilance in seeing after his safety. It has been held that if a passenger falls from a train, with the knowledge of the persons in charge thereof, and is left in a position of peril, where he is liable to be killed or injured by another train, it is the duty of those in charge of the train from which he fell to notify the crews of other trains, so that they can avoid injuring him; and if they fail to give such notice, and the person is injured by another train, the employer of the crew of the train from which he fell is responsible. And it seems to us that it is not asking too much of a railroad company to require that it shall render such assistance to a passenger who has been rendered helpless by a fall from one of its trains as it can give without endangering the safety of other passengers or property committed to its care. But, on the other hand, it is the settled rule that,

when a railroad company undertakes to transport persons by the powerful and dangerous agency of steam, public policy and safety alike require that it shall be held to the exercise of the highest possible degree of care, diligence, vigilance, and skill in the conduct and management of its trains in every particular, with a view to the safety of its passengers; and for the slightest negligence or carelessness in these respects the carrier is liable. See *Beach, Contrib. Neg.* § 144. Its trains necessarily run on fixed schedules of time, and, as a general rule, it is necessary, for the safety of railroad travel, that these schedules should be scrupulously adhered to; and unless appellee could have stopped its train in this instance long enough to have rescued appellant without endangering the safety of its other passengers by collisions arising from such stoppage, or otherwise, it was under no legal obligation to do so. The petition in this case does not allege that the train could have been stopped, and the time taken to rescue appellant, without running the risk of collision with other trains, nor is it alleged that there were any means by which the men in charge of the train could have procured others to go to the assistance of appellant; and, as the burden is upon appellant to allege and prove these necessary facts, the demurrer was properly sustained. *Wherefore the judgment is affirmed.*

A petition for rehearing having been filed, **Burnam, J.**, on December 16, 1898, handed down the following response:

The rule that a plaintiff is not required to allege matters which are peculiarly within the knowledge of a defendant has no application "where the matter is such that its affirmation is essential to the apparent or prima facie right of recovery of the party pleading. There it ought to be affirmed or denied by him in the first instance, though it may be such as would otherwise properly form the subject of objection on the other side." See *Steph. Pl.* p. 252. The defendant's paramount duty was to transport its passengers safely, and to avoid the possibility of accidents from collisions with other trains. The obligation on it to stop its train to rescue a passenger who, without fault on its part, had fallen from the train, was wholly subordinate to its obligation to others; and, before appellant could rightfully complain that appellee's failure to assist him was negligence, he must allege facts which made it the legal duty of appellee to have rendered such assistance; and, without allegations showing that under the conditions which obtained appellee could have safely rendered such assistance, no prima facie case is made out. The court cannot assume that a train can be stopped at any but regular stations without incurring danger to the passengers thereon, which it is the supreme duty of those in charge thereof to avoid. The burden of alleging and proving that such conditions existed is essential to the right of recovery in an action of this character.

DEPOSIT BANK OF OWENSBORO, Appt.,
v.
DAVIESS COUNTY.

FARMERS' & TRADERS' BANK, Appt.,
v.
City of OWENSBORO.

OWENSBORO SAVINGS BANK, Appt.,
v.
SAME.

CITIZENS' SAVINGS BANK, Appt.,
v.
SAME.

DEPOSIT BANK OF OWENSBORO, Appt.,
v.
SAME.

City of CARLISLE, Appt.,
v.
DEPOSIT BANK OF CARLISLE.

NICHOLAS COUNTY, Appt.,
v.
SAME.

City of CARLISLE, Appt.,
v.

FARMERS' BANK OF CARLISLE.

SIMPSON COUNTY BANK, Appt.,
v.
City of FRANKLIN.

(.....Ky.....)

1. Charters granting exemption from taxation, passed after the enactment of a general law which provides that all charters subsequently enacted shall be subject to amendment or repeal, may, unless a contrary intent was plainly expressed therein, be amended or repealed at the pleasure of the legislature so as to deprive the corporation of the exemption.
2. National banks doing business in a state are subject to have the same tax imposed upon their shares of stock as are imposed upon the shares of stock in state banks whose charters were passed after the adoption of a statute making the charters subject to amendment although they are in the state banks not subject to such taxation because of irrevocable exemptions in their charters.
3. Consent in writing by banks to be governed by the provisions of a statute fixing the rate of taxation which the state agrees shall be in lieu of all other taxation upon the banks does not effect an irrevocable contract where the statute expressly provides that it shall be subject to the provisions of another law making all grants to corporations subject to amendment at the pleasure of the legislature.
4. The acceptance by a bank of the provisions of a statute fixing its taxes

at a certain amount which shall be in lieu of all other taxes, which statute is made subject to amendment at the pleasure of the legislature, is a waiver of tax exemptions in its charter, and it will thereafter be subject to such taxation as the legislature sees fit to impose upon it and a repeal of the new statute will not restore the provisions of the old one.

5. A proviso to a statute making privileges and franchises granted to corporations subject to amendment, that no amendment shall impair other rights previously vested, does not include an exemption from taxation, since that is a franchise and as such subject to amendment, and not a vested right.
6. The enjoyment of a special rate of taxation given to a bank by a statute cannot continue after the repeal of the statute.
7. Statutes granting extension to corporate charters passed after the adoption of an act making all grants to corporations subject to amendment will be subject to that act, although the original charters contained exemptions which were irrevocable.

(March 24, 1897.)

A PPEALS by Deposit Bank of Owensboro, Farmers' & Traders' Bank, Owensboro Savings Bank, and Citizens' Savings Bank from decrees of the Circuit Court for Daviess County in favor of defendants in suits brought to enjoin the collection of taxes. *Affirmed.*

A PPEALS by the City of Carlisle from decrees of the Circuit Court for Nicholas County in favor of plaintiffs in suits brought to recover back taxes alleged to have been paid to the city by mistake and without consideration. *Reversed.*

A PPEAL by Nicholas County from a decree of the Circuit Court for Nicholas County in favor of plaintiff in a suit brought to enjoin collection of taxes alleged to be due the county. *Reversed.*

A PPEAL by Simpson County Bank from a decree of the Circuit Court for Simpson County in favor of plaintiff in a suit brought to compel payment of taxes. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. Wilfred Carleo*, for appellant, Owensboro National Bank:

The act of 1892 is in violation of contract rights.

Com. v. Farmers' Bank, 97 Ky. 590.

The statutes of 1892 are in conflict with the state Constitution.

Ky. Const. § 181.

The state cannot tax franchises of national banks.

McCulloch v. Maryland, 4 Wheat. 431, 4 L. ed. 607; *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. ed. 832; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 840; *National Bank of the Metropolis v. Kennedy*, 17 Wall. 19, 21 L. ed. 554; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143; *Crutcher v. Ken-*

NOTE.—The above decision was affirmed by the United States Supreme Court in 173 U. S. 636, 43 L. ed. 840.

For contracts of exemption from taxation, see also *State, Singer Mfg. Co., v. Heppenhelm* (N. J.) 32 L. R. A. 643, 44 L. R. A.

For other cases of interference with charter privileges, see also *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 33 L. R. A. 177, and note; and *Jacobson v. Wisconsin, M. & P. R. Co.* (Minn.) 40 L. R. A. 389.

tucky, 141 U. S. 47, 35 L. ed. 649; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153.

Messrs. Weir & Weir, Sweeney, Ellis, & Sweeney, and *Reuben A. Miller* for the Owensboro Banks.

Messrs. Goodnight & Roark for Simpson County Bank.

Messrs. Little & Little, for appellee city of Owensboro:

While these appeals have been pending some of the questions involved have been considered and determined in—

Com. v. Farmers' Bank, 97 Ky. 590.

The cases before the court do not involve a rule of property. It is not a question of right between two citizens but between the citizen on one hand and the state on the other, or the local government.

Even as to a rule of property, however, there may be departures from former decisions in cases where there is necessity of preventing continued injustice or of vindicating clear and obvious principles of law.

Wells, Res Adjudicata and Stare Decisis, § 598.

When the question decided is a doubtful one, and when the decision is made by a divided court, and when there has been no long period of acquiescence, the doctrine of *stare decisis* grows less inflexible.

When a decision has been rendered that plainly defeats an important legislative policy, where it perpetuates unjust inequalities in the burdens of government, and it is reached by only too faithfully following precedent of the Federal judiciary whose artificial reasoning has long been questioned by learned lawyers and judges everywhere, the doctrine of *stare decisis* should not prevent the court from again considering the question involved.

Bowers v. Green, 2 Ill. 43; *Shields v. Perkins*, 2 Ribb, 230; *Caldwell v. Price*, Hardin, 69; *Frank v. Darst*, 14 Ill. 304, 58 Am. Dec. 575.

Mr. J. D. Atchison, also for appellee city of Owensboro:

Every bank that accepted a charter after the passage of the act of 1856 did it with full knowledge of the fact that the state had adopted a policy of no longer entering into irrevocable contracts with corporations, except it plainly expressed its purpose to do so in making the grant, and that whatever rights were acquired under charters could only be enjoyed during such time as the legislature might see fit to continue the immunity.

There has always been a strong protest against the doctrine that such pledges could constitutionally be made.

Cooley, Taxn. 66; *Bailey v. Maguire*, 22 Wall. 215, 22 L. ed. 850.

The charters of incorporation are to be construed strictly against the incorporators.

Cooley, Const. Lim. 5th ed. 488, 489; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939; *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Perrine v. Chesapeake & D. Canal Co.* 9 How. 172, 13 L. ed. 92; 44 L. R. A.

Richmond, F. & P. R. Co. v. Louisa R. Co. 13 How. 71, 14 L. ed. 55.

Except as the banks have an absolute contract plainly expressed in the Hewitt bill they have no standing in court.

Exemptions from taxation are always subject to recall when they have been granted merely as a privilege, and not for a consideration.

Cooley, Const. Lim. 473; *Griffin v. Kentucky Ins. Co.* 3 Bush, 592, 96 Am. Dec. 259; *Louisville Water Co. v. Clark*, 143 U. S. 10, 36 L. ed. 57; *South Carolina v. Stoll*, 17 Wall. 425, 21 L. ed. 650; *Ex parte Crow Dog*, 109 U. S. 556, 27 L. ed. 1030; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *Hoge v. Richmond & D. R. Co.* 99 U. S. 348, 25 L. ed. 303; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 408; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 28 L. ed. 173; *Louisville Gas Co. v. Citizens' Gas Co.* 115 U. S. 683, 29 L. ed. 510; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979; *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898; *Miller v. New York*, 15 Wall. 488, 21 L. ed. 101.

There is nothing in the language used, nor in the character of the privileges and franchise granted and conferred, indicating that the intent to relinquish its power of taxation is plainly expressed.

Cumberland & O. R. Co. v. Barren County Ct. 10 Bush, 608; *Shields v. Ohio*, 95 U. S. 323, 24 L. ed. 358; *Louisville Water Co. v. Clark*, 143 U. S. 10, 36 L. ed. 57.

The taxing power of the state is never presumed to be relinquished unless the intent to relinquish is expressed in clear and unambiguous terms.

Bradley v. McAtee, 7 Bush, 667, 3 Am. Rep. 309; *Dazey v. Killam*, 1 Duv. 407; *Nunes v. Wellisch*, 12 Bush, 365.

It is perfectly well settled in Kentucky that the charters of corporations can be altered or amended by General Statutes.

Chattaroi R. Co. v. Kinner, 81 Ky. 221.

The acceptance of the amendment by the bank after its acceptance of the provisions of the Hewitt bill was a modification of the contract which took away the irrevocable qualities inherent therein, and placed this bank upon exactly the same footing as though incorporated under a charter granted after the expiration of the time fixed by the Hewitt bill for its acceptance.

Bath County v. Farmers' Bank, 19 Ky. L. Rep. 245; *Citizens' Bank v. Shelbyville*, 19 Ky. L. Rep. 247.

National banks can have no pretense that they have a contract with the state on the subject of taxation.

City Nat. Bank v. Paducah, 10 Ky. L. Rep. 221; *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 484; 16 Am. & Eng. Enc. Law, p. 190; *Lionberger v. Rouse*, 9 Wall. 468, 19 L. ed. 721.

The shares in national banks are subject to taxation, although the entire capital of

the bank be invested in the bonds of the United States which cannot be taxed by state authority.

Lionberger v. Rouse, 9 Wall. 473, 19 L. ed. 724; *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. ed. 229.

The right of the state to tax national banks is inherent within the state.

First Nat. Bank v. Kentucky, 9 Wall. 358, 19 L. ed. 702.

The tax sought to be imposed is a tax on the shares of stock owned by the stockholders in the national and state banks of the state coupled with the requirement that the banks shall pay the tax for and on behalf of the stockholder.

First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; *Lionberger v. Rouse*, 9 Wall. 468, 19 L. ed. 721.

The state is not confined to the par value of the shares in such institutions, but may tax them upon their market value.

Hepburn v. School Directors, 23 Wall. 480, 23 L. ed. 112; *New York v. New York Tax & A. Comrs.* 94 U. S. 415, 24 L. ed. 164.

Section 5219 of the United States Revised Statutes simply prohibits taxation at a greater rate than like property similarly situated.

Mercantile Bank v. New York, 121 U. S. 138, 30 L. ed. 895; *Davenport Bank v. Davenport Bd. of Equalization*, 123 U. S. 83, 31 L. ed. 94; *Bank of Redemption v. Boston*, 125 U. S. 60, *National Bank of Redemption v. Boston*, 31 L. ed. 689; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772; *Talbot v. Silver Bow County Comrs.* 139 U. S. 438, 35 L. ed. 210; *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 491.

The act of the Kentucky legislature known as "The Hewitt Bill" is itself repugnant, not only to the Constitution of Kentucky, but to the Constitution of the United States, in that it intentionally and purposely discriminates against other property in favor of banks with reference to the question of taxation.

Railroad Tax Cases, 13 Fed. Rep. 774; *Home Ins. Co. v. New York*, 134 U. S. 606, 33 L. ed. 1031; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892; *Proprietors of Bridge v. Hoboken Co.* 1 Wall. 116, 17 L. ed. 571.

Messrs. W. G. Dearing and G. A. Cassidy for city of Owensboro and Daviess County.

Mr. Robert S. Todd for Daviess County.

Mr. Thomas Owens for city of Carlisle.

Mr. Benjamin H. Robinson for Nicholas County.

Mr. G. T. Finn for city of Franklin.

Messrs. Hanson Kennedy, W. P. Ross & Son, and Harry Kennedy for Carlisle Banks.

Paynter, J., delivered the opinion of the court:

These cases were pending either in this or the lower courts when the cases known as the "Bank Tax Cases" were decided. 97 Ky. 44 L. R. A.

590. From that opinion the writer of this one dissented, in which Judges Lewis and Guffy concurred. The questions of law involved in these cases are similar to those in the cases mentioned. We therefore re-examine and reconsider the question as to whether the opinion of the majority shall stand as the law regulating the taxation of the banks of the state.

The conclusion which we have reached is that the shares of stock, etc., in the banks are subject to county and municipal taxation, hence the opinion referred to should be and is overruled. So is the case of *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370, overruled, for the reasons which will hereinafter appear.

This conclusion of the court renders it necessary to discuss the questions of law in the other "Bank Tax Cases," and we will consequently use parts of the dissenting opinion without quotation marks. There were four banks in the state, commonly designated as the "old banks," and they were the Bank of Kentucky, chartered in 1834; the Northern Bank, in 1835; the Bank of Louisville, in 18—; the Farmers' Bank of Kentucky, in 1850. The charters of the first three banks named were extended by the same act of the general assembly in 1858, and each of the charters was extended by subsequent legislative acts. In neither of the acts of extension is reference made to the act of 1856, nor does either contain express limitation upon the taxing power of the state. The charter and amendments of the Farmers' Bank of Kentucky were extended by an act of the general assembly in 1876, but the right to repeal the charter and its amendments "either by general or special act" was reserved in the act. The charters of all banks operating under charters were granted after the act of 1856. This was the situation when the revenue bill of 1886, generally called the "Hewitt Bill," became a law. The provision of it relating to the taxation of banks is art. 2, chap. 92, Gen. Stat., and reads as follows:

Sec. 1: "That shares of stock in state and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to \$100, or on each share of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each \$100 of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to 10 per cent of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, state, county, and municipal."

Sec. 4: "That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under

the charters of the state banks to a different mode or smaller rate of taxation, which consent or agreement to and with the state of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

Sec. 5: "The said banks may take the proceeding authorized by § 4 of this act at any time until the meeting of the next general assembly; provided, they pay the tax provided in § 1, from the passage of this act."

Sec. 7: "If any bank, state or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in § 4, the shares of stock of such bank, institution, or corporation, and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by § 2 of this act, and the same taxes, state, county, and municipal, shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals; provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Sec. 6: "This act shall be subject to the provisions of § eight (8), chapter sixty-eight (68) of the General Statutes."

Section 8 of chapter 68, referred to in § 6 above, is as follows: "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed; provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

These statutes were in force when the constitutional convention met to frame the present Constitution. This instrument was adopted on the 28th day of September, 1891.

Section 174 is as follows: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses, or franchises."

Section 175 provides: "The power to tax property shall not be surrendered or suspended by any contract or grant to which the commonwealth shall be a party."

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In pursuance of these provisions of the Constitution the general assembly enacted laws under which the taxes were levied on the shares of the capital stock, etc., for county and municipal purposes about the imposition of which these controversies arose. The general assembly by the laws imposing the taxes for county and municipal purposes reduced the amount which the banks had been paying the state so as to only collect 42½ cents on each \$100 of the value of the property interest in the bank assessed. This is the rate of taxation paid by individual property. The rate under the Hewitt bill was 75 cents on each share of the capital stock equal to \$100, or on each \$100 of stock therein, and, in addition thereto, pay upon each \$100 of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeded an amount equal to 10 per cent of their capital stock which was in full of all tax, state, county, and municipal. We assume the banks filed their written consent as provided for in § 4, art. 2, chap. 92, Gen. Stat. It is claimed that the banks have irrevocable contracts with the state from which it cannot recede without their consent; that the constitutional convention and the state had no power to change the mode or fix a higher rate of taxation than was imposed in the act of 1886. It is gravely asserted that when those who gave the state its organic law and statutory law seek to impose the burden of taxation equally on those who should bear it, a contract is attempted to be violated, and the state is acting in bad faith. We fully realize the wisdom of that provision of the Federal Constitution which declares that no state shall pass any law "impairing the obligation of contracts." The state should deal honestly with its citizens, thus setting an example worthy of the imitation of those who constitute the state. It has been well said: "A compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as is possible, against the fluctuations in human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellow man. They are the springs of business, trade, and commerce. Without them, society could not go on. Spotless faith in their fulfilment honors alike communities and individuals." While this is true, we feel that the fervid eloquence of an orator could not in too earnest terms plead the justness of this demand of the citizen that each integral part of the state shall bear its fair proportion of the burdens of the state. The one who seeks to show that it is just to grant the privilege of exemption from taxation except in consideration of a public service has assumed a vast undertaking. That state which refuses to surrender one of its attributes of sovereignty—the power to impose taxes on corporations or individuals—demonstrates its regardful care of the rights of its citizens, and manifests its purpose to preserve its existence. When the state has, in express

terms, declined to surrender any part of its sovereignty, and seeks to exercise its prerogative, we are unable to see the slightest foundation for the imputation of bad faith. From the *Dartmouth College Case* to the present time the Supreme Court of the United States has uniformly held that whenever the legislature granting the charter reserved the right to amend or repeal it, either by so providing in the charter or by a general law, the right to amend or repeal such charter exists, and to do so is not to impair the obligation of a contract; the charter being accepted with the full understanding that the right of repeal is part of the contract, and to the exercise of which right the grantee has consented. Many of the states, after the *Dartmouth College Case*, began to realize the importance of reserving the right to control corporate organizations which from time to time were being created; and, to make sure such power was being reserved, they passed general laws expressly reserving such powers, which statutes became a part of every act of incorporation as fully as if written therein, unless a different purpose was therein plainly expressed. The legislature of this state, being fully aware of the importance of such action as would reserve the right to amend or repeal acts of incorporation, passed what is known as the "Statute of 1856," which is § 8, chap. 68, Gen. Stat. It seems so plain that charters and grants, since the 14th of February, 1856, are subject to amendment or repeal, at the will of the legislature, unless a contrary intent is plainly expressed therein, that it is needless to discuss it. The Supreme Court of the United States has not only so held, but this court has done likewise in every case that has been before it. Acts of the character of the act of 1856 have uniformly been adjudged to be a condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made, and to be as much a part of the charters as if incorporated into them. Any other interpretation would render the statute inoperative, and wholly deprive it of its power to accomplish the purpose of its enactment.

In 1841, South Carolina passed a statute substantially the same as the statute of 1856. The Northeastern Railroad Company was incorporated in 1851. In 1855 an act was passed to amend its charter, the amendment exempting the railroad company from taxation. In 1868 the state adopted a new Constitution, in which it was declared that the property of the corporations then existing or hereafter created should be taxed. The legislature of the state passed an act to enforce that provision of the Constitution. The question involved in *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204, was as to the enforcement of such legislation. Justice Field, in delivering the opinion of the court in the case, said: "It is true that the charter of the company, when accepted by the corporators constituted a contract between them and the state, and that the amendment, when accepted, formed a part of the contract from that date, and was of the same

obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the state by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which, without that provision, would be irrevocable and protected from any measures affecting its obligation. There is no subject over which it is of greater moment for the state to preserve its power than that of taxation.

Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state." The same doctrine is enunciated in *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *Hoge v. Richmond & D. R. Co.* 99 U. S. 348, 25 L. ed. 303; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 28 L. ed. 173; *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 108; *Louisville Gas Co. v. Citizens' Gas Co.* 115 U. S. 683, 29 L. ed. 510; *Gibbs v. Consolidated Gas Co.* 130 U. S. 393, 32 L. ed. 979; *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898.

It was said in *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 271, 36 L. ed. 969: "This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the con-

tract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation. . . . In *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961, the question was as to the scope and effect of a clause in a general statute of Massachusetts, providing that every act of incorporation passed after a named day 'shall be subject to amendment, alteration, or repeal at the pleasure of the legislature.' This court, referring to that clause, said: 'Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it.' The words, 'at the pleasure of the legislature,' are not in the clauses of the Constitution of Ohio, or in the statutes to which we have referred. But the general reservation of the power to alter, revoke, or repeal a grant of special privileges necessarily implies that the power may be exerted at the pleasure of the legislature."

It must be conceded, from the authorities cited, the Supreme Court of the United States has repeatedly held that the legislatures of the states have the power, when reserved in the charter or by general law, to change or repeal acts granting corporate privileges or franchises. The decisions of this court are in accord with these opinions. The case of *Griffin v. Kentucky Ins. Co.* 3 Bush, 592, 96 Am. Dec. 259, has been quoted with approval in the case of *Louisville Water Co. v. Clark*, 143 U. S. 14, 36 L. ed. 59, and in that case the court held that in all cases of charters or grants of corporate franchises, where the intention of the legislature was not "plainly expressed" not to exercise the power reserved by the statute of 1856 to amend or repeal, at the will of the legislature, such charters or grants must be read as if all the provisions of the act of 1856 were incorporated in them. Judge Robertson, in delivering the opinion in *Griffin v. Kentucky Ins. Co.* 3 Bush, 595, 96 Am. Dec. 259, said: "Then, was this general reservation of power, like a special reservation in the charter itself, a part of the contract; or was the contract made subject to it, and the obligation defined or modified by it? We think so. And, whatever might be thought of the policy of such legislation, or of the policy or justice of the repealing statute 44 L. R. A.

ute, over which the judiciary has no jurisdiction, our conclusion, as to the mere power of repeal, is, as we think, sustained by reason and abundant authority. All contracts, except such as are municipal, are made subject to the law, and their obligation is defined by the *lex loci contractus*. Why should the contract in this case be excepted? Such exception would be unreasonable, and the authorities fortify the reason." In the case of *Cumberland & O. R. Co. v. Barren County Ct.* 10 Bush, 604, in reference to the act of 1856, the court said: "The act was intended to preserve to the state control over all acts of incorporation thereafter passed. Experience had demonstrated the propriety of, if not the absolute necessity for, such a reservation of power, and it would be a manifest disregard of the clearly-expressed will of the legislature for the courts to resort to technical rules of construction or finely-drawn legal implications to escape the effect of the plain declaration that all charters of and grants to corporations shall be subject to amendment and repeal 'unless a contrary intent be plainly expressed.'"

We conclude that the legislature, in 1886, when it passed the revenue bill, had the right to amend or repeal at will all charters and grants of or to corporations or amendments thereof enacted or granted since the 14th of February, 1856, "unless a contrary intent was plainly expressed."

The national banks were subject to have the same tax imposed on their shares of stock as are imposed on state banks doing business under charters granted since the 14th of February, 1856. Their real estate is subject to taxation. Their shares of stock may be taxed at their actual value, but no greater rate of taxation shall be collected on them than is assessed upon the moneyed capital in the hands of individual citizens of the state. In the case of *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 491, Justice Matthews, discussing this subject, said: "When, therefore, a state statute taxes the shares of a stockholder at their actual or market or full value, that necessarily includes such value beyond its par or nominal value as is imparted to the stock by the fact that the bank has a surplus fund or undivided profits." The interest which Congress has left subject to taxation by the states under the limitations prescribed, and which is a distinct, independent interest in property held by the shareholder, like any other property that may belong to him, is that interest, as defined in *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. ed. 229, which "entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares, and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts;" and (p. 587, 18 L. ed. 235), it includes for taxation the whole interest of the shareholder, such as would pass to the purchaser of the share on a transfer of his certificate. So, when a state law taxes shares of national bank stock, it taxes the

same interest of the shareholder that he would transfer on a sale. The state may tax them at their actual or at their market value, or at any other rate of appraisement which does not violate the act of Congress. To the same effect are the cases of *New York v. New York Tax & A. Comrs.* 94 U. S. 415, 24 L. ed. 164; *Mercantile Bank v. New York*, 121 U. S. 138, 30 L. ed. 895. In the latter case the court said (p. 155, 121 U. S. 30 L. ed. 901): "The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy." The legislature of Pennsylvania passed a statute taxing the shares in national banks on an assessed value thereof for county, school, municipal, and local purposes. The Supreme Court in *Hepburn v. School Directors*, 23 Wall. 480, 23 L. ed. 112, held the statute valid. It has been decided that it is competent for the states to tax the shares of national bank stock, notwithstanding the capital of the bank was invested in bonds of the United States which were not subject to taxation. *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. ed. 701. The national banking law does not prevent the state from taxing stock in national banks at a higher rate than that imposed on the most favored banks operating under the laws of the state. This question was fully determined in *Lionberger v. Rouse*, 9 Wall. 468, 19 L. ed. 721. The court said: "It is very clear that Congress, in conceding to the states the right to tax, adopted a measure which, it was supposed, would operate to restrain them from legislating adversely to the interests of the national banks. The measure itself had reference to prospective legislation by the states, and its object was accomplished when the states conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable; but the law-making power did not intend such an absurd thing, as that the power of the state to tax should depend on its doing an act which it had obliged itself not to do. It was well known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that states, by contract with individuals or corporations, could grant away the right of taxation, and that this power had been frequently exercised. It was equally within the knowledge of Congress that the policy on this subject varied in different states; while some of them retained in their own hands the power of taxation over all species of property, except such as were devoted to religious or charitable purposes, others had parted with it to interests of a purely business character, like banks and railroads. Can it be supposed that Congress, in this condition of things in the country, meant to confer a privilege by one section of a law which by 44 L. R. A.

another it made practically unavailable? If the construction contended for by the plaintiff in error be allowed, then a state so unfortunate as to have a single bank, whose shareholders are exempt by contract from taxation in the manner provided by Congress, can derive no benefit from the power given to tax the shares of national banks. And this further consequence would follow, that the shareholders of national banks located in one state would escape all taxation, while those whose property was invested in banks in a different locality would have to contribute their full share of the public burdens. This court will not impute to Congress a purpose that would lead to such manifest injustice, in the absence of an express declaration to that effect. Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the 41st section of the national banking act, than to require of each state, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

The court should endeavor to ascertain the legislative intent in the act of 1886 with reference to the taxation of banks, as all depends in this controversy upon what was that intent. To aid in reaching a conclusion as to what the intent was, it is well to recall some official facts within the knowledge of the members of the legislature. The 1st of July, 1886, was the date of the last report of the capital stocks of the banks in the state before the enactment of the revenue law of 1886. From that it is learned that the capital stock of the fifty-nine national banks amounted to \$9,708,900. The capital stock of sixty-five state banks, doing business under charters granted subsequent to 1856, amounted to \$6,224,891. The capital stock of the four state banks—Farmers' Bank of Kentucky, Bank of Kentucky, Northern Bank, and the Bank of Louisville—incorporated prior to 1856, was \$5,144,500. It will be seen from this statement that the capital stock of the national banks and of the state banks chartered since 1856 amounted in round numbers to \$16,000,000, while the capital stock of banks whose charters antedate 1856 amounted to about \$5,000,000, being less than one third of that of the other banks named. It must be presumed that the legislature knew that the banks claiming irrevocable contracts to pay only 50 cents on each share of their capital stock equal to \$100 paid less than one third of the revenue coming from the banks under the then existing law. It can hardly be said that the Farmers' Bank of Kentucky was in a condition to claim an irrevocable contract, because the act extending its charter, which became a law on March 10, 1876, expressly reserved the right to amend or repeal its charter and amendments thereto. It reads as follows: "That the charter of the Farmers' Bank of Kentucky, as amended, be extended for a period of twenty-five years from the termination of its charter as therein fixed: provided, that said charter and amendments

shall be subject to amendments or repeal by the general assembly either by general or special act; and provided further, that whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." To simply quote the act extending the charter is a sufficient denial of and answer to the claim of an irrevocable contract. This left but three banks in the state which could claim an irrevocable contract, and one hundred and twenty-five without any claim whatever to immunity against increased taxation. The revenue act repealed several acts by particularly naming them, and excluded certain other acts from the repealing clause, and declared all other acts, general and special, and parts of acts inconsistent or not in conformity therewith, were thereby repealed. Chapter 92, Gen. Stat., contained the revenue law. The only part of the act relating to the taxation of banks and other institutions of loan or discount is art. 2, chap. 92, Gen. Stat. Section 1 of the article relates to the amount of tax which the banks shall pay, and designating the method of levying the tax. Section 2 imposes certain duties on the cashier of the bank with reference to making a report to the auditor of public accounts. Section 3 exempts banks having certain money invested in bonds or funds of the United States from taxation named in the section. By the terms of § 7, if the banks failed or refused to make the consent and agreement as provided in § 4, then they are to be assessed, and the same tax, state, county, and municipal, shall be imposed, levied, and collected, etc., as is imposed on the assessed taxable property in the hands of individuals. Without § 4, the remaining sections of the article would have been a complete system for levying and collecting taxes on the banks chartered after 1856. The article treats of nothing except the taxation of banks. Under § 4 the banks were asked to waive and release all right under the acts of Congress or under the charters of the state banks to a different mode or smaller rate of taxation. The national banks were subject to the payment of taxes for state, county, and municipal purposes, and it was not necessary to obtain their consent that they might be taxed for that purpose. It was needless to ask this class of banks to enter into the agreement. The legislature may have entertained some doubt, not as to the right to tax banks for state, county, and municipal purposes, but as to the method prescribed, and desired to remove all doubt by obtaining the consent of such banks to that method. It was greatly to the interest of the national banks and the state banks chartered subsequent to 1856 to enter into the agreement, because they were thus released from the payment of county and municipal taxes. In agreeing to pay the amount provided in the article for state purposes they were released from local burdens, which in some instances are two or three times as great as that which they agree to pay the state. It was greatly to their interest to accept the proposition of the state. As a matter of fact, these banks were relinquishing

no rights. They were apparently yielding a right which the state, in its sovereignty, already possessed. The right had never been relinquished, but had been expressly reserved. So vigilant had been the state to retain the control of the corporations, and retain its power to tax them, that its purpose to do so was declared in the form of a legislative enactment, which was understood to be written in every act of incorporation. It may be a more difficult task to show why the three old banks entered into the agreement. Their right to the immunity from increased taxation was questioned, as shown by the revenue act, as their charters were declared repealed so far as they were inconsistent therewith. It was the evident purpose of the legislature to induce these banks to recede from their claim to an irrevocable contract. It was desired that all banks should be placed upon the same footing in the matter of taxation with the other banks of the state. The legislature had been renewing their charters, and, if they were again renewed, an appeal must be made to the same power. These banks may have realized that the act of 1856 should have, by a proper interpretation, been made applicable to the acts renewing their charters. However, it is needless to speculate further as to the reason which induced them to enter into the contract with the state by which they released any irrevocable contract which they had under their charter against increased taxation. These banks had the right to give their consent to the increased taxation.

The courts have always recognized the right of a corporation to consent to legislation, or accept its provisions, and be bound thereby, though it may have the effect of depriving such corporation of a vested right. This brings us to the question as to what were the terms and conditions of the contract into which all these banks entered. The banks must be presumed to know the law, and the effect of the contract to which they agreed. Those who represent banks are among the brightest and most sagacious business men of the country. The law is brief, simple, and without ambiguity. In short the state agreed to accept, and the banks agreed to pay, 75 cents annually on each share of their stock equal to \$100, and, in consideration thereof, be exempt from all taxation whatsoever, so long as this tax shall be paid during the corporate existence of such bank. If these were all its terms then it might be contended with some reason that it was irrevocable during their corporate existence. Being mindful of the policy which had been pursued for thirty years, it said, in effect, to the banks: "It is desired that the statute shall be accepted in the formal way prescribed, but it must be understood that the right to alter or change it is reserved to the state." That its purpose might be fully understood, the legislature placed in the article § 6, which in turn makes the statute of 1856 a part of the contract. It is expressly provided that the article shall be subject to the provisions of § 8, chap. 68, Gen. Stat. The legislature was

determined that the provisions of the act of 1856 should not depend on rules of construction to be read into the contract by implication, but in terms said that it should be part thereof. It is admitted that when the word "act" appears in art. 2 it has reference to the article (2). Article 2 was an independent measure, offered as a substitute to article 2 of the original bill. The substitute was adopted, and became a part of the revenue bill. It now appears as part of the bill in the exact language as offered. This § 6 has no reference to any part of the revenue bill except the article of which it is a part. It has been suggested that it had reference to new banks that might be organized. This could not be so, because article 2 is dealing with banks in existence, and asks them to give their consent, etc., thereto, and says, if at all, they must do so before the meeting of the next general assembly. When it was admitted that the word "act" as used, is synonymous with "article," then it must be admitted that the provisions of § 6 of art. 2 are applicable alone to the article (2) of which it is a part. If there could be any doubt from the language used as to the meaning of the legislature then that must be removed by an examination of the house and senate journals. An amendment (page 1241, House Journal 1886) was offered to art. 2 of the original revenue bill, and § 7 of that amendment reads as follows: "This act shall not be subject to the provisions of § 8, chap. 68, of the General Statutes." The amendment (page 1243, House Journal 1886) was defeated. While the revenue bill was pending in the senate, it was proposed to amend § 6 of art. 2 by inserting after the word "shall," in the first line, the words "not for ten years" (p. 1315, Senate Journal 1886). This amendment was defeated. Had it been adopted, then the section would have read: "This act shall not for ten years be subject to the provisions of § 8, chap. 68, of the General Statutes." The proceedings of the house and senate show the legislature fully understood the purpose for which this section was made part of article 2. It was the purpose of the legislature not to be restricted for any period of time in its right to repeal the article, and withdraw from the contract. In view of the plain provision of the statute, about the meaning of which there should be no doubt, and the intent of the legislature being fully explained by its record, it seems to us there should be no hesitation in concluding the act of 1856 should be read as part of the statute; hence an irrevocable contract did not exist. The fact that a written consent was asked and secured does not alter the application of the act of 1856. The act of 1856 should be read as part of the act of 1886, even if it had not been referred to as part of it.

In *Louisville Water Co. v. Clark*, 143 U. S. 10, 36 L. ed. 57, this rule of construction was recognized. The court said: "But, in respect to all the acts passed after 1850, amending the charter of, or relating to, the water company, including that of 1882, each must be read as if all the provisions of the act of 1856 were incorporated in it, because

in no one of them is plainly expressed an intent to waive the right of amendment or repeal at the will of the legislature." *Greenwood v. Union Freight R. Co.* 105 U. S. 20, 26 L. ed. 964, is to the same effect. *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352, is cited by counsel for appellees and also by counsel for appellants. The facts of that case were as follows: The Morris & Essex Railroad Company was created a corporation by an act of the legislature of New Jersey passed January 29, 1835. The act provided that, as soon as the net proceeds of the railroad amounted to 7 per cent on its cost, it should pay a state tax of one half of 1 per cent on the costs of the road, and no other tax should be levied upon it. The 20th section reserved to the legislature the right to amend or repeal the act whenever it should think proper. A supplemental act was passed on March 2, 1836, in which the right to repeal or amend was reserved. On the 14th of February, 1846, the legislature of New Jersey passed an act in effect the same as the Kentucky act of 1856. Another supplemental act to the charter of the railroad was approved March 23, 1865, authorizing a branch road to be built, and by which the company was vested with all the powers and franchises given by the original and supplemental act, etc. The 3d section of the last-named act reads as follows: "Be it enacted that the tax of one half of 1 per cent provided by this said original act of incorporation to be paid by the said company to the state whenever the net earnings of the said company amount to 7 per cent upon the cost of the road shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipsburg, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatever, by or under the authority of this state or any law thereof: provided, that this section shall not go into effect or be binding upon the said company, until the said company, by an instrument duly executed under its corporate seal and filed in the office of the secretary of state, shall have signified its assent thereto, and which assent shall be signified within sixty days after the passage of the act, or this act is void." The instrument required by the section was duly executed by the company. In the act of 1865 there was no reservation of the right to repeal or amend it. Acts of the legislature imposed a more burdensome tax on the railroad company than that provided for in § 3, *supra*. The sole question in *New Jersey v. Yard* was whether the act of 1865, and its acceptance by the railroad company, constituted a contract which could not be impaired by any subsequent legislature of the state. The court held that it was an irrevocable contract because the legislature had not reserved the right to amend or change it. It is plain from the opinion that, had the legislature reserved the right to alter or change the contract or act by which it was made, the court would have held the act of the legislature doing so did not impair the obligation of the contract. Justice Miller, in

delivering the opinion, said: "But as we have already said, since the legislature which passed the act of 1865 had the power to make a contract which should not be subject to repeal or modification by one of the parties to it without the consent of the other, the main question here is, Did they intend to make such a contract? . . . In the case now under consideration, it is conceded on all hands that the act of 1865 was a contract for a tax of one half of 1 per cent per annum on the cost of the Morris & Essex Railroad, and no more. But counsel for defendant says the contract was repealable; that the legislature of its own volition could impose other and more burdensome taxes at its discretion; that it was a contract so long as the legislature of New Jersey was satisfied with it, and no longer. It is conceded, also, that this construction of it cannot be sustained unless we are bound to import into it either the reservation clause of the act of 1836, or what is called the interpretation act of 1846. We have already shown how little reason there is for doing this on general principles of construction. We think it still clearer that it cannot be done, because it is inconsistent with the legislative intent in passing the act of 1865. . . . The implication is of a right to revoke it, and comes from the other quarter, and is one which we do not think exists by fair construction, and which we do not feel at liberty to import into the contract to defeat its manifest purpose." From the language of this opinion, and the long line of decisions of the same court, it is manifest that the decision was made to turn on the question of the reservation of the right to amend or repeal, etc.

In *New Jersey v. Yard* the court held the act was invalid, because the right to repeal or modify had not been reserved. In this case we are asked to hold the organic or statutory laws invalid because the right to repeal or modify was reserved in express terms. By the very terms of the act of 1856, a rule of interpretation is given that "all charters and grants of or to corporations or amendments thereof and all other statutes" shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein "plainly expressed." It is proposed now by those representing the banks to disregard this statutory rule of construction. It is now, in effect, insisted that, in order to reserve the right claimed, it must be "plainly expressed" in the act that it is reserved. This being done, it is still disregarded. The legislature, doubtless anticipating such contention and versatility, "plainly expressed" in the article that whatever was done thereunder or in pursuance thereof could only continue during its will. If § 6 was not for this purpose, we would like to have had someone suggest some reason as to why it was placed in the article. The doctrine is that, when it is asserted that a state has bargained away her right of taxation in a given case, the contract must be clear, and cannot be made out by dubious implication. *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352. Chief Justice Taney, delivering the opinion of the court in 44 L. R. A.

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 425, 14 L. ed. 1000, gave a rule of construction as follows: "The rule of construction, in cases of this kind, has been well settled by this court. The grant of privileges and exemptions to a corporation are strictly construed against the corporation, and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving, undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken. This is the rule laid down in the case of *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939, and reaffirmed in the case of the *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. 420, 9 L. ed. 773." The supreme court has enunciated substantially the same rule in numerous cases. The taxing power of the state is never presumed to be relinquished unless the intention to relinquish is expressed in clear and unambiguous terms. *Bradley v. McAttee*, 7 Bush, 667, 3 Am. Rep. 309. It is a familiar rule of construction of statutes that effect must be given to every provision except in cases of absolute and irreconcilable incongruity. *Dazey v. Killam*, 1 Duv. 407. If one statute refers to another for the power given by the former, the statute referred to is to be considered incorporated in the one making the reference. *Nunes v. Wellisch*, 12 Bush, 365. Mr. Cooley, in his work on Taxation (p. 204), says: "As taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain." For the interpretation of statutes, this court, in *Nichols v. Wells*, Sneed (Ky.), 59, said that "the most natural and genuine way of construing a statute is to construe one part by another part of the same statute; that the words and meaning of one part of a statute do frequently lead to the sense of another; and if it can be prevented no clause, sentence, or word shall be superfluous, void, or insignificant." As there is a clear expression of the legislative intent in the statute, no rules are really necessary to aid in its interpretation.

It can hardly be said it was unwise on the part of one hundred and twenty-five of the one hundred and twenty-eight banks in the state, as by the very terms of the act under which the contract was entered into they were required to pay state, county, and municipal taxes, with the power in the legislature to increase it at will. It certainly was a very advantageous contract for them to enter into when these banks paid more than two thirds of the taxes paid by all the banks, with the power in the legislature to increase the amount if they should so desire. What reason can be suggested as to why the legislature would desire to reverse the policy which had been steadfastly adhered to for so long, and enter into an irrevocable contract with

such banks? Why should it want to surrender a power which it had been so zealous to preserve? The contract was made subject to the right of the legislature to withdraw from it whenever it regarded the public interest demanded it should do so. Whenever the banks accepted the provisions of the act of 1886, they surrendered any rights to immunity from increased taxation which their charters gave them. The acceptance of the act of 1886 was a consent to the repeal of so much of their charters as was inconsistent therewith. Hence they stood in such relation to the state, as to future taxation, as the legislature saw proper to impose. If the provisions of their charters relating to taxation were repealed,—as it must be admitted they were by the act of 1886,—then such provisions were no longer in force. It is unreasonable to say that the provisions of the charters fixing the rate of taxation on the banks at 50 cents on each share of the capital stock of the banks equal to \$100 can be in force if the act of 1886 fixing such tax at 75 cents, instead of 50, on shares, is in force. In doing this it must be admitted the charter privilege has been repealed. If repealed, then, by the act of 1886, surely the only way in which the provisions of their charters could be restored would be by the legislature so providing in some act. There is no pretense this has been done. The fact that the law of 1886 has been repealed does not restore the former provisions of their charters.

Section 464, Ky. Stat., provides: "When a law which may have repealed another shall be repealed, the previous law shall not be revived, unless the law repealing it be passed during the same session of the general assembly." It is a most groundless contention to say that, if the present law is sustained, the old banks will be restored to the former privileges under their charters. It has been suggested that the provisions of their charters with reference to taxation were vested rights, and, although they consented to the legislation of 1886, and became subject to the provisions of the act of 1886, still, as the charter privilege as to taxation was a vested right, therefore it was saved to them by the provision which preserves "other rights previously vested." The proviso of the act of 1886 is, "that whilst privileges and franchises" so granted may be changed or repealed, no amendment or repeal shall impair "other rights previously vested." If a corporation by its charter or a general law, is exempted from the payment of taxes, it is released of a duty or burden. It enjoys an immunity of exemption from a general law which imposes the burden of the government on others. It may be said it enjoys a privilege. "Franchise . . . [is] a branch of the King's prerogative, subsisting in the hands of a subject." 2 Sharswood's Bl. Com. 37. The legislature has reserved the right to amend or repeal the privileges and franchises, thus reserving the power to destroy or qualify the privileges and franchises which have been granted. The "other rights" which have become vested while operating under 44 L. R. A.

the charter cannot be impaired by an amendment or repeal. These "other rights" do not embrace "privileges and franchises." The "privileges and franchises" are the rights bestowed by the state, to be withdrawn or destroyed at the pleasure of the legislature. In the exercise of its pleasure the legislature may fix a higher rate of taxation, or it may declare to those enjoying the franchise that they shall no longer have it. Privileges and franchises are not "vested rights" either in the letter or spirit of the act of 1886. "Other rights" referred to in that act are such as the beneficiaries under the charter or general laws may have in property, contracts, choses in action, real and personal property, in fact every interest which they could acquire in operating under the charter or law, and also such rights or interests as other persons may have previously acquired by contract, mortgage, judgment, or otherwise in property belonging to the corporation. The purpose of the act of 1886 was to reserve in the legislature the power to destroy the privileges and franchises granted in the charters. If it does not have this effect, it would be entirely inoperative, and the effort to retain control of corporations would be abortive. The claim that the privileges granted by article 2 can be repealed, but without the right to terminate their enjoyment, is not founded on reason. The only privilege which the banks enjoyed was to pay the 75 cents on each share of stock in lieu of all taxes. To say that the law granting the privilege can be repealed because the right to do so was reserved, as is admitted, and still leave the banks in its enjoyment (as the effect of the opinion of the court in the *Bank Tax Cases*), is to disobey a plain statute, to ignore the authority of the opinions of the supreme court, and is a failure to follow sound reasoning in the settlement of a question of vast importance to the state and the people. The former opinion on this question gave the banks the substance and the state the shadow. Had § 6 of art. 2 provided that the act of 1886 should not be considered part of it, we do not doubt the representatives of the banks would have easily seen the meaning of the provision. As it is plainly written that the act of 1886 is to be considered a part of the article, they have the very greatest difficulty in seeing the purpose of the provision. It was said in *Griffin v. Kentucky Ins. Co.* 3 Bush, 594, 96 Am. Dec. 259: "The proviso was intended to secure the right of beneficiaries and others vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchise." To the same effect is *Cumberland & O. R. Co. v. Barren County Ct.* 10 Bush, 604. Section 174 of the Constitution recognized a just principle when it declared that all property, whether owned by persons or corporations, should be taxed in proportion to its value, unless exempted thereby, and that all corporate property should pay the same rate of taxation paid by individual property. The legislature, in obedience to that provision of the Constitution, enacted the law for levying and collecting taxes from the banks of the state,

the validity of which is in question in these cases.

For the reasons already given, we conclude that the obligations of no contracts were impaired by the action of the constitutional convention or the succeeding legislature. Some of the best lawyers in the state were members of the convention which framed our Constitution, who gave an earnest consideration to the questions involved in these cases; and the conclusions which they reached were crystallized into § 174 of the Constitution. We believe that their conclusions are correct.

The former opinion of the court denies the power is in the legislature to say what taxes the banks of the state shall pay for state purposes during the existence of their several charters. It denies the right of the legislature to compel them to bear any of the burdens of county and municipal government. We cannot believe the legislature did or intended by art. 2 of the act of 1886 to reverse its policy so earnestly pursued for a generation, and surrender to sixty-odd banks of the state its right, previously reserved, to control them in the matter of taxation, and to give up its power to increase or diminish the taxes imposed on one hundred and twenty-five banks, this including the national banks. Exigencies may arise requiring the levying and collecting of vast sums to meet the public demand, yet however great the emergency may be, or imperative the demand for money to meet such wants, the legislature is powerless to compel the banks to contribute more than they are now paying at any time during their corporate existence. The counties and municipalities are annually compelled to raise large sums of money by taxation. The counties of the state are compelled to incur large expense to support the county governments, and to pay for bridges and public highways, and support their unfortunate citizens. The municipalities must incur great expense in making all necessary improvements for the comfort, safety, and health of their citizens, to supply water and lights and to give police protection to their citizens and to the banks. The organic and statutory laws of the state, in our opinion, require that the banks should contribute their proper share of such expense to the local governments. In *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370, the court adjudged that there was a broad distinction between the extension of a charter and the grant of a new one. This is true in a certain sense. To extend a charter requires a statute to be enacted which grants certain rights to the corporation. Under the act of 1856, all statutes, and also grants to corporations, are subject to amendment or repeal. All acts granting extensions to the charter of corporations since the 14th of February, 1856, are as much subject to amendment or repeal as are acts of incorporation passed since that date. In so far as the case of *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370, is in conflict with this opinion, it is overruled. *Shields v. Ohio*, 95 U. S. 323, 24 L. ed. 358; *Maine C. R. Co. v. Maine*, 96 U. 44 L. R. A.

S. 503, 24 L. ed. 836; *Com. v. Masonic Temple Co.* 87 Ky. 349.

There are many national and state banks organized since the passage of the Hewitt bill. They certainly cannot claim with any degree of reason that they have any, much less an irrevocable, contract with the state. If there could have been any doubt on the question, it is removed by the case of *Bank of Commerce v. Tennessee*, 163 U. S. 416, 41 L. ed. 211. If the banks which accepted the Hewitt law are to be exonerated from the payment of county and municipal tax, then during the existence of their respective charters the burden placed upon the banks is not equal and just. In the same city or town we will have part of the banks paying county and municipal tax, while others have immunity from such burdens. It will greatly increase the value of the stock of the banks enjoying special privileges, while it will necessarily render less valuable stock in the banks which have the burden of a share of county and municipal taxes. It will be a check on the organization of new banks. It will give the favored banks a monopoly of the business in their respective communities. The effect would be an unjust and unwarranted discrimination.

It was seriously argued in the former opinion of this court that the enforcement of the Constitution and laws will diminish the revenues of the state government. With this we have nothing to do. It is our business to obey the Constitution, and respect the statutes enacted in accordance therewith. Were this a question of policy involved, it is not considered a great task to vindicate its wisdom. While more of the citizen's tax will go to support the state government, yet he is trebly compensated by the banks' contributing their fair share of county and municipal taxation, and thus reducing the amount which each citizen will be required to pay to sustain the local governments.

The cases of *Deposit Bank of Owensboro, Farmers' & Traders' Bank, Owensboro Savings Bank, and Citizens' Saving Bank v. City of Owensboro, etc.*, *Deposit Bank of Owensboro v. Davies County, Simpson County Bank v. City of Franklin* are affirmed, and the cases of *City of Carlisle v. Deposit Bank of Carlisle, Nicholas County v. Deposit Bank of Carlisle, and City of Carlisle v. Farmers' Bank* are reversed with directions that further proceedings conform to this opinion.

Hazelrigg, Du Relle, and Burnam, JJ., dissent.

Du Relle, J., dissenting:

Assuming that I should differ from the former opinion of the court if the construction sought upon these appeals were an original question now for the first time presented for decision, and that the meaning of the constitutional and statutory provisions under consideration is so plain that I should do so without regard to argument drawn from real or supposed inconvenience which might result from my construction, I am nevertheless constrained to dissent from the present

opinion. The case is not, in my judgment, one in which a former erroneous decision upon a question of taxation is sought to be overruled by the court as to taxes assessed for subsequent years; nor do I intend here to express an opinion upon that class of cases. The original opinion now overruled by the opinion of the court was not a mere question of liability to tax under statute or Constitution. It was a question of contract proprietary right, and was so decided. Having been so decided after elaborate discussion and full consideration, it having been established by that decision that a contract right existed, and property of enormous value having doubtless changed hands upon the strength of the property right so adjudged to exist, this court should be slow to overturn a decision which has stood for more than a year and a half the law of the commonwealth. It has been said, and, in general, it is true, that "the certainty of a rule is of more importance than the reason on which it is founded." The rule having been settled (though in my judgment, not correctly), having been acted upon for a considerable time, I think it should be adhered to until the question is again presented to the court by legislative action or constitutional amendment. Instability in the decisions of a court of last resort with respect to property rights not only leads to an increase of speculative litigation, instituted for the purpose of testing the sentiment of the court as constituted at the time, but directly invites persons and corporations interested in the determination of such questions to undue

and improper interference in the selection of judges. In my judgment, the evils to result from the continuance of the incorrect rule are less than those which will result inevitably from the alteration of the rule by a divided court. These views, which I have stated without elaboration or argument, are sustained by the reasoning of the supreme court in *Gelpcke v. Dubuque*, 1 Wall. 213, 216, 17 L. ed. 528, 529; *Green v. Neal*, 6 Pet. 299, 300, 8 L. ed. 406; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 432, 14 L. ed. 1003. For these reasons, to the extent that the opinion disturbs rights adjudged by the former opinion to exist, I do not concur in the opinion of the court.

Extension of opinion (Filed March 25, 1897):

The banks are not required to pay tax on the money deposited with them by their customers, or on amounts which represent it. Owing to the particular character of the business which they conduct they are quasi trustees of their depositors, and under the law the depositors are required to pay the tax on the money so deposited. The banks should be required to pay tax on the shares of capital stock, on their surplus funds, undivided profits, franchises, and their real estate.

Petition for rehearing overruled June 19, 1897.

The decision in these cases was affirmed by the Supreme Court of the United States April 3, 1899.

LOUISIANA SUPREME COURT.

STATE of Louisiana

v.

Solini HAINES, Appt.

(51 La. Ann. 731.)

- *1. The husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent, which she has given, and which she cannot retract.
2. To hold a husband charged with rape upon a woman who is his wife, or to convict him, it must appear that the carnal knowledge of the woman constituting the rape was accomplished through a man other than the husband, and that the husband procured it to be done, or assisted the other in the execution of their common purpose.
3. But where the "other man" in the case, demanding a severance, is tried first, and acquitted, the prosecution against the husband falls, since he cannot be guilty of raping his own wife.

*Headnotes by BLANCHARD, J.

NOTE.—As to the legal rule respecting the capacity of a boy to commit crimes of this character, see note to *State v. Yeargan* (N. C.) 36 L. R. A. 196; and *Foster v. Com.* (Va.) 42 L. R. A. 589.
44 L. R. A.

4. The "face of the record" in matters pertaining to motions in arrest of judgment does not mean merely the face of the indictment. It embraces the record of the case as made up to that point.
5. To have a mere note entered on the record. "Bill of exceptions reserved," is, in a criminal case, no bill whatever. And it is not good practice, and not warranted by law, for the clerk only to sign papers drawn as bills of exception. Act No. 113 of 1896 does not authorize it. Bills of exception in criminal trials should be signed by the trial judge.

(March 20, 1899.)

APPEAL by defendant from a judgment of the 19th Judicial District Court, Parish of St. Martin, convicting him of rape. *Reversed.*

The facts are stated in the opinion.

Messrs. J. E. Mouton and Martin & Voorhies, for appellant:

The husband cannot commit the crime of rape on the person of his wife.

2 Archbold, Crim. Pr. & Pl. fol. 158.

The trial and acquittal of the principal necessitates the release of the accessory before the fact.

Bowen v. State, 25 Fla. 645; *Ex parte Bowen*, 25 Fla. 214.

A party cannot be held for procuring an act to be done, unless it were in fact done. 1 Bishop, § 671.

A person indicted alone for the commission of a crime cannot be convicted as an aider and abettor.

Mulligan v. Com. 84 Ky. 229.

Messrs. M. J. Cunningham, Attorney General, and *James Simon*, for appellee:

No evidence can be introduced to prove facts alleged in a motion in arrest of judgment.

State v. Prudhomme, 25 La. Ann. 523; *State v. Harris*, 3 La. Ann. 91; *State v. Nolan*, 8 Rob. (La.) 513; *State v. Arthur*, 10 La. Ann. 265.

Such motions can be based only on errors patent upon the face of the record.

State v. Hardin, 25 La. Ann. 370; *State v. Washington*, 28 La. Ann. 129; *State v. Addison*, 15 La. Ann. 185.

Where two parties are charged as principals in the same indictment, the acquittal of one tried separately on his own motion for severance, granted by the court, does not acquit the other, or furnish any reason why he may not be subsequently tried and convicted of the same offense.

One not technically capable of rape may become guilty by aiding and abetting another who is.

19 Am. & Eng. Enc. Law, p. 948, par. III.; *People v. Chapman*, 62 Mich. 280.

In such a case the husband is guilty of the offense, and if he is guilty he should be punished, even if the party acting with him in the perpetration of the offense should escape.

Blanchard, J., delivered the opinion of the court:

This man was indicted for rape. The woman was his wife. That he is guilty of a heinous offense against her a jury of his countrymen have so said. They called it rape, qualifying their verdict, however, so as to "save his neck." From a sentence by the court to imprisonment for life he appeals. The question presented is unique and novel. Can a husband commit rape upon a woman who is his wife? That he can procure the commission of the crime upon her, or aid and abet its being done, and thus, under our law and criminal practice, make himself liable as principal along with the actual perpetrator, is clear. But in this case the actual perpetrator—the one who in and by his own person had carnal knowledge of the woman, who performed the act of sexual intercourse, and who was named and identified by the prosecutrix as having performed it—was acquitted. Solini Haines, present accused, and Desire O. Thibodeaux, were jointly indicted for rape upon the person of Rose Moreaux. They were properly charged as principals. *State v. Prudhomme*, 25 La. Ann. 522. Thibodeaux demanded a severance, which was granted, and being tried first, was found not guilty. The indictment did not aver the woman to be the wife of Haines, but proof of this fact abundantly appeared in the preliminary proceedings leading up to the trial, and at the trial itself. The acquittal of Thibodeaux left 44 L. R. A.

Haines, the husband, alone charged with the crime of rape, and he was convicted. After acquittal of the man who actually violated the person of the woman, the husband being present, aiding and abetting, is there any longer a basis, a predicate, a foundation, upon which to rest the prosecution of the husband? This is the question in the case.

While the husband is indicted as a principal, he could be guilty of the crime of rape, in so far as his wife is concerned, only on the supposition and proof that he procured the offense to be committed upon her by another, or aided or abetted that other in so doing; for, if he were the one who forcibly and against her consent performed the sexual act upon her, there was, and could be, no rape. This is so because the husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract. 2 Archbold, Crim. Pr. & Pl. 158. Therefore, while this husband is charged with rape on a woman who is his wife, to hold him, or convict him, it must appear that the carnal knowledge of the woman, or act of intercourse with her, was accomplished through a man other than the husband, and that the husband procured it to be done, or assisted the other in the execution of their common purpose. Thibodeaux was "the other man" in this case. There is no pretense that any other than he and Haines are implicated. The woman charges no one else. The act was done at Thibodeaux's house. She was well acquainted with Thibodeaux. She was kept, against her will, at his house all the day following the night on which the deed was committed, and then driven by him in a buggy to her father's house, where she made her home. There is thus no question of his identification as the man who was with her husband when the rape was accomplished. The woman's testimony was that the husband held her down by the throat while Thibodeaux performed the sexual act. The husband, then, to be guilty of this charge of rape must necessarily have been the aider and abettor of another. The real principal in a case of this sort is the man who actually performed the act constituting rape, who had carnal knowledge by and through his person with the person of the woman. The husband could not be this actor, for sexual intercourse by him with his wife, even effected by violence and against her consent, would not, in law, be rape. Not being the principal in this sense, but being present, aiding and abetting, he must be viewed as an accomplice in the crime of another man.

Our law declares that all parties present aiding and abetting in the commission of a felony may be indicted, convicted, and punished as principals. But, while this is so, the common-law distinction is not to be lost sight of. This distinction at common law found expression in degrees of guilt. "A principal in the first degree," says Blackstone (Com. bk. 4, p. 34), "is the actor or absolute perpetrator of the crime; and, in the second degree, is he who is present, aiding and abetting the fact to be done." Our

law has done away with this distinction so far as charging the crime and punishing it, but the reason upon which it rests remains and must be applied in a case like the instant one. To make a man a principal in the second degree, there must be a principal in the first degree; that is to say, there must be one who does the act or thing without which there is no crime, and with respect to the doing of which the other, or principal in the second degree, was present, aiding and abetting. If there be no principal in the first degree, no one who does the act or thing constituting the crime, there can, of course, be no principal in the second degree. The principal in the first degree is the one who actually commits the criminal act. By his act he is guilty, without reference to the act of the other, or principal in the second degree; but the latter cannot be guilty of crime unless the former actually perpetrates the act. One cannot be guilty of aiding and abetting the perpetrator of a crime without its first being shown that the crime has been actually committed by another. *Mulligan v. Com.* 84 Ky. 232; *Bowen v. State*, 25 Fla. 645; *State v. Antoine*, 42 La. Ann. 945. If Thibodeaux performed the act which constituted rape upon the person of the wife of Haines, and the latter was present, aiding and abetting, both are guilty as principals of the crime. But if Thibodeaux, on that occasion, which is the only one charged, did not do the act, then it was not done, and Haines cannot be convicted. It is true it is for the jury alone to determine whether or not the act was done, and by their verdict on the trial of Haines they said it had been done. By whom? Not by Thibodeaux, for, on the previous trial, the jury said he did not do it; that Rose Moreaux was not raped at the time laid in the indictment by him. If Thibodeaux did not do it, and the husband did, the conviction of the latter is faulty, for the husband cannot, *per se*, be guilty of raping his wife.

The case stands thus: (1) Thibodeaux exonerated from the charge by the verdict of not guilty as to him; (2) Haines declared, by the verdict of guilty as to him, to have committed the crime of rape upon Rose Moreaux; (3) Rose Moreaux was, at the time of the act, the wife of Haines. We are constrained to hold that this conviction cannot stand. The case as to Haines fell with the acquittal of Thibodeaux. It would be different if Haines had forced Thibodeaux by threats and violence, against his will and consent, to have sexual intercourse with the wife, who, herself, through menace and coercion exerted on the part of the husband,

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had been forced to yield. In such case the husband alone might well be found guilty of the crime, and his unwilling instrument of its accomplishment acquitted. But the case at bar is altogether different. Everything negatives any suggestion that the jury acquitted Thibodeaux on such ground. It is not pretended that they did.

The motion in arrest of judgment should have been sustained. By the bill of exceptions taken to the contrary ruling, the question herein discussed was properly brought before us. From the record of the case as then made up, from the proceedings of the trial up to that point, appeared the defect, the error, the inherent weakness, the intrinsic cause which vitiated the verdict and arrested judgment upon the same. The point made by the state, that the ruling of the trial judge on the motion in arrest of judgment cannot be reversed, because such motion was not based upon errors patent upon the face of the record, is not considered well taken. The "face of the record" does not mean merely the face of the indictment. It embraces the record of the case as made up to that point. "A motion in arrest of judgment is not limited to the indictment, but may be made where there is error in any other part of the record." *Knobloch*, *Crim. Dig.* pp. 42, 43, citing 1 *Bishop*, *Crim. Proc.* § 1285, and *Wharton*, *Crim. Pl. & Pr.* § 759.

We find in this transcript what purport to be bills of exception reserved by defendant to other rulings of the court. One of them is a mere note, made by the clerk, as follows: "Bill of exception reserved," and found at the close of the judge's ruling denying a motion to quash. Two others are drawn in the proper form of bills of exception, but signed only by the clerk. We take this occasion to say that this is not good practice, and not warranted by the law. There is no sanction for it in act No. 113 of the Acts of 1896. Bills of exception taken on the trial of criminal causes should be regularly drawn, and either state the facts, or have annexed to them the statement of facts taken down by the clerk pursuant to act No. 113 of 1896, and should in all cases be signed by the judge, and filed by the clerk. The bill taken to the ruling of the judge denying the motion in arrest of judgment is the only one in this record that comes up in proper shape. It was signed by the judge.

For the reasons assigned, it is ordered, adjudged, and decreed that the verdict of the jury herein be set aside, the judgment and sentence based thereon annulled and avoided, and that the accused be discharged from custody.

MASSACHUSETTS SUPREME JUDICIAL COURT.

George B. VAN NORMAN, *Appt.*,
v.

Gustavus E. GORDON.

(172 Mass. 576.)

1. It will be presumed that a court of record in another state which entered judgment upon a warrant of attorney had jurisdiction to do so, and that its proceedings were regular.
2. A judgment by confession entered in another state in conformity to the terms of a warrant of attorney executed in that state by a person who was at the time a resident thereof must be given full faith and credit as a judgment rendered by consent, although it was rendered without any personal service on the defendant.

(March 2, 1899.)

APPEAL by plaintiff from a judgment of the Superior Court for Suffolk County in favor of defendant in an action brought to enforce a judgment entered in another state under a warrant of attorney. *Reversed.*

Defendant while a resident of the state of Wisconsin made a promissory note payable to plaintiff in that state and executed a power of attorney to confess judgment on said note as follows: "Now, therefore, in consideration of the premises, I do hereby make, constitute, and appoint E. H. Bottum, Esq., or any attorney of any court of record, to be my true and lawful attorney irrevocably, for me and in my name, place, and stead to enter my appearance before any court of record, in term time or in vacation, in any of the states or territories of the United States, or any time after said note becomes due to waive the service of process and confess a judgment in favor of said George B. Van Norman or his assigns, upon said note, for the above sum, or for as much as shall appear due, according to the tenor and effect of said note, and interest thereon at the rate of 7 per cent per annum to the day of the entry of said judgment, together with costs, and also to file a cognovit for the amount that may be so due, and to release all errors that may intervene in entering up said judgment, or in issuing the execution thereon, hereby ratifying and confirming all which my said attorney may do by virtue hereof."

Plaintiff brought suit on said note in a court of record in Wisconsin, and by virtue of said power of attorney, Ogden & Hunter, attorneys of the court, entered appearance for the defendant, and confessed judgment according to the term of the power of attorney. The present suit is founded on said judgment. From an agreed statement of facts it appeared that no personal service was made on defendant in the suit in which the judgment was entered. That he never

directly authorized the attorneys to appear for him any further than they may have been authorized to do by the warrant of attorney. Upon these facts the court found for the defendant.

The case further appears in the opinion.

Mr. Charles H. Sprague, for appellant:

In the case at bar the judgment was confessed in a court of the state in which the power of attorney was executed. Such a judgment is valid and binding and will support an action in any other state.

First Nat. Bank v. Garland, 109 Mich. 515, 33 L. R. A. 83; *Teel v. Yost*, 128 N. Y. 387, 13 L. R. A. 796.

Mr. George B. Upham for appellee.

Morton, J., delivered the opinion of the court:

The question is whether the judgment which the plaintiff seeks to enforce is entitled to full faith and credit. The answer depends on whether the court which rendered it had jurisdiction to render such a judgment. *Virginia Bd. of Public Works v. Columbia College*, 17 Wall. 521, 21 L. ed. 687. If it had, then the fact that it is a judgment by confession under a warrant of attorney is immaterial. Such judgments, when rendered by courts having jurisdiction of the cause and the parties, have all the qualities, incidents, and attributes of other judgments. *Teel v. Yost*, 128 N. Y. 387, 13 L. R. A. 796. See *Henry v. Estes*, 127 Mass. 474.

It does not appear from the facts that are agreed whether the laws of Wisconsin in force at the time authorized the entry of judgments pursuant to powers of attorney to confess judgment, or, if so, under what circumstances, or whether the court which rendered the judgment was a court of record or of general jurisdiction, or, if that is material, whether the defendant was a resident of Wisconsin when the judgment was rendered and the proceedings were instituted. No objection has been made, however, in respect to these matters, and the copy of the record which has been submitted to us shows that the court was a county court, with a clerk and seal, and was therefore a court of record, and may be presumed to have been a court of general jurisdiction. *Knapp v. Abell*, 10 Allen, 485, 487; *Pringle v. Woolworth*, 90 N. Y. 502. And in view of the further considerations that every presumption is to be made in favor of the regularity of the proceedings, that it is not now contended that the court had not jurisdiction to enter judgment pursuant to a warrant of attorney to confess judgment, and that such proceedings are well known at common law and in many states, we think that it may also be presumed that the court had jurisdiction to enter judgment upon a warrant of attorney to confess judgment, and that the proceedings were regular and according to the laws of Wisconsin. *McMahon v. Eagle Life Asso.* 169 Mass. 539, and cases cited; *Wright v. Andrews*, 130 Mass. 149; *Stock-*

NOTE.—For judgments confessed on warrants of attorney, see also *Teel v. Yost* (N. Y.) 13 L. R. A. 796, and *note*; also *First Nat. Bank v. Garland* (Mich.) 33 L. R. A. 83.
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well v. McCracken, 109 Mass. 84; *Bissell v. Wheelock*, 11 Cush. 277; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959.

The attorneys who appeared and acted for the defendant never were authorized to appear for him, and confess judgment, except as they were authorized to do so by the warrant of attorney. It is agreed that they were attorneys of a court of record; in Wisconsin we assume. We assume also that they were requested to appear by the attorney named in the warrant or his firm, and that their appearance was really in the plaintiff's interest. That naturally would be so, and must have been expected when the power of attorney was given. There is no charge of fraud, or that judgment was entered for more than was due, or before the note was due, which would have been contrary to the power of attorney. The record shows that judgment was not entered till seventeen or eighteen months after the note was due. The note and warrant of attorney were both signed in Wisconsin, where the defendant, and, as we infer, the plaintiff, resided at the time; and the note was payable in Wisconsin, where the plaintiff has his place of business, if not his home.

What was done in confessing judgment came within the terms of the warrant of attorney. Unless, therefore, the warrant of attorney purported to give an authority which it did not, or was for some reason invalid, we see no ground on which the judgment can be called in question. Assuming that we could refuse full faith to the judgment if we thought that there was an error of law in it (see *contra*, *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640; *Richards v. Barlow*, 140 Mass. 218), we find nothing which would justify such a conclusion. The warrant well might be held valid in Wisconsin, though adjudged invalid in an-

other state. According to Mr. Dicey and Mr. Freeman, however, a warrant of attorney may be so drawn as to authorize a confession of judgment in a foreign state. Dicey, *Confl. Laws*, 377; Freeman, *Judgm.* § 545. Lord Blackburn went so far in one case as to suggest that "if at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them." *Schibbsby v. Westenholz*, L. R. 6 Q. B. 155, 161. He was overruled, however, in *Sirdar Gurdaj Singh v. Rajah of Faridkote* [1894], A. C. 670, 685, 686. In *Richards v. Barlow*, 140 Mass. 218, no objection seems to have been taken because the warrant authorized an appearance "by any attorney of any court of record." See also *First Nat. Bank v. Garland*, 109 Mich. 515, 33 L. R. A. 83; *Teel v. Yost*, 128 N. Y. 387, 13 L. R. A. 796. And in *Pirie v. H. Stern, Jr., & Bro. Co.* 97 Wis. 150, it was held that a power authorizing a confession of judgment "in any court of record" could be executed in any state in the Union; disapproving, as does also the court in Michigan in *First Nat. Bank v. Garland*, 109 Mich. 515, 33 L. R. A. 83, of the cases in Ohio and Tennessee on which the defendant relies. In *Blanc v. Medley*, 63 Ill. App. 211, it was held that a warrant of attorney authorizing "any attorney of any court of record" to confess judgment could be executed by an attorney in partnership with the attorney who signed the declaration for the holder of the note. See also *Mikeska v. Blum*, 63 Tex. 44.

We think, therefore, that the judgment must be regarded as rendered by consent of the defendant; that it was such a judgment as the court which rendered it had jurisdiction to render; and that it is entitled to full faith and credit.

Judgment for the plaintiff.

MICHIGAN SUPREME COURT.

LAMB KNIT-GOODS COMPANY, Appt.,
v.
LAMB GLOVE AND MITTEN COMPANY
et al.

(.....Mich.....)

1. A man who, as agent for a corporation using his name, has negotiated a sale of the property, business, and goodwill of the company, is estopped from asserting that the name is not rightfully used by the purchaser.
2. The name "Lamb Glove & Mitten Company," or any name in which the word "Lamb" occurs, when used in connection with the business of manufacturing gloves and mittens by what is known as the Lamb stitch, cannot lawfully be used, even by the

man named Lamb who invented the stitch, when he has transferred his right in a similar business previously carried on to a corporation named "Lamb Knitting Goods Company," which conducts such business in another town in the same state.

(May 9, 1899.)

APPEAL by complainant from a decree of the Circuit Court of Shiawassee County in favor of defendants in a proceeding brought to enjoin defendants from using the word "Lamb" in their corporate name. *Reversed.*

The facts are stated in the opinion.

Mr. Hugh P. Stewart, with Mr. Fred L. Chappell, for appellant:

The defendant company should be restrained from further use of the name as a

NOTE.—As to the right to use one's own name when claimed by another person as a trademark, see also *Gato v. El Modelo Cigar Mfg. Co.* (Fla.) 6 L. R. A. 823; *Vonderbank v. Schmitt* (La.) 15 L. R. A. 462, and *note*; *Fish* 44 L. R. A.

Bros. Wagon Co. v. Fish (Wis.) 16 L. R. A. 453; *Chas. S. Higgins Co. v. Higgins Soap Co.* (N. Y.) 27 L. R. A. 42; and *Bingham School v. Gray* (N. C.) 41 L. R. A. 243.

corporate name, by the injunction of this court.

2 Cook, Stock & Stockholders, § 699; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811.

The defendants should be restrained from using the name or word "Lamb" in advertising knit goods, in marking the same, or in referring to the same.

Le Page Co. v. Russia Cement Co. 5 U. S. App. 112, 51 Fed. Rep. 941, 2 C. C. A. 555, 17 L. R. A. 354; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Beal v. Chase*, 31 Mich. 490; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811; *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 896; *Thorley Cattle Food Co. v. Masson*, Cox, Manual Trademark Cases, No. 668; *Keddaway v. Banham* [1896] A. C. 214; *Raymond v. Royal Baking Powder Co.* 35 U. S. App. 575, 85 Fed. Rep. 231, 29 C. C. A. 245; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118.

A corporation choosing a name has an infinite variety of names and combinations of names from which to choose, and there is not the slightest excuse for one corporation adopting a name that has for its prominent feature the same name which is prominent in the name of another company.

Clark Thread Co. v. Armitage, 67 Fed. Rep. 896.

Defendants should adopt a name wherein they would not be required to take pains to distinguish it from the complainant company; and the fact that they have adopted a name requiring explanations is one of the things the complainant complains of.

Pillsbury v. Pillsbury-Washburn Flour Mills Co. 24 U. S. App. 395, 64 Fed. Rep. 841, 12 C. C. A. 432.

Numerous cases are on record in which parties have been restrained in the use of their own name even, where they used it fraudulently.

William Rogers Mfg. Co. v. Rogers & S. Mfg. Co. 11 Fed. Rep. 495; *Morgan v. Rogers*, 19 Fed. Rep. 596; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 24 U. S. App. 395, 64 Fed. Rep. 841, 12 C. C. A. 432; *William Rogers Mfg. Co. v. R. W. Rogers Co.* 66 Fed. Rep. 56; *Walter Baker & Co. v. Baker*, 77 Fed. Rep. 181; *Walter Baker & Co. v. Baker*, 87 Fed. Rep. 209; *Allegretti Chocolate Cream Co. v. Keller*, 85 Fed. Rep. 643; *Landreth v. Landreth*, 22 Fed. Rep. 41.

The use of any other name with fraudulent intent should be restrained.

Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118.

The mere shape of the package, other things being similar, should be restrained.

Cook & B. Co. v. Ross, 73 Fed. Rep. 203; 2 Cook, Stock & Stockholders, § 699, p. 1013; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 44 L. R. A.

37 Conn. 278, 9 Am. Rep. 324; 26 Am. & Eng. Enc. Law, p. 260.

Messrs. Cahill & Lauch, for appellees:

While it is true that a man may part with the right to use his own name in connection with a business, such right can only be parted with by express agreement; nor does a man part with his right to engage in business under his own name by the sale of a former business, together with the goodwill of the business.

Churton v. Douglas, Johns. V. C. (Eng.) 174; *Williams v. Farrand*, 88 Mich. 492, 14 L. R. A. 161; *Beal v. Chase*, 31 Mich. 490; *Grow v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811.

The transfer of a business, including its goodwill, from one concern to another, where it does not expressly include a sale of the name and contain a covenant against going into the same business elsewhere, will not of itself be construed to prevent the seller from engaging in a similar business elsewhere, if he does so without attempting to mislead and deceive the public.

Williams v. Farrand, 88 Mich. 473, 14 L. R. A. 161, and cases cited at pp. 490-493; *Supreme Lodge K. of P. v. Improved Order K. of P.* 113 Mich. 133, 38 L. R. A. 658; *Hazleton Boiler Co. v. Hazleton Tripod Boiler Co.* 142 Ill. 494; *Duryea v. National Starch Mfg. Co.* 45 U. S. App. 649, 79 Fed. Rep. 651, 25 C. C. A. 139; *Fish Bros. Wagon Co. v. LaBelle Wagon Works*, 82 Wis. 546, 16 L. R. A. 453; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118.

Defendants are not responsible for blunders made by the business community in not distinguishing between the two concerns.

Turton v. Turton, L. R. 42 Ch. Div. 128; *Supreme Lodge K. of P. v. Improved Order K. of P.* 113 Mich. 133, 38 L. R. A. 658.

The term "Lamb Knit" is descriptive and generic, and is not capable of being appropriated as property.

26 Am. & Eng. Enc. Law, pp. 289, 295; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535; *Corbin v. Gould*, 133 U. S. 308, 33 L. ed. 611; *Ball v. Siegel*, 116 Ill. 137.

A trademark is the name, symbol, figure, letter, form, or device adopted and used by manufacturer or merchant to designate the goods that he manufactures or sells, and to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and must be purely arbitrary.

6 Wait, Act. & Def. 21 et seq.; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 60, 25 L. ed. 996; *McLean v. Fleming*, 96 U. S. 254, 24 L. ed. 832; 26 Am. & Eng. Enc. Law, p. 241.

The purpose of a trademark is (1) to protect the party using it from competition; (2) to protect the public from imposition.

26 Am. & Eng. Enc. Law, p. 241, note 1, and p. 340.

The right to the trademark is, in the bill, based upon the alleged fact that it uses a peculiar stitch in the manufacture of its goods, which it says have come to be known as "Lamb Knit" because of such stitch. The

words, then, are not arbitrary, but descriptive, and relate to the method of manufacture, and no trademark can be secured in such words.

26 Am. & Eng. Enc. Law, p. 295.

A trademark must be adopted and applied by the manufacturer or merchant to his goods, with his name and address, and the goods sold in the open market.

26 Am. & Eng. Enc. Law, pp. 348 *et seq.*; *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125; *Kohler Mfg. Co. v. Beshore*, 53 Fed. Rep. 262.

The trademark must be affixed to the goods themselves. The use of the mark on advertising matter alone does not create a right.

26 Am. & Eng. Enc. Law, p. 358, and cases cited; *Browne, Trademarks*, §§ 91, 305.

Montgomery, J., delivered the opinion of the court:

The complainant avers by its bill of complaint that it is a corporation, with its home offices at Colon, Michigan; that, prior to its organization, the defendant Isaac W. Lamb had organized a company at Concord, Michigan, known as the "Lamb Knitting Company," and that at the time of complainant's organization it acquired all of the property, business, and goodwill of the Lamb Knitting Company from Isaac W. Lamb, and paid a valuable consideration therefor; that, at the time of the organization of the complainant, Isaac W. Lamb was interested in the organization of the company and raised a large amount of the capital stock; that the complainant assumed the name of the "Lamb Knitting-Goods Company," with the knowledge and consent and at the desire of Isaac W. Lamb; that the complainant was organized to conduct a business similar to that which had been previously conducted by the Lamb Knitting Company, which was the manufacture and sale of knitted goods, principally gloves and mittens; that these gloves and mittens had in the main been knitted with a peculiar stitch, and that from the connection of complainant's name with said goods the peculiar stitch had become known as the "Lamb Stitch;" that gloves and mittens may be manufactured by the same machine with a different stitch, which will be equal to the complainant's in durability; that the stitch used by the complainant is for the purpose of distinguishing complainant's goods; that, after the organization of complainant, Isaac W. Lamb was in its employ for a number of years as superintendent, but that he had become dissatisfied, and left complainant's employ on the 8th of April, 1892; that thereafter he, with the assistance of others, organized a company known as the "Lamb Glove & Mitten Company," at Perry, Michigan, and commenced to manufacture gloves and mittens knitted with the same peculiar stitch as that employed by the complainant; that the name adopted by the defendant company is similar to that adopted by the complainant, and that purchasers and dealers are deceived thereby, and buy the goods of the defendant believing them to be the goods of the complainant; that the busi-

ness of the complainant has been damaged thereby. Complainant avers that it is entitled to the exclusive use of the word "Lamb" in connection with knit goods of any description, and to the word "Lamb" in its corporate name; that it has the exclusive right to use the peculiar stitch; and that for this reason the words "Lamb Knit" have become and are a valid trademark at common law. The bill prays an accounting and an injunction.

The answer admits that the complainant assumed the name of the "Lamb Knit-Goods Company," with the knowledge and consent of Isaac W. Lamb, but denies that the complainant is entitled to the exclusive use of the words "Lamb Knit" goods, or the use of the word "Lamb" in connection with other words indicating knitted goods. The answer also admits that the complainant acquired all the property, business, and goodwill of the Lamb Knitting Company, but avers that Lamb acted in the transaction, not for himself, but as agent for the Lamb Knitting Company. The answer also admits that the defendant corporation organized with, and is conducting a business under, the name of the "Lamb Glove & Mitten Company," but denies the allegation that this name is so similar to complainant's as to mislead purchasers and dealers. The answer further avers that the peculiar stitch adopted by complainant has been in common use for many years; that the defendant Lamb was the inventor of a knitting machine upon which this stitch was made, and that he sold the rights, under patents granted to him, to the Lamb Knitting-Machine Company of Rochester, New York, and the Lamb Knitting Machine Company of Springfield, Massachusetts, which companies consolidated under the name of the "Lamb Knitting-Machine Company of Chicopee Falls, Massachusetts," and that this last-named corporation is still doing business under the name of the "Lamb Manufacturing Company," and is manufacturing Lambknitting machines; that in 1868 defendant Lamb invented a machine for knitting many kinds of knit goods, and procured a patent thereon, and afterwards procured patents on various improvements; that in 1885 he issued printed directions for using the "New Lamb Knitter," manufactured by the New Lamb Knitting Company of Jackson, Michigan; that a large number of persons purchased these machines; that a large number of the persons and corporations which use these machines advertise such goods as made by the Lambknitters, and that the name of "Lamb" as applied to knitting machines, and the terms "Lamb Knit" and "Lamb Goods," have been in common use in this country, by a large number of different persons, firms, and corporations, for more than twenty years. The case was heard on pleadings and proofs, and the bill dismissed. Complainant appeals.

We are well satisfied that the complainant has not established its right to the exclusive use of the term "Lamb Knit." The testimony shows that goods manufactured on the Lamb machine were in common use many years before the organization of complainant company, and that to distinguish such goods

from goods knitted on other machines they were designated as "Lamb Goods," "Lamb Machine Goods," or "Lamb Knit Goods." It also appears that the peculiar stitch which complainant claims the exclusive right to was in common use before complainant adopted it.

The case narrows down to the single question whether the defendant infringed the rights of complainant by the use of a corporate name so similar to that of complainant as to mislead the public, and, if so, what remedy ought to be applied. There can be no doubt that by the transfer to the complainant of the goodwill of the Lamb Knitting Company it was the intention of the defendant Lamb to grant the right to use his name in connection with the complainant's business. In fact, he assisted in organizing the corporation, and became a stockholder in the complainant company. The statute (How. Anno. Stat. § 4161) authorizes the formation of a corporation, and provides that no two companies shall use the same name or a name so similar as to be liable to mislead. It is contended that the defendant Lamb has entered into no express agreement not to use his own name, and that Mr. Lamb, in making a sale of the Lamb Knitting Company to the complainant, was acting on behalf of the Concord company, and that the Concord company could not, and Mr. Lamb did not, sell the exclusive right to use Mr. Lamb's name, nor undertake that he would not engage in any similar business elsewhere. It appears, however, that the proposition to the promoters of complainant came from Mr. Lamb, and, as before stated, he is estopped from asserting that the company did not take its name rightfully. Reference is made to the case of *Williams v. Farrand*, 88 Mich. 473, 14 L. R. A. 161. That case, however, recognizes a distinction between a corporate name and that of a partnership. In the majority opinion it is said: "A corporate name is regarded in the nature of a trademark, even though composed of individual names, and its simulation may be restrained. After adoption it follows the corporation." Reference is also made to *Supreme Lodge K. of P. v. Improved Order K. of P.* 113 Mich. 133, 38 L. R. A. 658. In the latter case there was no evidence that any person had been misled, and, while the case is near the line, the court held that the rights of complainant had not been infringed. In the present case the testimony shows that dealers have been misled, and in view of the fact that the complainant's business is largely the manufacture of gloves and mittens, and that the name "Lamb" is prominent in the corporate name, we think it is likely to mislead. The case is very similar to *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42. In that case the plaintiff's name did not describe its business. The business was, in fact, the manufacture and sale of soap. The court restrained the defendant from carrying on the business in the name of the Higgins Soap Company. The court held that, even if the name was assumed in good faith, without design to mislead the public and acquire the plaintiff's trade, the defendant, knowing of 44 L. R. A.

the fact, must be held to the same responsibility. See also *Holmes, B. & H. v. Holmes, H. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811; *Frazer v. Frazer Lubricator Co.* 121 Ill. 147; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 24 U. S. App. 395, 64 Fed. Rep. 841, 2 C. C. A. 432; *Walter Baker & Co. v. Baker*, 57 Fed. Rep. 209. It is true that the business office of defendant is not located in the same village as that of complainant, but it appears that the business has been conducted through agents largely, and that the public have in numerous instances been deceived. We think the case falls within the class in which protection should be afforded.

The decree will be reversed, and a decree entered restraining the defendant from continuing the use of the corporate name "Lamb Glove & Mitten Company," or any name in which the word "Lamb" appears, in connection with other words indicating a business similar to that of complainant. Subject to this restriction, defendant is at liberty to advertise its goods as made on the Lamb knitting machine.

The other Justices concur.

Clarence CONELY *et al.*

v.

Charles P. COLLINS *et al.*, *Pliffs. in Err.*

(.....Mich.....)

1. An agent to whom are intrusted the entire management and control of a corporation whose stockholders hold no meetings has power to make an assignment of its property for its creditors.
2. A conveyance of property of a corporation in trust to be sold and the proceeds applied to the payment of indebtedness, also authorizing the trustee to collect accounts and use the proceeds in payment of debts, but providing that any surplus should be returned to the corporation or its assigns, is an assignment for the benefit of creditors, and not a mere mortgage.

(March 14, 1899.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to obtain possession of certain lumber which had been taken by defendants under a writ of attachment. *Reversed.*

The facts are stated in the opinion.

Messrs. Keena & Lightner, for plaintiffs in error:

There is no implied authority in the superintendent of a corporation to make an assignment for the benefit of creditors.

Kalamazoo Novelty Mfg. Co. v. McAlister, 36 Mich. 327; *New York Iron Mine v. First Nat. Bank*, 39 Mich. 644; *McCullough v. Moss*, 5 Denio, 567; *Murray v. East India*

NOTE.—On the question whether a preference by mortgage or sale is an assignment for creditors, see *note to Tittle v. Vanleer* (Tex.) 37 L. R. A. 337.

Co. 5 Barn. & Ald. 204; *Benedict v. Lansing*, 5 Denio, 283; *The Floyd Acceptances*, 7 Wall. 666, 19 L. ed. 169; *Doyle v. Mizer*, 42 Mich. 341; *Delta Lumber Co. v. Williams*, 73 Mich. 86; *Kendall v. Bishop*, 76 Mich. 634; *Hartford Iron Min. Co. v. Cambria Mfg. Co.* 80 Mich. 495; *Marquette & O. R. Co. v. Taft*, 28 Mich. 293; 3 Am. & Eng. Enc. Law, 2d ed. p. 23; *Goodyear Rubber Co. v. George D. Scott Co.* 96 Ala. 440.

Even if Hathaway did have authority to execute the paper, it is void as violating How. Stat. § 6184, as to trusts, and § 8739 as to voluntary assignments.

The deed is a trust deed.

An assignment which conveys practically all of the property of a debtor for the benefit of creditors is a general assignment within the meaning of How. Stat. § 8739.

Pettibone v. Byrne, 97 Mich. 85; *Du Bose v. Carlisle*, 51 Ala. 592; *Bishop v. Catlin*, 23 Vt. 71; *Krug v. McMillard*, 76 Ind. 28.

The preference of the Bay City Manufacturing Company would be enough to vitiate the entire assignment, but the additional direction that the accounts attached are to be paid in the order named makes it still further illegal.

Kendall v. Bishop, 76 Mich. 634; *Pettibone v. Byrne*, 97 Mich. 85; *Warner v. Littlefield*, 89 Mich. 329; *Hill v. Mallory*, 112 Mich. 387; *Burnham v. Haskins*, 79 Mich. 35.

The trust bill of sale is void under How. Stat. § 6203, as being made with intent to hinder, delay, or defraud creditors, and on this the jury should have been allowed to pass.

Bendetson v. Moody, 100 Mich. 553; *Whitaker Iron Co. v. Preston Nat. Bank*, 101 Mich. 146.

Plaintiffs cannot recover because the deed from Lynch to Conely & Co. was void as to creditors, since Conely & Co. were aware that the value of the lumber they took was largely in excess of the amount of the indebtedness of the company to them.

Gumberg v. Treusch, 110 Mich. 451; *Hough v. Dickinson*, 58 Mich. 89; *Bedford v. Penny*, 58 Mich. 428.

Mr. John D. Conely, with *Messrs. Haug, Yerkes, & Duffie*, for defendants in error:

The difference between a chattel mortgage and a common-law assignment is that one is a conditional transfer of property and the other is an absolute transfer.

Warner v. Littlefield, 89 Mich. 340.

The absolute title to the property did not pass to Lynch.

An assignment by a debtor to his creditor of personal property upon trust to sell and pay his debt with reservation to himself of the surplus if any there be, is held to be in effect a mortgage.

Warner v. Littlefield, 89 Mich. 338; *Jones, Chatt. Mortg.* § 352.

The fact that a chattel mortgage is made to a trustee makes no difference.

Bagg v. Jerome, 7 Mich. 145; *Adams v. Niemann*, 46 Mich. 136; *Walker v. White*, 60 Mich. 429; *Lyon v. Ballentine*, 63 Mich. 97; 44 L. R. A.

Warner v. Littlefield, 89 Mich. 329; *Cluett v. Rosenthal*, 100 Mich. 193.

The instrument must be read as a whole, and the intent gathered from its entire contents.

Warner v. Littlefield, 89 Mich. 335; *Morrison v. Moore*, 113 Mich. 101; *Austin v. First Nat. Bank*, 100 Mich. 613.

The deed was to hinder and delay creditors; this alone would not make it void.

Olmstead v. Mattison, 45 Mich. 617; *Jordan v. White*, 33 Mich. 253.

Whenever a corporation permits the superintendent to have such powers as the one in this case exercised a mortgage given by him on the assets of the corporation to secure creditors, and other contracts, are valid.

Preston Nat. Bank v. George T. Smith Middlings Purifier Co. 84 Mich. 364; *Michigan Slate Co. v. Iron Range & H. B. R. Co.* 101 Mich. 27; *Sarmiento v. Davis Boat & Oar Co.* 105 Mich. 302; *Poole v. West Point Butter & Cheese Asso.* 30 Fed. Rep. 513.

Long, J., delivered the opinion of the court:

This action of replevin was brought in the Wayne circuit court, and about \$300 worth of lumber was taken under the writ. Plaintiffs had verdict and judgment by direction of the court. Defendants bring error.

It appears that in 1894, one Gilbert Hathaway executed in behalf of the Mascotte Lumber Company a conveyance of that company's stock in trade, consisting mostly of lumber, to Thomas H. Lynch, upon certain conditions, therein named, which will be spoken of more at large, and which conveyance empowered Lynch to sell the property and pay certain debts, according to a schedule attached. After Lynch had paid part of these debts, he sold the entire remaining stock, except a portion that was claimed by Salliot & Ferguson, to the plaintiffs. Under this sale an indebtedness due to the plaintiffs was canceled, and their note given for the balance. Very shortly after, the defendants in this suit attached the stock thus transferred to the plaintiffs, and took it into possession. Thereupon this suit in replevin was brought, and the property taken by plaintiffs.

1. It was contended by the defendants below, and is contended here, that the conveyance executed by Hathaway was illegal, and transferred nothing, for the reason that Hathaway, as shown by the evidence in the case, had no authority to execute it. The court below, in passing upon this question, said: "To determine what Hathaway's authority was, you should look rather at what he did by the assent of the stockholders, than by what he called himself." It appears that the stockholders of the Mascotte Lumber Company were Sarah V. Bishop, Susan Sage, Carrie F. Schnoor, and John C. Hartz. Sarah V. Bishop was Hathaway's aunt. Susan Sage his grandmother, and Carrie F. Schnoor became his wife. John C. Hartz was second cousin to Carrie F. Schnoor. No meetings of the stockholders of the company were held, and apparently the business

was left with Hathaway to manage and control. None of the stockholders did anything concerning the management of the business. Hathaway employed Lynch to assist him, and exercised all the power of management of the business in every particular, and presumably so by the consent of the stockholders. He continued to exercise such authority up to the time the transfer was made, June 24, 1894. He had as much power in the management of the affairs of the company as had George T. Smith in the case of *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.* 84 Mich. 364; and in that case it was held that Smith had the power to execute the mortgage on the assets of the company. This case was followed and approved in *Michigan Slate Co. v. Iron Range & H. B. R. Co.* 101 Mich. 14. The court below was not in error in holding that Hathaway had power to execute the conveyance.

2. It is claimed that the conveyance was void under the provisions of §§ 6184 and 8739, How. Anno. Stat., or at least that the question should have been left to the jury to determine whether it was made for the purpose of hindering and defrauding creditors, and therefore void under the terms of § 6203, How. Anno. Stat. The claim is that the conveyance was a voluntary assignment, and that, as it prefers certain of the creditors it is therefore void as to creditors. We think this contention is correct, and that the court was in error in holding it to be a mere chattel mortgage. The conveyance transfers all the property of the Mascotte Lumber Company to Lynch in trust; he to sell the same, and apply the proceeds to the payment of the indebtedness. He is given power to collect accounts due the company, and use the same in the payment of the debts, the West Bay City Manufacturing Company to be paid first. The trustee is to pay himself \$50 per month after the unsecured debts are paid; surplus money or property in his hands to be turned back to the Mascotte Lumber Company or its assigns. In all essential particulars, the conveyance is in the exact form of an assignment for the benefit of creditors. It is therefore void, as it makes preferences. The case falls within *Kendall v. Bishop*, 76 Mich. 634; *Burnham v. Haskins*, 79 Mich. 35; *Pettibone v. Byrne*, 97 Mich. 85; *Hill v. Mallory*, 112 Mich. 387. The learned court below was of the opinion that the case is ruled by the case of *Austin v. First Nat. Bank*, 100 Mich. 618. There the conveyances were worded as mortgages, and authorized the mortgagee to take possession upon default. They were held not to make an absolute title in the mortgagee. Here Lynch was authorized to take possession and sell the property. The assignment conveyed an absolute title in the property to Lynch.

We need not consider the other assignments of error, as the court should have directed a verdict in favor of the defendants.

Judgment is reversed, and a new trial ordered.

The other Justices concur.

44 L. R. A.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, Appl.,

v.

Elizabeth DICK.

(.....Mich.....)

A beneficiary in a life-insurance policy is not estopped by statements in the proofs of loss as to the cause of death which were made in good faith upon information received from the attending physician, from showing that the death resulted from another cause.

(July 12, 1898.)

A PPEAL by complainant from a decree of the Circuit Court for Wayne County in favor of defendant in a suit brought to cancel the renewal of a life-insurance policy. *Affirmed.*

The facts are stated in the opinion.

Mr. Alfred Russell, for appellant:

The defendant is bound by the statement

NOTE.—Conclusiveness of proof of loss as against insured or his beneficiaries.

I. General rule.

II. In life insurance.

- a. In general.
- b. Misstatements as to dates, etc.
- c. As to condition of mind of insured.
- d. As to cause of death.
 1. In general.
 2. Coroner's inquests, suicide
 3. Doctor's certificates, etc.

III. In fire insurance.

- a. In general.
- b. Misstatements as to cause of fire.
- c. Amount of loss.
- d. Misstatements as to occupancy and use of premises.
- e. Misstatements as to ownership, etc.
- f. Discrepancy as to building.
- g. Other insurance.
- h. Magistrate's certificate.

This note is confined exclusively to the consideration of the question of the conclusiveness of the proofs of loss as evidence against the insured or his beneficiaries, and the question as to how far they are evidence in his favor is not, therefore, considered, neither is the question of fraud dealt with herein.

I. General rule.

As a general rule a person is estopped to show the existence of a fact, when by his own act, declarations, or conduct it is against conscience that he should be permitted to show the truth. In order, however, to preclude the party, the opposite party must have done some act or changed his situation in reliance upon the statement or conduct of the party to be estopped. *Schmidt v. Mutual City & Village F. Ins. Co.* 55 Mich. 432.

The doctrine of estoppel has not, however, been generally applied in this class of cases for the reason that an estoppel *in pais* arises where an act or declaration of the person is intended or calculated to mislead another who has relied upon it, and has so acted, or refrained from action, as that injury will befall him if the truth of the act or declaration be denied; but the exhibition of truth, though at enmity with the declaration, does not create or increase or change the liability. *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 229. 14 Am. Rep. 239; *Smiley v. Citizens' Fire Marine & L. Ins. Co.* 14 W. Va. 33, 40.

in the proof of claim which she presented, and on which she asked payment, which proofs were signed and sworn to by the physician.

The statement in the health certificate, which was the basis of the contract of reinsurance, was a warranty; the health certificate being expressly conditioned upon the truth of the statement therein contained.

Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L. R. A. 666.

The statements of the insured are bound to be made in good faith, and nothing should be kept back, because the insured and his family should know of his condition, and the agent of the company cannot, in the nature of things, know about the condition of the insured except as statements are made to him upon the subject.

Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610; *Equitable L. Assur. Soc. v. McElroy*, 49 U. S. App. 548, 83 Fed. Rep. 631, 28 C. C. A. 365.

All the elements of an estoppel *in pais* are lacking in the proofs of loss as they do not create the liability to pay the loss, and do no more in that respect than to set running the time at the end of which the sum contracted for shall become payable, and at which action may be brought to enforce the liability. *Smiley v. Citizens' Fire, Marine, & L. Ins. Co.* 14 W. Va. 33, 40; *Spencer v. Citizens' Mut. L. Ins. Asso.* 3 Misc. 458, 460; *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380, 24 L. ed. 499; *Phillips v. New York L. Ins. Co.* 81 N. Y. S. R. 639; *Cluff v. Mutual Ben. L. Ins. Co.* 99 Mass. 317; *Smith v. Ferris*, 1 Daly, 18; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 229, 14 Am. Rep. 239.

Since, in order to preclude a party from showing the truth, the opposite party must have done some act or changed his situation in reliance upon the statement or conduct of the party to be estopped, if an insurance company has done nothing upon the proof of loss by which it would be prejudiced if some articles were proved on the trial to have been lost which were not enumerated in the proofs of loss made out and furnished to the company, the doctrine of estoppel does not apply to prevent the claimant from showing the loss entailed. *Schmidt v. Mutual City & Village F. Ins. Co.* 55 Mich. 432, 430.

Even the sworn statement of the assured himself in his proofs of loss will not estop him, but in a suit upon the policy he may give evidence of the actual amount of his loss and recover accordingly. *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 335. To the same effect, *Lebanon Mut. F. Ins. Co. v. Kepler*, 106 Pa. 28; *Maghan v. Hartford F. Ins. Co.* 24 Hun, 58, 61; *Parmelee v. Hoffman F. Ins. Co.* 54 N. Y. 193; *Hoffman v. Aetna F. Ins. Co.* 1 Robt. 501, 32 N. Y. 405, 88 Am. Dec. 337; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 14 Am. Rep. 239; *Commercial Ins. Co. v. Huckberger*, 52 Ill. 464.

But the proofs presented to the company by the claimant are admissible as representations on his part as to the death and manner of death of the insured, and are presented to the company in compliance with the conditions of the policy requiring notice and proof of death as preliminary to the payment of the insurance money, and are intended for the action of the company, and upon their truth the company has a right to rely, and therefore, unless cor-

A warranty is a condition precedent, and its terms must be strictly complied with.

Barteau v. Phoenix Mut. L. Ins. Co. 67 N. Y. 595; *O'Neil v. Buffalo F. Ins. Co.* 3 N. Y. 122; *Hartwell v. Alabama Gold Life Ins. Co.* 33 La. Ann. 1353; *Day v. Mutual Ben. L. Ins. Co.* 1 MacArth. 41, 29 Am. Rep. 565; *Cobb v. Covenant Mut. Ben. Asso.* 153 Mass. 176, 10 L. R. A. 666.

The nature of this contract imposes upon the insured the duty of disclosing to the company every fact material to the risk which comes to his knowledge at any time before the contract is finally closed.

Equitable L. Assur. Soc. v. McElroy, 49 U. S. App. 548, 83 Fed. Rep. 636, 28 C. C. A. 365; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610.

A claimant against a life-insurance company must proceed upon one uniform theory. The beneficiary in the policy must decide upon the facts which entitle him, or her, to recovery, and cannot put forward one disease

rected for mistake, the claimant is bound by them. *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 35, 22 L. ed. 793, 795.

In *Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380, 389, 24 L. ed. 499, 503, the court refers to the above statements as to the effect of facts set forth in the preliminary proofs as admissions, and holds that the whole of the preliminary proofs of death must be taken together, and are evidence of facts therein stated, in favor of as well as against the company.

The rule as established in the above cases is followed in *United States L. Ins. Co. v. Klengast*, 26 Ill. App. 567, 572, wherein it was sought to bind the claimant by the proofs delivered by him to the company.

In this case the court stated that the rule was well settled that where, in a suit upon a policy of insurance, the proofs of death are offered in evidence by the claimant, they are admissible only for the purpose of showing performance by the assured of the conditions of the policy in relation to preliminary proofs. But where the proofs are offered in evidence by the company, a somewhat different rule applies, and in that case they are admissible as declarations by the claimant, and are prima facie evidence of the facts stated therein against the claimant and on behalf of the company.

So, in *Spencer v. Citizens' Mut. L. Ins. Asso.* 3 Misc. 458, 460, in deciding that the proofs of loss were not conclusive against the claimant's right to recover, and holding that nothing but a technical estoppel would shut out the truth, the court stated that the preponderance of authority showed that the preliminary proofs might be used: First, for the purpose of showing that the requirements of the policy in that regard had been complied with, and second, as prima facie evidence of the facts stated therein against the assured and on behalf of the company; but that they were not conclusive against the claimant.

This is also asserted to be the rule in the case of *Phillips v. New York L. Ins. Co.* 31 N. Y. S. R. 636, 637, in which the court relied upon the *Newton* and *Higginbotham* cases, *supra*.

And in *Cushman v. United States L. Ins. Co.* 70 N. Y. 72, 79, the same rule is upheld. There the claimant sought to prove at the trial who the usual medical attendant of the assured was, against the company's contention that the statement contained in the assured's application for insurance and in the doctor's statement

and one state of facts under oath and demand payment upon it and then change her ground of recovery.

New York Cent. Ins. Co. v. Watson, 23 Mich. 486; *Campbell v. Charter Oak F. & M. Ins. Co.* 99 Mass. 317 [10 Allen, 213]; *Ircing v. Excelsior F. Ins. Co.* 1 Bosw. 507.

Mr. Philip T. Van Zile, for appellee:

For a mere mistake in diagnosis of the disease, or a wilful false statement, or misjudgment, courts of justice will not say the company is to be relieved of its contract of insurance.

Runkle v. Hartford Ins. Co. 99 Iowa, 414.

An honest intentional mistake with proof of loss under a fire policy will not necessarily prevent a recovery even if notice thereof is not given insurers until the trial.

Parker v. Amazon Ins. Co. 34 Wis. 363; *Waldeck v. Springfield F. & M. Ins. Co.* 53 Wis. 129; *Beckett v. Northwestern Masonic Aid Assn.* 67 Minn. 298; *Backmeyer v. Mutual Reserve Fund Life Assn.* 82 Wis. 255, 87 Wis. 325; *Charter Oak L. Ins. Co. v. Ro-*

del, 95 U. S. 232, 24 L. ed. 433; *Employers' Liability Assur. Corp. v. Anderson*, 5 Kan. App. 18.

While the application and the certificate furnished in this case may be a warranty, it is only a warranty that the assured is in as good health as when first examined upon his application for said policy.

At most this warranty will only be held to warrant that he was at the time free from disease or ailment that affected the general soundness or healthfulness of his system seriously, not a mere temporary indisposition which does not tend to weaken or undermine the constitution of the assured.

Kettenbach v. Omaha Life Assn. 49 Neb. 842; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; *Pudritzky v. Supreme Lodge K. of H.* 76 Mich. 423; *Hann v. National Union*, 97 Mich. 513; *Plumb v. Penn Mut. L. Ins. Co.* 108 Mich. 94.

A court of equity will not make a decree on slight or uncertain proofs that will result in canceling or forfeiting this policy.

furnished in accordance with the terms of the policy were blinding upon the claimant as the latter statement was untrue.

In *Goldschmidt v. Mutual L. Ins. Co.* 102 N. Y. 486, 491, wherein the company sought to give in evidence the testimony of the coroner's inquest annexed to the proofs of death which were in all respects complete without such testimony, and fully complied with the requirements of the policy, the claimant's contention, that proofs of death were not admissible in evidence "except so far as they are evidence of the death as required by the rules of the company, and of the plaintiffs' presentation of proof to the company under their rules," and also their objection to the proceedings before the coroner being introduced in evidence as an admission of the plaintiffs, or as evidence of the statements contained therein, was upheld, as the claimants were in no respect bound by them.

And after the insurance company has received due notice of the facts stated in the proofs, the proofs have the probative force of solemn admissions under oath against interest. *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547; *Travelers' Ins. Co. v. Melick*, 65 Fed. Rep. 179, 187, 12 C. C. A. 544, 27 L. R. A. 629.

The case of *Mutual L. Ins. Co. v. Stibbe*, 46 Md. 302, 312, also holds that when the proofs are offered in evidence by the company they are admitted as evidence against the claimant.

In the case of *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793, the claimant was bound by the statements contained in the proofs of death which showed suicide and consisted of several affidavits and the record of the proceedings before the coroner's jury, as there was nothing to show a mistake therein, and no suggestion was made that they did not truly state the manner of the death of the insured.

This case is, therefore, distinguished from the *Goldschmidt* Case, *supra*, as in that case the company raised no issue as to the preliminary proofs of death which were complete without the statements of the coroner's inquest, the contents of which formed no part of the representations of the claimant, and the statements were not sworn to by him nor prescribed as worthy of belief.

The *Newton* Case is also distinguished from that of *Fisher v. Fidelity Mut. Life Assn.* 188 Pa. 1, 14, upon the ground that in the latter case there was no admission by the claimant

that death occurred by suicide, while in the former case it was clear and uncontradicted.

The same ground of distinction is also made out by the *Higginbotham* Case, 95 U. S. 380, 24 L. ed. 499, and also by the case of *Goldschmidt v. Mutual L. Ins. Co.* 102 N. Y. 486.

The proofs of loss or of death are not conclusive evidence against the claimant. *Spencer v. Citizens' Mut. L. Ins. Assn.* 142 N. Y. 505, 509; *Hanna v. Connecticut Mut. L. Ins. Co.* 150 N. Y. 526, 530; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 229, 233, 14 Am. Rep. 239; *Smith v. Ferris*, 1 Daly, 18, 20; *Parmelee v. Hoffman F. Ins. Co.* 54 N. Y. 193, 196; *Bradley v. John Hancock Mut. L. Ins. Co.* 20 App. Div. 22, 26; *Redmond v. Industrial Benefit Assn.* 150 N. Y. 167; *Chinnery v. United States Industrial Ins. Co.* 15 App. Div. 515; *Maghan v. Hartford F. Ins. Co.* 24 Hun. 58, 61; *Fisher v. Fidelity Mut. Life Assn.* 188 Pa. 1, 14; *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547; *Travelers' Ins. Co. v. Melick*, 65 Fed. Rep. 178, 187, 12 C. C. A. 544, 27 L. R. A. 629; *Keels v. Mutual Reserve Fund Life Assn.* 29 Fed. Rep. 198, 201; *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Lebanon Mut. F. Ins. Co. v. Kepler*, 106 Pa. 28, 34. See more particularly hereon the various sections of the note, *infra*.

In the above case of *Keels v. Mutual Reserve Fund Life Assn.* the court stated that if it were to hold that a claimant under a policy is irrevocably bound by statements of fact in the proof; that there is no room for the correction of mistakes,—correction made upon after-discovered testimony, and more careful inquiry,—it would give to such proofs a character higher than is given to evidence offered upon a trial and verdict thereon.

And the rule as to their conclusiveness holds, although they should be admitted as evidence. *Bradley v. John Hancock Mut. L. Ins. Co.* 20 App. Div. 22, 26; *Chinnery v. United States Industrial Ins. Co.* 15 App. Div. 515; *Hanna v. Connecticut Mut. L. Ins. Co.* 150 N. Y. 526; *Redmond v. Industrial Benefit Assn.* 150 N. Y. 167.

They may be used as *prima facie* evidence of the facts stated therein against the insured, and on behalf of the company, but they are not conclusive against the claimant. *Spencer v. Citizens' Mut. L. Ins. Assn.* 3 Misc. 458, 460; *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380, 24 L. ed. 409; *Phillips v. New York L. Ins. Co.* 31 N. Y. S. R. 639;

Lyon v. Travelers' Ins. Co. 55 Mich. 141, 54 Am. Rep. 354; *Utter v. Travelers' Ins. Co.* 65 Mich. 545; *Allen v. St. Louis Ins. Co.* 85 N. Y. 473.

Hooker, J., delivered the opinion of the court:

The complainant issued an insurance policy upon the life of one John J. Dick, which he suffered to lapse. A short time afterwards his son presented a certificate of good health, reading as follows:

Detroit, Michigan, Feb. 18, 1890.

I, John J. Dick, of Detroit, Mich., being the person whose life is insured under policy No. 28,251 in the John Hancock Mutual Life Insurance Company, do hereby certify that I

am in as good health as when first examined on my application for said policy, and that my family record is unchanged. I also understand and agree that the payment of premium due Jan. 8, 1896, is received, and said policy is now reinstated, by said company, on condition of the truth of the above statement.

John J. Dick.

Witness. (Note any change in family record below).

I witness the above: H. C. Judson, M. D.,
Physician of Family.

At the same time the overdue premium was paid. A day or two later, John J. Dick died. The bill was filed to cancel the renewal receipt given at the time the premium was paid, and has been before us, upon de-

Cluff v. Mutual Ben. L. Ins. Co. 99 Mass. 817; *Maghan v. Hartford F. Ins. Co.* 24 Hun, 58, 61; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 229, 14 Am. Rep. 289.

Proofs of death furnish some evidence of the facts therein stated, but after all they are only prima facie evidence and may be rebutted. *Bradley v. John Hancock Mut. L. Ins. Co.* 20 App. Div. 22, 26.

Preliminary proofs presented to an insurance company in compliance with the conditions of the policy of insurance are admissible as prima facie evidence of the facts stated therein against the insured and in behalf of the company. *Goldschmidt v. Mutual L. Ins. Co.* 102 N. Y. 486, 493; *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *United States L. Ins. Co. v. Kleigast*, 26 Ill. App. 567, 572; *Hayes v. Union Mut. L. Assur. Co.* 44 U. C. Q. B. 360, 365.

And when the proofs are offered in evidence by the company as defendants they are admissible as declarations by the beneficiary. *United States L. Ins. Co. v. Kleigast*, 26 Ill. App. 567, 572; *Mutual L. Ins. Co. v. Stibbe*, 46 Md. 302.

But proofs of death are only competent evidence against a beneficiary so far as they contain statements of facts within his knowledge or that of the parties who made them as admissions against interest. *Mutual L. Ins. Co. v. Schmidt*, 8 Am. L. Rec. 629.

And a statement accompanying a proof of loss cannot be used as evidence against the claimant in an action on the policy. *Helwig v. Mutual L. Ins. Co.* 58 Hun, 866.

Such proofs furnished by the beneficiaries are prima facie evidence against the persons furnishing the same, and when no evidence is given to contradict them they are conclusive. *Proppe v. Metropolitan L. Ins. Co.* 13 Misc. 266, 269; *National Life Asso. v. Sturtevant*, 78 Hun, 572.

Statements made by the assured in the proof of loss are admissions, and may be considered by the jury for what they are worth, but the party furnishing them may show that statements in the proofs are erroneous or inadvertently made. *Spencer v. Citizens' Mut. L. Ins. Asso.* 3 Misc. 458, 460.

And in the absence of any explanation or other evidence the statements contained in the proof of loss or of death should be deemed to establish the facts so stated. *Proppe v. Metropolitan L. Ins. Co.* 13 Misc. 266, 269; *Schmitt v. National Life Asso.* 84 Hun, 128.

The sworn statement of the claimant put in evidence by the company tends to prove the facts stated therein in favor of the company and against the claimant, even in the absence of other evidence tending in that direction, although it might not have that effect as against

any other person who might be interested in the question. *Bachmeyer v. Mutual Reserve Fund Life Asso.* 82 Wis. 255, 268.

It has, however, been held that the assured may correct a mistake of fact in his original statement of proof of loss, but such corrections are not for the first time to be made known to the insurers at the trial of the action to recover the loss by the introduction of evidence showing that the statements filed were not true in a material fact, which, if it exists as stated, will be fatal to the right of the insured to recover. *Campbell v. Charter Oak F. & M. Ins. Co.* 10 Allen, 213, 219.

And further, that if an incorrect statement in a material fact made by mistake in the notice or proof of loss, as required by the conditions of the policy, is not corrected or amended before the trial, the assured cannot prove the mistake and show that the facts are not as therein stated. *Ibid.*

The same doctrine is maintained by the court in *Irving v. Excelsior F. Ins. Co.* 1 Bosw. 507, 514, in which case the company rested its claim upon the facts stated and sworn to in the affidavit of proof of loss, and the plaintiff was not allowed to impeach the truth of his statement at the trial.

This theory has, however, been looked upon as too strict.

Thus, in *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793, the court stated that the opinions maintained in the above cases of *Campbell v. Charter Oak F. & M. Ins. Co.* and *Irving v. Excelsior Ins. Co.*, to the effect that where a mistake has occurred in the preliminary proofs presented, and no corrected statement is furnished the insurers before trial, the insured will not be allowed on the trial to show that the facts were different from those stated, were applicable only where the insurers have been prejudiced in their defense by relying upon the statements contained in the proofs.

In *Neill v. American Popular L. Ins. Co.* 10 Jones & S. 259, the above case of *Irving v. Excelsior F. Ins. Co.* 1 Bosw. 507, was looked upon as overruled by the subsequent case of *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 14 Am. Rep. 289, and also by the case of *Parmelee v. Hoffman F. Ins. Co.* 54 N. Y. 193.

But in *Hoffman v. Aetna F. Ins. Co.* 1 Robt. 501, 518, the court stated that it did not think the case of *Irving v. Excelsior F. Ins. Co.* 1 Bosw. 507, would exclude the correction of mistakes, and cited the case of *American Ins. Co. v. Griswold*, 14 Wend. 899.

And it has been expressly held that errors and omissions in the proof of loss furnished to insurers in cases of insurance may be corrected or supplied at the trial. *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. ed. 294.

murrer, on a former occasion. See 72 N. W. 179. It is now before us upon the merits, having been appealed by the complainant, against whom a decree for the amount of the policy was granted in the circuit court.

Two questions are presented: 'First, the claim that the renewal was obtained by fraud; and, second, that the certificate was a warranty of good health, which the proof shows that Mr. Dick did not enjoy at the time.

In our opinion, the preponderance of the evidence shows that the renewal was not obtained through fraud. It is true that the statements made by Dr. Judson may be criticised as not entirely consistent upon the subject of the time that he was called to treat the deceased for his last illness. But, aside from his testimony, there is much evidence,

from the family, neighbors, and acquaintances, tending to show that the deceased was not attacked by his last illness until after the renewal of the policy.

The proofs of loss state that the deceased died from typhlitis, and it is urged that the nature of this disease is such as to conclusively show that he must have been ill before the certificate of good health was furnished. We are of the opinion that the proofs justify the conclusion that he may not have died from that disease, but from some other cause. In this connection it is insisted that we must find that he died from that disease, inasmuch as the beneficiary has decided upon that, and based her claim and proofs of loss upon it. We have no doubt that the proofs of loss should be treated as evidence of the fact stated, being in the na-

So, the assured may, without filing an amended statement, show upon the trial that his proofs of loss are erroneous, if the error is in fact a mistake and not an attempt upon the part of the assured to defraud or mislead the insurer. *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 14 Am. Rep. 239; *Smiley v. Citizens' Fire, Marine, & L. Ins. Co.* 14 W. Va. 83, 41.

And an insurance company cannot, by embodying in his preliminary proof any document which it sees fit to call for, hold the assured to an admission, not only of the existence of a document and its terms, but also of the truth of all the statements therein contained. *United States L. Ins. Co. v. Kielgast*, 26 Ill. App. 567, 572.

So, if a mistake has been made in the proof of death it may be corrected or explained by evidence given on the trial. *National Life Assn. v. Sturtevant*, 78 Hun, 572.

Proofs of loss are not stronger than a receipt in full which has always been held to be open to explanation. *Lebanon Mut. F. Ins. Co. v. Kepler*, 106 Pa. 28, 34.

And there is no magic in a proof of loss which prevents a correction of errors contained therein, and it is proper to show the circumstances under which the proofs of loss were made out, and the rest is for the jury. *Ibid.*

Honest mistakes made in proofs of loss cannot defeat the right of the insured to recover what may be justly due him under the contract of insurance. *Boyd v. Royal Ins. Co.* 111 N. C. 372, 377.

Proofs of loss in which honest mistakes have been made are open to explanation. *Ellis v. Agricultural Ins. Co.* 7 Pa. Super. Ct. 264, 267.

And a statement accompanying the proof of loss cannot be used against the claimant in an action on the policy. *Pickett v. Metropolitan L. Ins. Co.* 20 App. Div. 114, 116.

So, a mere mistake or unintentional error or misstatement of an immaterial matter in the affidavit in the proof of loss will not avoid the policy, but the statement in order to preclude recovery of the policy must be wilfully made in respect to a material matter and for the purpose of deceiving the company. *Walker v. Phoenix Ins. Co.* 62 Mo. App. 209.

And even if the policy contains a provision that "any fraud or attempt at fraud, or any misrepresentations in proof of loss or examination, or any false swearing, shall cause a forfeiture of all claims," it cannot be taken that any innocent misstatement can work a forfeiture; and the court commits no error in charging the jury that under such a clause a misstatement will not avoid the policy if it is a 44 L. R. A.

mere mistake in an expression of opinion, and that the misstatement meant by such condition must be false and fraudulent. *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410, 420.

The right of the assured to recover under the policy is not forfeited by a mere mistake or misstatement in his proof of loss in the absence of fraud or false swearing. *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382.

In *Chapman v. Pole*, 22 L. T. N. S. 306, 307, it is said a man may make a mistake in his claim of proof of loss, and it may be quite honestly. He may either fail to recollect the precise quantity of the goods he has on his premises at the time of the fire, or mistake the value of those of which he is in possession, and press the claim according to what he believes honestly to be true, but which may in the end turn out to be a mistake. In such cases the only consequence which ensues is that as the contract of insurance is simply one of indemnity he can only recover to the extent of the real value of the goods actually lost.

II. In life insurance.

a. In general.

As shown in the preceding section, the doctrine generally adopted in case of life and fire insurance is that the preliminary proofs presented to an insurance company in compliance with a condition of the policy of insurance are admissible as prima facie evidence of the facts therein stated against the insured and on behalf of the company. *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793.

The whole of the preliminary proofs of death must, however, be taken together, and are evidence of facts therein stated in favor of as well as against the company. *Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380, 24 L. ed. 499.

The proofs of death required by a fraternal society or order, furnished by the plaintiff under the conditions of the certificate, and as an act necessary to be done in order to sustain an action against the company, are competent evidence on behalf of the company as against the beneficiaries, and the court errs in rejecting them. *Modern Woodmen of America v. Von Wald*, 6 Kan. App. 231, 236.

Yet, although misstatements in the proof of loss or death may be conclusive evidence of the fact therein stated as against the party seeking to recover if he does not furnish corrected statements before the trial, such rule only applies in cases where the insurer has been prejudiced in his defense by relying upon such statements. *Employers' Liability Assur. Corp. v. Anderson*, 5 Kan. App. 18, 23.

ture of an admission; but it is subject to explanation, and cannot have the effect of an estoppel, when made upon information received from the attendant physician, and in good faith. We find nothing in the case of *New York Cent. Ins. Co. v. Watson*, 23 Mich. 486, which is at variance with this doctrine; and the same may be said of the other cases cited. In *Irving v. Excelsior F. Ins. Co.* 1 Bosw. 507, when the assured furnished an account of loss under a claim in the policy requiring it, and making it a condition precedent to "his right to recover,"—the loss "not being payable until sixty days after such account is delivered,"—it was held that the defendants had a right to take the facts as he stated them, and that, had they been subse-

quently corrected, they would have been entitled to sixty days for examination, and that, "for the purposes of the trial of this action and its decision [the plaintiff] was concluded by that [his] affidavit." That falls short of the broad contention made here. The case of *Campbell v. [Charter Oak F. & M.] Ins. Co.* cited as 99 Mass. 317, we do not find. [10 Allen, 213.]

Upon the proofs, we think that the complainant has failed to sustain the case made by the bill.

The decree is affirmed, with costs.

The other Justices concur.

Rehearing denied.

And all admissions contained in the proof of death are not binding upon the claimant, and they may be varied or contradicted by him in cases of mistake. *Fisher v. Fidelity Mut. Life Assn.* 188 Pa. 1.

The general rule is that the claimant under a life-insurance policy is not concluded by the proofs of death presented, but such claimant may give evidence changing or correcting the facts therein appearing to have been stated by or for him. *Hanna v. Connecticut Mut. L. Ins. Co.* 150 N. Y. 526, 530.

So, the claimant under a life policy is not absolutely concluded by the statements made by another party as to the cause of the assured's death contained in an affidavit made by such party forming part of the preliminary proofs of death, especially where it is not affirmatively shown that the claimant knew of the statements made in such affidavit, and the terms of the policy as to proof of loss do not require any such evidence. *Day v. Mutual Ben. L. Ins. Co.* 1 MacArth. 598, 599.

If the policy requires the proofs of death to be furnished through the insurer, but does not state what such proofs shall contain, the plaintiff will be allowed upon the trial to explain and contradict statements made in such proofs as to the manner of death. *Beckett v. Northwestern Masonic Aid Assn.* 67 Minn. 298.

And an incorrect statement or mistake made by the beneficiary in the preliminary proof of loss may be corrected and explained by parol evidence upon the trial, when the same has been asked for by the company by letter and has been rendered to it in substance by letter prior to the commencement of the suit. *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209, 240, 23 Fla. 193.

So, if an affidavit of the beneficiary tending to show that, contrary to the representations of the assured in his application, he had been subject to epileptic fits, is introduced, it is proper to permit the affiant to show that she never knowingly subscribed to or made the statements contained in such affidavit. *Bankers' Life Assn. v. Lisco*, 47 Neb. 340.

In *Covenant Mut. Ben. Assn. v. Hoffman*, 110 Ill. 603, 605, under the assured's certificate of membership, no benefit could be claimed if death was caused by any act of self-destruction committed, "same or insane," or upon the happening of any one of certain other conditions. The proof of death given in evidence stated the disease to be pneumonia. The company asked for an instruction to the jury that the proofs of death were not evidence of what disease the holder of the certificate died, and that they could not be considered by the jury for that purpose. The court refused the instruction, and held the proofs of death were proper evidence although they contained proof of the dis-

ease of which the assured died, and that it was not error in the trial court to refuse the instruction in the form it was asked; and further, that as the conflict was as to whether he had disease of the lungs or other diseases at the time he made the application or renewal of membership the court would, if so asked, have instructed the jury that the proofs of death were no evidence on that question.

If, however, there is an express clause in the policy that the contents of the proofs of death are to be evidence of the facts therein stated, such condition is not only a waiver of privilege on the part of the deceased, but is an agreement and condition which binds the beneficiaries, and they cannot claim the benefit of the contract and sue to enforce it without accepting and abiding by its provisions. *Proppe v. Metropolitan L. Ins. Co.* 13 Misc. 266, 269.

See also *Bradley v. John Hancock Mut. L. Ins. Co.* 20 App. Div. 22, 20; *Mutual L. Ins. Co. v. Schmidt*, 8 Am. L. Rec. 629; *National Life Assn. v. Sturtevant*, 78 Hun, 572,—*supra*, 1.

b. Misstatements as to dates.

Proofs of death are not conclusive upon the claimant under a life-insurance policy as to the age of the assured, and he can show the real age of the assured, and that the statement in the proof in that respect is erroneous. *Schmitt v. National Life Assn.* 84 Hun, 128; *National Life Assn. v. Sturtevant*, 78 Hun, 572; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 14 Am. Rep. 239, Affirming 64 Barb. 536; *Cummins v. Agricultural Ins. Co.* 67 N. Y. 261, 23 Am. Rep. 111.

In *Cotton States L. Ins. Co. v. Edwards*, 74 Ga. 220, 230, an error in stating the age and the proof of death was held to be explainable.

And a variance between the statements made in the claimant's proof of death and those made in the application for insurance, which, if true, would probably have constituted a breach of warranty which would have avoided the policy, with respect to the date of the birth of the deceased, and also with respect to another policy in another company, does not estop the claimant from showing that they were inadvertently made, and that as a matter of law they were not true. *Wells v. Metropolitan L. Ins. Co.* 19 App. Div. 18.

The plaintiff in an action to recover on an insurance policy is not estopped, by reason of the statements in the proof of loss being inconsistent with those contained in the application by reason of a different statement of the age of the assured, and also as to other insurance, from showing that they were inadvertently made and incorrect, and that as a matter of fact they were not true. *Wells v. Metropolitan L. Ins. Co.* 19 App. Div. 18, 22; *McMaster v. In-*

insurance Co. of N. A. 55 N. Y. 222, 14 Am. Rep. 239; Mead v. American F. Ins. Co. 13 App. Div. 476.

And the beneficiary under a life-insurance policy is not concluded by the statement made by herself to the age of the deceased in the proof of loss, where the same is voluntarily and not necessarily made by her, and she has a clear right to explain why and how she came to make such statement.

In this case the proofs of death showed the age of the decedent to be two years more than the age as shown by his application for insurance, and the beneficiary testified that she made the statement owing to being misled by an old book of the insured, which was a record of the service in the army, in the possession of the insured, and also by statements made by him that he was younger than the age as shown in the record of service. *Hayes v. Union Mut. L. Assur. Co.* 44 U. C. Q. B. 360, 365.

So, evidence to show a mistake in the date of a certain birth for which a blank had been left in the proof of death, and which, some days after the same had been signed and sworn to by the claimants, was filled in without their authority or consent by a person who had charge of the paper, has been allowed upon the ground that although the proof became prima facie evidence so far as the claimants are concerned, yet it was not conclusive. *National Life Assn. v. Sturtevant*, 78 Hun, 572.

And parol evidence on behalf of the claimant was admitted to explain a mistake in the age of the assured, in *Neill v. American Popular L. Ins. Co.* 10 Jones & S. 259, where the proof of death made the insured one year older than he was stated to be in the original application, and this was proved to have been caused by an error of one year in the computation by the person who prepared the proofs of loss, and not to have resulted from any error in the original application, as the declaration of the age in the proofs of death did not mislead or injure the company, or lead it to do or omit to do anything by which it would be prejudiced, and the basis of an estoppel *in pais* did not exist.

In the case of *Schmitt v. National Life Assn.* 84 Hun, 128, there was a variance between the age of the assured as shown in the application and the age as contained in the proofs of death, as the latter showed that the assured was born the year previous to that stated in the application. The answers in the application were held to be warranties and material to the risk, and the claimant was not estopped by the proof of loss from showing the true age of the assured, and from showing that there was a mistake therein; and, as there was no explanation or other evidence, the statement of the age of the assured as given in the proofs was taken as establishing the facts so stated.

In *Young v. Travelers' Ins. Co.* 80 Me 244, 249, which was an action on an accident policy, the notice and proof of death were filed in by the agent of the company. It was held that if such agent, under the directions of the plaintiff without any fault on the part of the insured, misstated the date of the accident, the company could not take advantage of the error in date, and that the court below committed no error in the admission of the notice and proof of disability.

And the beneficiary under an accident policy is not concluded from showing that she was mistaken in the date of the accident mentioned by her in her letters to the company as that of the accident, as the date was not then material, and the deceased was not disabled so as to be prevented from attending to his ordinary business for fully a week after sustaining the in-

jury, and no indemnity was claimed or paid for any disability between the two dates. *American Acci. Ins. Co. v. Norment*, 91 Tenn. 1.

In *Tuthill v. United L. Ins. Assn.* 50 N. Y. S. R. 266, the attention of one of the company's officers was called to a mistake in the proof of loss given by the plaintiff and the physician which stated that the health of the deceased was first affected on a given date when it should have been a year later, which the officer said was all right. On the trial the plaintiff was permitted to explain the mistake and how it happened, as the truth or veracity of the certificate was in issue.

In a case wherein the insured died three months from the date of his reinstatement, and the first proof of loss sworn to by the beneficiary and the attending physician stated the duration of the last illness as being between certain dates, and the remote cause of death as liquor, and the immediate cause acute Bright's disease, which statements were corrected in the supplemental proofs rendered by the beneficiary and the attending physician so far as they related to the time the deceased was taken sick, — the company claimed that the first proof established a breach of warranty and was conclusive of the interest of the beneficiary, but the court held that she was not estopped by such proof, and that she might still show the true facts of the case. *Spencer v. Citizens' Mut. L. Ins. Assn.* 3 Misc. 458, 460.

c. As to condition of mind of insured.

The fact that the claimant in her proofs of the death of her husband deposed that he committed suicide while insane is not binding upon her where such statement was made in an honest and unintentional mistake of the facts, and where she testified on the trial that she deposed to such statements in the proofs of death on the faith of what others had told her, and not from actual knowledge. *Bachmeyer v. Mutual Reserve Fund Life Assn.* 82 Wis. 255, 260.

In *Behr v. Connecticut Mut. L. Ins. Co.* 2 Flipp. 692, 699, 4 Fed. Rep. 357, the claimant had previously filed a petition for a divorce from her husband whose life was assured by the company. She stated under oath that her husband was an habitual drunkard for four years, and for the past two years prior to filing the petition was subject to mania a potu. The company claimed that his death was produced by drinking, and that the policy was void by reason of the representations made by the assured, and introduced the sworn statement of the claimant in proof thereof. The claimant stated that at the time she made such statement she was suffering from great mental anxiety, and that it was a mistake made by her in telling her lawyer that her husband had been so long a drunkard, and that she had sworn to the petition without knowing the effect or force of the words employed and without discovering the mistake. It was claimed that the petition for divorce was an estoppel, but the court ruled otherwise as it was made inconsiderately or by mistake, and that the distinguishing feature of an estoppel was that under no circumstances could it be averred against, and was not susceptible of explanation and often spoke against the truth, but it was not an estoppel where the parties had not acted upon it or been prejudiced by it. In this case the court pointed out that the real question was as to the force and effect of a petition for divorce as a part of the proof, and further that when it was once admitted as part of such proof the contrary might be shown, and it was not an estoppel.

Yet the sworn statement made by the claim-

ant herself that her husband was insane, put in evidence by the company, as against the claimant tends to prove such insanity even in the absence of other evidence tending in the same direction, although it might not have that effect as against any other person interested in the question. *Bachmeyer v. Mutual Reserve Fund Life Assn.* 82 Wis. 255, 263.

See also *Home Benefit Assn. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, *supra*, d. 1.

d. As to cause of death.

1. In general.

Statements as to the cause of death in proofs of loss are binding and conclusive on the party who makes them until by pleading or otherwise he gives the insurance company reasonable notice that he was mistaken in his statement and that he will endeavor to show that the death was the result of a different cause than that stated in his proofs, and after the company has received due notice of the fact, the proofs have the probative force of solemn admissions under oath against interest, but they are not conclusive. *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547; *Travelers' Ins. Co. v. Melick*, 65 Fed. Rep. 178, 12 C. C. A. 544, 27 L. R. A. 629; *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Keels v. Mutual Reserve Fund Life Assn.* 29 Fed. Rep. 198, 201; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 228, 233, 14 Am. Rep. 239; *Parmelee v. Hoffman F. Ins. Co.* 54 N. Y. 193.

The cause of death as represented in the proof of death furnished under the provisions of the life policy constitutes admissions of the material fact made by the claimant against interest, and although they are not conclusive, yet they are competent *prima facie* evidence against him in an action on the policy wherein the issue is the cause of death,—especially in the absence of evidence showing misstatements or errors therein. *Hanna v. Connecticut Mut. L. Ins. Co.* 150 N. Y. 526, 530.

A statement as to the cause of death, made by the claimant under a life policy which accompanied the proof of loss, does not constitute a part of the proof of death required by the policy, but is a mere declaration of the opinion of the claimant as to the cause of death, and as such cannot be relied upon by the company as conclusive, but is only to be considered by the jury in connection with all the other evidence in the case. *Mutual L. Ins. Co. v. Stibbe*, 46 Md. 302, 312.

So, in an action on a life policy proofs of loss stating suicide as the cause of death are admissible but not conclusive against the assured. *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L. R. A. 589. See further, as to suicide, *infra*, II. d. 2.

And the claimant's affidavit in the proof of death under a life policy which shows that the injuries from which the deceased died were received by him while unloading hay, when he accidentally strained himself, and an affidavit of a physician showing the cause of death to be from an accident, by exertions made in hauling in hay, are not conclusive so as to prevent recovery, where it is proved upon the trial that death was the result of a blow with a pitchfork while hauling hay, as the injury producing death is correctly described in the preliminary proof, although the claimant may have imputed death to a strain instead of a blow, as the variance is not such as can be regarded as fatal. *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 48, 52, 8 Am. Rep. 212.

In an action on a life-insurance policy, the claimant is not estopped from claiming that the

death of the insured was caused otherwise than by suicide, by the statements and opinions contained in the proofs of death, that the cause of death was mental aberration, where the statements were based on hearsay. *Home Benefit Assn. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160. See also II. d. 2, *infra*.

In *Walther v. Mutual L. Ins. Co.* 65 Cal. 417, 418, the claimant, after proving the fact of death, offered in evidence, for the sole purpose of showing a compliance with the requirements of the policy, the preliminary proofs of death of the deceased which had been furnished to the company, and which consisted of the proceedings of the coroner's inquest had upon the deceased's body, and statements made by the claimant together with statements by attending physicians, the undertaker, and a householder. This evidence, which was not contradicted, showed that the deceased died from the effects of prussic acid, and the verdict of the coroner's jury was death by prussic acid administered by his own hands with suicidal intent. The court below found that there was no evidence sufficient to show that the deceased committed suicide, and that the allegations of the answer that he committed suicide were untrue. This finding was based on the proposition that as the claimant offered the papers referred to solely for the purpose of showing that she had complied with the requirements as to preliminary proofs they would not be considered for any other purpose.

Upon appeal this was held to be error for the reason that when the papers were in evidence they were before the court and showed on their face that the cause of death was suicide, and for the purpose of the trial they were *prima facie* evidence of such fact and should have been so considered, although the claimant might have been permitted to overcome them by evidence that death was due to natural causes.

See also *Keels v. Mutual Reserve Fund Life Assn.* 29 Fed. Rep. 198, *infra*, II.

2. Coroner's inquests, suicide.

It has been held that the finding of the coroner's inquest is only admissible as part of the proof of loss furnished by the claimant to the insurance company, and is not evidence which the jury are to consider in making up their minds how the deceased was or was not injured, and they must determine such questions by the evidence produced at the trial. *Dougherty v. Pacific Mut. L. Ins. Co.* 154 Pa. 385, 387.

A certified copy of the verdict and evidence given at a coroner's inquest furnished under the policy as part of the proofs of death will not be binding upon the beneficiary as an admission that the verdict therein stated is true, or that the evidence was actually given, or that the witnesses had stated the facts correctly. *United States L. Ins. Co. v. Kleigast*, 26 Ill. App. 567, 572.

In *Keels v. Mutual Reserve Fund Life Assn.* 29 Fed. Rep. 198, 201, the court held that although the cause of death in the proof may be stated to be suicide, and this may be found by the proceedings of the coroner's jury attached to the proof of death, and the claimant may admit making such statement on information, and not from personal knowledge, and as not meaning technical suicide by the use of the word, such claimant may show that death was caused by some other means, such as accident, as, at the most, the statement made in the proof is an admission by the claimant, and, with all the other evidence, is to be submitted to and weighed by the jury, and such evidence meets the presumption of accidental death, and

puts on the claimant the burden of showing a mistake.

And the claimant is not estopped from asserting that the cause of death was otherwise than suicide where the proofs of death signed by the defendants in answer to the question as to whether the deceased's death was caused by his own hand or not referred to the statement of the coroner's physician which appeared on the next page and showed that he found "shock from penetrating shot wound in the head (right temple), mental aberration superinduced by chronic headache," and in answer to the question as to whether the death was "caused or accelerated or aggravated by his own hand or acts," the physician stated that he examined the deceased only as coroner's physician, and was unable to make any further statement than above, further than that his mental condition was probably due to chronic headaches which were caused either by chronic meningitis or tumor of the brain, as the company were in no way prejudiced by the statements and opinions in them. *Sargent v. Home Benefit Assn.* 35 Fed. Rep. 711.

So, the claimant's evidence contradicting the proof of death by suicide was admitted in *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L. R. A. 589, where the proofs of loss furnished the company contained statements of the undertaker, physician, agent, and friends, as well as the coroner's inquest, that suicide was the cause of death, over the company's objection that the plaintiff was bound by these proofs, as the cause of death was mere matter of opinion, and there was no testimony whatever on the subject, except the fact that the insured was found dead from a mortal gun-shot wound, with a pistol wedged in the bend of his thumb, and the body so disposed as to suggest inferences entirely consistent with accidental death, or at least not of a character to exclude every supposition but suicide.

In *Fisher v. Fidelity Mut. Life Assn.* 188 Pa. 1, in the proofs of death to which a copy of the coroner's inquest and the testimony given thereat were attached, the claimant entered the following protest: "I have been informed the verdict was suicide, but I decline to be bound by it." The company made no request for further proofs, but accepted them as filed, and on the trial attempted to prove the defense of suicide by offering the proofs of death, and a copy of the coroner's notes as admissions by the claimant. The claimant was held not to be bound by them, as, although by attaching a copy of the coroner's verdict and depositions he admitted their existence, yet by his protest he expressly declined to admit the proof of the fact which the company sought to establish.

The proofs of loss which include the proceedings before the coroner read in evidence to the jury on behalf of the claimant, and offered generally as evidence and so received without objection on behalf of the company, are to be considered in all their parts, and effect must be given to all they prove or tend to prove. *Lawrence v. Mutual L. Ins. Co.* 5 Ill. App. 280, 283.

So, the verdict of the coroner's jury sent to the company as part of the proof of death at the company's request and introduced by it to show the claim therein made by the plaintiff that the insured had died by his own hand, which was competent upon the issue made on the trial as to whether the death was due to an accident, forms no basis for an estoppel against the company, inasmuch as the plaintiff is not misled or prejudiced thereby, and the utmost he can claim is that the proofs of death, including the verdict of the coroner's jury, are evidence to be considered together with the other

facts upon the issues in the case. *Zimmerman v. Masonic Aid Assn.* 75 Fed. Rep. 236, 239. Although this case is not directly in point as showing the conclusiveness of the proof of loss, yet it is here cited as showing that the proof is to be considered along with the other evidence and other facts upon the issues of the case, and therefore as supporting the view that they are not absolutely conclusive.

See also *Home Benefit Assn. v. Sargent*. 142 U. S. 691, 35 L. ed. 1160; *Walther v. Mutual L. Ins. Co.* 65 Cal. 417, 418, *supra*, d. 1.

3. Doctors' certificates, etc.

The preliminary proofs presented to an insurance company in compliance with the conditions of its policy of insurance are admissible as prima facie evidence against the insured, but statements by physicians which are by statute made confidential become available to the company as evidence because found in or connected with the preliminary proofs, especially when they are not made concerning the last sickness or proximate cause of death. *Dreier v. Continental L. Ins. Co.* 24 Fed. Rep. 670, 673.

The certificate of a physician as to the cause of death, taken by itself and unexplained, is not conclusive evidence of the cause of death, nor is it prima facie proof against the claimant in an action to recover upon an insurance policy when it is stated *ex parte* and without opportunity for cross-examination, but it becomes a part of the evidence to be considered when it has been explained by and incorporated with the oral testimony of a physician examined by the court with reference to it. *Davey v. Aetna L. Ins. Co.* 38 Fed. Rep. 650, 653.

And a physician's certificate as to the cause of death, furnished with the proof of loss in compliance with the conditions and terms of the policy, is not conclusive as against the beneficiary claiming under the policy. *De Camp v. New Jersey Mut. L. Ins. Co.* 3 Ins. L. J. 89, 102.

The sworn testimony of a physician derived from hearsay, that death was caused by arsenic, is not conclusive as against the beneficiary, even though part of the proof of loss furnished by him in compliance with the conditions of the policy. *Mutual L. Ins. Co. v. Schmidt*, 8 Am. L. Rec. 624.

And the physician's statements based entirely upon hearsay, furnished with the proofs of death submitted upon the company's forms which required the physician who attended the deceased to answer questions prepared by the company, and required the claimant to furnish said answers to the insurer, were rejected by the court as not binding upon the assured, in *Insurance Co. v. Schmidt*, 40 Ohio St. 112.

So, a certificate of death, signed by the attending physician of the deceased, which contained the duration of his illness, with which the claimant had nothing to do, procured by the company, although evidence in the case, is not conclusive upon the claimants, especially where it is an unsworn document. *Chinnery v. United States Industrial Ins. Co.* 15 App. Div. 515.

And the claimant is not bound or responsible for the statement of a doctor who attended the insured during his last illness, attached to the proof of death in compliance with the conditions of the policy, in which he incorrectly stated that he had been the attendant or family physician for five years, as not caused by the claimant himself, and the evidence of such physician as a witness for the defense is properly contradicted by another medical witness on behalf of the plaintiff to prove that his evidence was not correct, and that he had made contrary statements. *Cushman v. United States L. Ins. Co.* 70 N. Y. 72.

A doctor's certificate which shows his attendance upon the deceased for one month at a time prior to the policy is not conclusive when it is explained or contradicted by the claimant, who states that the deceased had never been sick or at any time attended by a physician. *Howard v. Metropolitan L. Ins. Co.* 18 Misc. 74. In this case, however, the court reversed the judgment of the court below in favor of the claimant and ordered a new trial upon the ground that by a condition in the policy the contents of the proof of death were to be evidence of the facts therein stated in behalf of, but not as against, the company, which condition or statement was not invalid in its nature as it was competent for the parties to agree to such an arrangement.

And where the only proof of the veracity in the application of the assured was contained in the certificate of the physician presented by the claimant among the proofs of death and put in evidence by her, and this constituted prima facie evidence binding upon her as an admission, evidence by the deceased's mother which tended to contradict the physician's certificate was admitted and showed that the deceased was not ill at the time the insurance was effected but was in good health, and this obviated the effect of the contrary admission in the proof of death and raised an issue upon the facts, and was sufficient to authorize a finding, not only that no admission was intended, but also that the fact was otherwise than as appeared to be admitted by the proofs. *Boylan v. Prudential Ins. Co.* 18 Misc. 444.

And under a policy which provides that the proofs of death shall contain answers by the claimant, physicians, and other persons, and that all the contents of such proofs shall be evidence of the facts therein stated in behalf of, but not against, the company, and also a condition that the statements of the attending physician are to be considered as part of the proof of death, the proofs of death, signed by the claimant, which contain the sworn statement by the attending physician that the chief or primary cause of death was organic heart disease, asthma, and pleurisy, and that he had attended the deceased prior to the issuing of the policy for a similar disease, although competent evidence in support of the defense that the insured had been treated for the disease prior to the date of the policy as an admission in a material fact and under the rules as to admissions against interest, are not conclusive against the claimant who is at liberty to offer any evidence to set aside, contradict, or qualify the statements therein contained. *Klapp v. Metropolitan L. Ins. Co.* 41 App. Div. 208, 300.

If the by-laws of the company require that upon the decease of a member the proofs of death shall contain, *inter alia*, a statement under oath of the attending physician made upon a blank furnished by the company as a condition precedent to recovery, the sworn statement of the attending physician of the deceased in the proofs of death that he had attended her for a certain disease prior to the application and issuance of the policy, is not conclusive evidence that the representations of the deceased in the application, to the effect that for a number of years previous to the application for insurance he had no disease of those parts, was false, where the doctor's certificate showed the true cause of death to be the disease of several members of the body. *Redmond v. Industrial Benefit Assn.* 150 N. Y. 167.

So, the beneficiary is neither concluded nor estopped on the trial by the statements of the physicians contained in two affidavits made by them as to the cause of death on the company's

blanks, one of which states delirium tremens as the cause, while the other asserts that hemorrhages, induced by an excessive use of intoxicants, caused death, which affidavits were forwarded by the company to the plaintiff with other proofs of the death of the assured, as the issue made by the pleadings as to the real cause of death is triable as any other issue of fact. *Bentz v. Northwestern Aid Assn.* 40 Minn. 202, 2 L. R. A. 784. In this case the physicians were not the agents of the beneficiary, and she had not referred the company to them for information, but had merely given their names in reply to a question propounded to her as those who had attended the deceased in his last sickness, and the affidavits made by them were *ex parte* at the request of the company and were forwarded by the claimant by the advice of the company's agent on the assurance that they were all right.

Where the certificate of a physician furnishes as part of the proof of death according to the policy stated the cause of death to be exhaustion produced by the overuse of alcoholic liquors and opiates, the court admitted evidence to show that the symptoms at the post mortem examination did not point to alcoholism as the cause of death, or as one of the causes, and also that death was caused by a high state of mental excitement in consequence of domestic complication, aggravated by the use of liquor in not large quantities, and mainly by exhaustion produced by very severe overdoses of narcotics taken to allay that excitement. *DeCamp v. New Jersey Mut. L. Ins. Co.* 8 Ins. L. J. 89, 102.

A letter written by a doctor who attended the assured for some time previous to his death, and a part of the proof of death, although admissible for the purpose of showing compliance with the conditions of the contract requiring proof of loss, does not bind the beneficiaries, and even if it can be considered at all as proof of the facts certified to, its force may be overcome by other evidence proving the good health of the assured. *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Assn. v. Robinson*, 147 Ill. 138, 157, 158.

In this case the company sought to give the letter in evidence so as to escape liability upon the ground that the assured was suffering from a certain disease at the time he made application for membership. The court refused to admit such evidence as the letter was an unsworn declaration by a third party.

And a charge to the jury that the doctor's certificate that the deceased came to his death from the effects of alcoholic stimulants, etc., is not to be taken or accepted by the jury as conclusive evidence of the truth of the facts therein stated, nor is the claimant bound by that statement or estopped from proving a different cause of death, but that the certificate is entitled to the weight which ought to be given to an opinion of a doctor as to the cause of death, who saw the person so spoken of shortly before his death and who had personal knowledge of the person for some time previous to his death, sufficiently embodies the law of the case. *Etna L. Ins. Co. v. Ward*, 140 U. S. 76, 88, 35 L. ed. 371, 376.

In *Buffalo Loan, Trust, & S. D. Co. v. Knights Templar & Masonic Mut. Aid Assn.* 56 Hun, 303, affirmed, 128 N. Y. 450, proof of death was furnished to the company, and the certificate of the physician who attended the assured in his lifetime stated the cause of death to be delirium tremens, which, if true, would have avoided the policy. It was a part of the contract that "upon due notice and satisfactory proof of the death of a member of the association, the fi-

nance committee shall, within sixty days, pay," etc.; but, as there was nothing in the contract of insurance which required that those representing the deceased should state the cause in the notice of death, the exclusion of that part of the doctor's certificate which stated the cause of death on the trial was correct, as the only duty which devolved upon the claimant was to prove death, and that its cause was a matter of defense which must be proved by common-law evidence. In this case it was also held that the records or books of the board of health were not evidence as to the cause of death.

In *Proppe v. Metropolitan L. Ins. Co.* 13 Misc. 266, 269, the policy provided that all the contents of the proofs of death should be evidence of the facts therein stated in behalf of, but not against, the company, and the evidence showed that the proofs of death submitted to the company were made upon the forms prescribed by the policy. The physician's certificate, which was a part of the proof of death, certified that the chief or primary cause of death was oedem pulmon, and that the contributory or secondary cause of death was heart disease, and such certificate was referred to in the proof of death furnished by the beneficiary, and this was held to preclude her from claiming the privilege that the physician's statement did not bind her under the statute.

In *Supreme Lodge K. of H. v. Jagers*, 62 N. J. L. 98, the by-laws of a benevolent society provided that the suicide of a member should invalidate a benefit certificate issued upon his life, and the society for the purpose of establishing suicide produced and offered in evidence a paper asserted to be the official proof of death, which was signed by officers of the lodge and annexed to the affidavit of the attending physician, which stated suicide as the cause of death. It was held that the plaintiff's claim was not precluded by such proof.

III. In fire insurance.

a. In general.

It has been held that if the insured is induced to make a false statement in his proof of loss by false representations made by the representative of the company, he cannot be bound by such a statement. *Cook v. Lion F. Ins. Co.* 67 Cal. 372.

An honest or unintentional mistake in the proofs of loss under a fire policy will not necessarily prevent a recovery thereon even though notice of the error is not given the insurers until the trial. *Bachmeyer v. Mutual Reserve Fund Life Asso.* 82 Wis. 255, 256; *Parker v. Amazon Ins. Co.* 34 Wis. 363; *Waldeck v. Springfield F. & M. Ins. Co.* 53 Wis. 129.

So, if the question in the case does not arise with respect to the account which accompanies the preliminary proofs of loss in fire policies, but arises out of the examination of the claimants themselves under oath in the absence of their books of account, a mistake made under such circumstances should be open to correction, and the parties should not be concluded thereby. *Commercial Ins. Co. v. Huckberger*, 52 Ill. 464, 466.

And the statement made by an administrator under oath, upon examination before the insurance agent, that the property had been sold previous to the fire, does not estop her from proving otherwise on the trial. *Germania F. Ins. Co. v. Curran*, 8 Kan. 9.

The second proofs of loss made with a full knowledge of the value of the goods not totally destroyed, and with knowledge of the itemized appraisal of the arbitrators, and also that of

his *ex parte* appraisers, so that if there was any mistake or fraud the claimant then knew of it, will be conclusive upon him, especially if he chose to adopt under his oath the appraisal made by the arbitrators which shows every article of the goods, and the amount of the damage done. *Morley v. Liverpool & L. & G. Ins. Co.* 85 Mich. 210, 219.

See also *supra*, I.

b. Misstatements as to cause of fire.

In *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 14 Am. Rep. 239, the claimant was held not to be precluded from showing by evidence *alibunde* that the party who had made the proof of loss, and who was then deceased, was mistaken in his statement of the cause of the fire in his account of the loss, and the claimant was not bound by the erroneous statement made as to the cause of the fire but might fix the company's liability by proof of the true cause of the loss without regard to the statements in the preliminary loss.

So, an expression of opinion in a proof of loss that the fire originated through friction in the exhaust fan put into the building after the insurance without the consent of the company, while evidence as to how the fire originated, is not conclusive, and amounts to nothing more than an opinion. *Roby v. American Cent. Ins. Co.* 11 N. Y. S. R. 93, 95.

And a sworn statement in the proof of loss that "the fire originated from explosion of the boiler, fire ensuing afterwards," may be corrected on the trial by other evidence showing that there was a mistake in the proof of loss in that respect, and that the fire originated from another cause, where the assured has made an honest mistake as to the material fact in his proof of loss. *Waldeck v. Springfield F. & M. Ins. Co.* 53 Wis. 129, 130.

In this case it further appeared that the agents of the company had ample notice of the mistakes in the proof of loss before the suit was commenced, and it was not shown that there was any surprise or that the company had been misled to its prejudice in defending on the merits. To the same effect, *Stache v. St. Paul F. & M. Ins. Co.* 49 Wis. 89, 35 Am. Rep. 772.

c. Amount of loss.

And the claimant is not estopped by the statement and proof of loss of the actual costs, from claiming a larger sum as the value of the goods, where the actual cost of the articles was required to be shown by a condition attached to the policy, and to be stated in the preliminary proofs, but the policy showed that the value of the property was to be deemed to be the cost at the time of the fire to replace it. *Hoffman v. Aetna F. Ins. Co.* 1 Robt. 501, 518.

The claimant is not limited in recovery by the amount of loss specified in the proof of loss where no fraud is shown. *Bentley v. Standard F. Ins. Co.* 40 W. Va. 729.

And the fact that the claimant has made out his proofs of loss and given them to the company's agent does not preclude him from recovering a greater sum than is set forth in the said proofs, for the reason that they do not work an estoppel. *Lebanon Mut. F. Ins. Co. v. Kepler*, 106 Pa. 28, 34.

In the above case, the insured was allowed to prove a recovery upon a higher valuation than his former proofs of loss had shown, and to explain the reason for that higher valuation and mistake in the proof of loss.

If an estimate of the loss under a fire policy is made out by the claimant under the policy from his best recollection without his books before him, and there is no intention to deceive,

he will be entitled to recover as the mistakes are honestly committed. *Huckberger v. Merchants' F. Ins. Co.* 4 Biss. 285, 286.

In *Schulter v. Merchants' Mut. Ins. Co.* 62 Mo. 236, 238, it was said that if there is a difference between the amount claimed and that sworn to by the assured himself on the trial or established by the uncontradicted testimony in the case, it is a question for the jury to determine from all the circumstances in the case whether the deficiency was the result of accident, of honest error, or fraudulent intent on the part of the plaintiff in making the proof of loss, and there is no presumption of law or fact arising from the absence of satisfactory explanation of such deficiency that the plaintiff has for a fraudulent purpose sworn falsely in making his proof of loss, and no false swearing will forfeit the rights of the assured unless it be also fraudulent.

Mere mistakes in stating facts, or an overvaluation in making out proofs of loss, are not sufficient to sustain a defense to an action brought against the company upon the policy; it must appear that the erroneous statements or overvaluation were made intentionally and with a fraudulent intent. *Carson v. Jersey City Ins. Co.* 48 N. J. L. 800, 311, 39 Am. Rep. 584.

And no sworn statement made by plaintiff in his proof of loss as to the value of buildings will have the effect of defeating his right to recover on the policy, unless it is made falsely and wilfully and for the purpose of deceiving the company. *Walker v. Phoenix Ins. Co.* 62 Mo. App. 209.

And if the company refuses to act upon the proofs of loss, and repudiates all liability, the insured is not bound by the proofs of loss which make the amount less than that awarded to him by the court, as there is no element of estoppel in the case, and the action of the company puts him to legal proof. In such a case there is no ground, legal or equitable, upon which the company can insist on holding the insured to proofs which are only made with a view to adjustment without litigation, but which the company itself repudiates. *Sibley v. Prescott Ins. Co.* 57 Mich. 14, 20.

So, the assured is not concluded by the statement of the amount of his loss as made in his proof of loss so as to render a verdict for more than his share of the amount excessive, especially where the company has refused to pay upon the basis of that amount; and in such a case he may recover upon the basis of the actual value of the property destroyed. *Corkery v. Security F. Ins. Co.* 99 Iowa, 382.

When the assured has been compelled to bring a suit for loss, he has a right to prove the value of the articles omitted by mere inadvertence from his account submitted with the preliminary proof, but if the insurance company settles the loss promptly according to the account exhibited, the assured is bound by it in the absence of fraud. *Commercial Ins. Co. v. Huckberger*, 52 Ill. 464, 466; *Ætna Ins. Co. v. Stevens*, 48 Ill. 31, 24.

So, if the omission from the preliminary proofs of loss of articles destroyed in the fire is inadvertent, and the claim is not paid, and the assured is obliged to sue, he is not prevented from claiming in his action for additional articles which he can prove were destroyed by the fire. *Ætna Ins. Co. v. Stevens*, 48 Ill. 31, 34.

And if the insurance company has done nothing upon the faith of the proofs of loss by which it can be prejudiced if some articles not enumerated in the proof of loss are proved on the trial to have been lost, the insured may 44 L. R. A.

still recover for such property. *Schmidt v. Mutual City & Village F. Ins. Co.* 55 Mich. 432.

If a mistake is made in the proof of loss by reason of an underestimate of the total amount of loss, and the company has a right to demand an arbitration, but has acted upon such undervaluation by not demanding arbitration, the assured cannot recover upon a higher estimate of the loss, yet he is not estopped from proving the full amount of actual loss as the basis of recovery in the action upon the policy when no right to arbitrate is given by the policy and the company has lost nothing by such undervaluation. *Case v. Manufacturers' F. & M. Ins. Co.* 82 Cal. 263, 268, 271.

In a case in which the original complaint and proof of loss stated the loss to be a given amount and the plaintiff upon the trial sought to amend his complaint so as to demand the amount specified in the policy which was considerably larger, it was held that the court did not improperly make use of its discretion in allowing him to amend his complaint by increasing the amount of his demand, as he was not estopped by his proof of loss, and especially as the evidence adduced at the trial showed that the claim was stated as a less amount in the proof of loss in order to obtain a speedy settlement. *Mlaghan v. Hartford F. Ins. Co.* 24 Hun, 58, 61.

An assured who after the exhibition of his proof of loss and interest under a marine insurance presents a statement of his demands less in amount than what he is legally entitled to recover, is not estopped from claiming a larger amount if a settlement is not made pursuant to such statement. *American Ins. Co. v. Griswold*, 14 Wend. 399.

The appraisal of the value of the property which was not destroyed, by parties selected for that purpose, was held not to be conclusive as to the amount of the loss sustained so as to preclude evidence of the quantity, quality, and value of the property insured. *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 598.

And there is no error in the court's permitting the claimant's witness to enumerate and state the value of certain articles alleged to have been destroyed by the fire not included in the proof of loss. *Kahn v. Traders' Ins. Co.* 4 Wyo. 419.

If a renewal is issued to the insured by way of a binding slip, and the company subsequently proposes a reduced insurance which is not accepted by the insured, and the slip is in force at the time of the fire, the insured may sue upon the binding slip, as there is no waiver of it on his part, or he may elect to rely upon the unaccepted offer of reduced insurance, as a waiver or election will not be imported by the mere fact that in his notice of loss, tender of premium, and proof of loss, he limited his demand to the sum proposed for reduced insurance. *Van Tassel v. Greenwich Ins. Co.* 151 N. Y. 130.

If the assured in making proof of loss acts in good faith, and in the honest belief that the property destroyed is worth the amount of the valuation placed upon it, and the excessive valuation is not intended to deceive or defraud the company, such overvaluation cannot be held to be fraudulent, and will not defeat recovery, and is not conclusive. *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 598. To the same effect, *Rockford Ins. Co. v. Nelson*, 75 Ill. 548; *Franklin F. Ins. Co. v. Vaughan*, 92 U. S. 516, 23 L. ed. 740.

A mere mistake as to the value of the premises burned, in proving the loss where there is no actual fraud shown, only amounts to an estimate and opinion, and even if it is excessive

will not prevent recovery under a policy upon the ground that the assured swore or made false statements contrary to the provisions of the policy, and such an expression of opinion is not a misstatement of a material fact. *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291, 301, 40 Am. Rep. 625.

So, the mere fact that the assured in the proof of loss has made an overvaluation of the property destroyed will not defeat a recovery on the policy for the actual loss sustained. *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 598.

If there is an overvaluation by mistake or inadvertence a verdict can be found for such an amount of loss as has actually occurred, but if such an overvaluation is made knowingly and with a fraudulent intent there can be no recovery. *Hickman v. Long Island Ins. Co.* 1 Edm. Sel. Cas. 374, wherein the point in contest was the amount of the loss which the company alleged was greatly exaggerated.

And a claimant who largely overstates the value of the property destroyed in the preliminary proofs of loss without any fraudulent intent, in consequence of his imperfect knowledge of the English language, under the direction of a person who aided him in making out the proofs, is not precluded from recovering upon the policy when the statement is made honestly and without any fraudulent intent, although it may be an extravagant valuation. *Dogge v. Northwestern Nat. Ins. Co.* 49 Wis. 501, 504.

Recovery has been sustained although much less than the amount of loss as estimated in the proof of loss. *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595, 598. To the same effect, *National Bank v. Hartford F. Ins. Co.* 95 U. S. 673; *First Nat. Bank v. Hartford F. Ins. Co.* 24 L. ed. 563; *Moore v. Protection F. Ins. Co.* 29 Me. 97, 48 Am. Dec. 514; *Dogge v. Northwestern Nat. Ins. Co.* 49 Wis. 501; *Helbing v. Svea Ins. Co.* 54 Cal. 156, 35 Am. Rep. 72.

In *Dolan v. Aetna Ins. Co.* 22 Hun, 396, it was insisted that the claimant in submitting the proof of loss violated the provision in the policy that any fraud or attempts at fraud on the part of the assured should cause a forfeiture of all claims. The proof of loss contained a claim on his own behalf for several articles used by the claimant's daughter, and the company contended that this worked a forfeiture of all claim under the policy. It was shown, however, that the agent of the company had knowledge of the fact, and that he had directed an appraisal of such property, and that it so came to be included in the proof of loss. It was held that the question of its insertion in the proof with a fraudulent intent was for the jury, and further, that the fact that the claimant in the proof of loss showed the damage to amount to a certain sum, and the appraisers estimated it at a much less sum, and also that claimant had told the company's agent that the property was worth a certain amount, when in point of fact it was worth much less, was not conclusive against the plaintiff as showing an attempt to defraud.

An instruction to the jury to the effect that the slightest possible exaggeration of the amount or value of the property destroyed or damaged will be sufficient to defeat the insured's claim, even if such exaggeration only amounts to a fraction of a cent, is properly refused. *Hamberg v. St. Paul F. & M. Ins. Co.* 68 Minn. 335, 339.

But the claimants were concluded by the amount of loss which they claimed in their proof, and could not upon the trial for the first time show the loss to be greater than the amount claimed in the proofs of loss, where 44 L. R. A.

the policy required the proof of loss to show the character and extent of the loss, and the proof furnished showed a loss of much less than 5 per cent. and no further proof was made or presented to the company before the commencement of the action some two years and a half afterwards. *DeGrove v. Metropolitan Ins. Co.* 61 N. Y. 594, 607, 19 Am. Rep. 305.

In *Irving v. Excelsior F. Ins. Co.* 1 Bosw. 507, 514, the company had made no objections to the sufficiency of the accounts furnished in the proof of loss, and by its answer had acquiesced in its truth, and rested upon the claim that if the facts so stated and sworn to were true it was not liable. It was therefore held that the claimant could not change his ground on the trial by impeaching the truth of his own statements, as the company had a right to take the facts as the claimant had stated them, and the claimant was therefore bound by the material facts stated in his affidavit of loss, and was concluded thereby.

See also cases cited *supra*, I.

d. Misstatements as to occupancy and use of premises.

The statement in the proof of loss under a fire policy that the premises were vacant will not preclude the plaintiff from showing at the trial the circumstances under which the house had been vacated. *Cummins v. Agricultural Ins. Co.* 67 N. Y. 260, 263, 23 Am. Rep. 111.

In this case the absence of the plaintiff, though for a considerable period, was temporary in its nature, and for a special purpose, and there was evidence that he still retained the house as his residence, and that in his absence his wife took care of it. The policy contained a condition that it should be void if the house became vacant upon the removal of the owner or occupant.

And the claimant's statement in the proof of loss that the premises were occupied in part by another company and the insured, and for no other purpose whatever, and that the fire originated in an adjoining building occupied by such company, and that there was no change in the occupancy since the insurance, does not afford conclusive evidence against him that the warranty that the premises were wholly occupied by him at the time of the insurance was broken, and he can adduce evidence to show exactly how the fact of occupancy was at the time of the insurance. *Parmelee v. Hoffman F. Ins. Co.* 54 N. Y. 193, 196.

In *Commercial Union Assur. Co. v. Meyer*, 9 Tex. Civ. App. 7, the proofs of loss furnished were admitted to be complete except that the same did not name the occupant of the dwelling at the time of the fire, but stated that the property was occupied as a dwelling without showing the name of the occupant. As, however, it did not appear that the name of the occupant was material, or that the omission of the name from the proofs of loss affected the real issue directly or remotely, the plaintiff was allowed to recover.

The proof of loss is not an admission that the property was unoccupied for ten days after a date mentioned therein, so as to come within the conditions of the policy by which, if the premises were unoccupied for more than ten consecutive days, the policy was to be void, so as to raise a presumption of a breach of the condition of the policy with respect to the occupancy of the building when insured, where it relates to the character of the occupancy, and not to the fact of occupancy. *Hanover F. Ins. Co. v. Parrotte*, 47 Neb. 576.

And under a policy containing a clause that it was to be void if benzine was kept, used, or

allowed on the premises, and the proofs of loss signed and sworn to were to state the claimant's knowledge and belief as to the origin of the fire, evidence is admissible to contradict a statement in the proofs that the claimant believed that the fire originated from benzine which accidentally turned over and caught fire while his wife was cleaning clothes, and to show that it was not benzine that was being used. *White v. Royal Ins. Co.* 8 Misc. 613.

In that case the company relied upon the cases of *Campbell v. Charter Oak F. & M. Ins. Co.* 10 Allen, 213, and *Irving v. Excelsior F. Ins. Co.* 1 Bosw. 507, as supporting the theory that the evidence was incompetent, irrelevant, and immaterial, and that the proofs concluded the assured from contradicting or explaining the mistake in the proof of loss, but the court pointed out that those cases differed from the one then before the court for the reason that in them the actual facts were required to be set forth in the proofs, whereas in the case then before the court only the belief as to what facts had caused the fire was called for. The court further distinguished that case from *DeGrove v. Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 306, upon the ground that the latter case only held that the plaintiff could not recover more than he filed a claim for under a proof of loss, and pointed out that that case did not intend to overrule *Parmelee v. Hoffman F. Ins. Co.* 64 N. Y. 193, and *McMaster v. Insurance Co. of N. A.* 55 N. Y. 223, 14 Am. Rep. 239, without referring to them in the opinion.

c. Misstatements as to ownership, etc.

The statement in the proof of loss that the property belonged to the claimant as "the legal heir of his wife" and "by purchase at auction" although it may be incorrect, is not of a fact so much as of a legal conclusion, and does not and cannot mislead under a policy which provides that all persons having a claim shall give immediate notice and render a proper account stating the ownership of the property insured, and that any fraud or attempt at fraud will forfeit the claim. *Rohrbach v. Aetna Ins. Co.* 62 N. Y. 613.

So, a misstatement by the assured, made after the fire, with respect to his being the sole and unconditional owner of the property covered by the policy, when in fact it was subject to a mortgage of which the company's agent had notice when he issued the policy, is immaterial, and will not prevent a recovery in the absence of evidence showing it to be fraudulent. *German Ins. Co. v. Luckett*, 12 Tex. Civ. App. 139, 144.

In *Parker v. Amazon Ins. Co.* 34 Wis. 363, 370, a mistake in the proof of loss occurred through the negligence or inadvertence of the insurer, and consisted in not properly giving the names of the owners of the property, and the statement was signed in haste by one of the owners; the claimants were, however, allowed to recover upon the policy as the mistake was an innocent one.

And under a proof of loss filled out by the adjuster and showing that the insurer was the owner in fee simple, when in fact he claimed under a contract, which proof was not read over to the insured, evidence to the effect that he did not read the same, but supposed that it had been filled out properly, and that his claim was really under a contract, is admissible as it shows that the insured had an insurable interest in the property, and that the proof of loss would have been equally available had the insured stated the actual facts as to his ownership, and the company is not prejudiced by 44 L. R. A.

such misstatement. *Star Union Lumber Co. v. Finney*, 35 Neb. 214.

In a case in which the proof of loss upon which the insurance company bases its defense was prepared by the adjuster who knew the condition of the title of the property, and the evidence showed that the assured, although he signed and swore to the document, which was very lengthy, did not know that it stated that he was the owner in fee simple, and his evidence and that of his witnesses proved the contrary, it was held that although the assured was negligent in not reading and fully comprehending all that was in the proof of loss before he signed it, yet as there was no reason to believe that he intended or attempted to commit fraud upon the company, and no such fraud was committed, he was not precluded from recovering on his policy. *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 469, 36 L. R. A. 374, Affirming 64 Ill. App. 30. In this case it appeared that the agent of the company knew of the condition of the title and of the claimant's interest in the premises at the time the policy was issued.

In a case in which the insured in proof of loss made claim for the loss of property of which she was not the owner, and testified upon the trial that she included such property for the reason that the company's agent told her to make a list of the articles burned, which she did without any intention of defrauding, and supposed that they were included in the policy covering clothing and wearing-apparel, the court refused to disturb a verdict of the jury found in her favor under proper instructions. *Tubbs v. Dwelling-House Ins. Co.* 84 Mich. 646, 653.

Where one testifies that he lost certain personal property covered by the policy and which he claimed as his own, and made two sworn statements, one covering his father's loss and the other his own, and his statements were introduced in evidence and he then testified that some of the articles in the statement as his own loss belonged to his father, he may show and testify that he did not state or intend to state that he owned such property, and that in so doing he made a mistake. *Gristock v. Royal Ins. Co.* 84 Mich. 161.

In *Schuster v. Dutchess County Ins. Co.* 102 N. Y. 260, an action was brought upon a policy covering a house and personal property. The proofs of loss were made and verified by one of the insured and contained an untrue statement of the plaintiff's ownership of the house. The company requested the court to charge that if the party made and delivered the proofs to the company, intending thereby to obtain from it the amount of insurance, knowing that the insured was not the owner of it, such false statements precluded a recovery, but the court refused to give such instruction, and its action was upheld as it involved the proposition that a false statement not fraudulently made, as to the real property, would defeat a recovery as to personal property.

A condition in the policy that any misrepresentations in any statement touching the loss or any false swearing of the party assured in the proofs of loss or otherwise shall cause a forfeiture will not preclude the claimant from recovering under the policy where he has by an honest mistake failed to give notice of an encumbrance which he did not believe to be a lien upon the premises, in the absence of a showing that the nondisclosure was fraudulent and willful. *Thierolf v. Universal F. Ins. Co.* 110 Pa. 37, 42.

In *Huff v. Jewett*, 20 Misc. 35, 37, the company contended that the plaintiff was not entitled to recover upon the ground, *inter alia*,

that he was not the sole owner of the property as asserted under oath in the proof of loss, for the reason that there was a mortgage upon the premises which he had not disclosed. The court held that as the fact of the existence of the mortgage was not material and in no wise affected the validity of the contract at the time it was entered into, the "false swearing" of the plaintiff in the former proofs of loss as to the ownership of the property had no bearing upon the question, and that he was entitled to recover.

In *Carson v. Jersey City Ins. Co.* 43 N. J. L. 300, 81, 89 Am. Rep. 584, there was a condition in the policy that all fraud or attempts at fraud by false swearing or otherwise should cause forfeiture of all claims under the policy. It was claimed that the assured made false statements with regard to encumbrances upon the property, but as there was no proof of fraud the claimant was not precluded thereby.

1. Discrepancy as to building.

Where the description of the building in the proof of loss corresponds in other respects with that contained in the policy, and there is nothing to show that the insurer is misled or prejudiced by the error, the right of the assured to recover is not affected by the mistake in the proof of loss in regard to the number of the building. *Faulkner v. Manchester F. Assur. Co.* 171 Mass. 349, 351.

g. Other insurance.

So, the statement of the insured in the proof of loss submitted to the company, that he had other insurance on the same property, does not estop him from showing the contrary thereof though the contrary was true, and such declaration made is not conclusive evidence of the facts asserted, as an estoppel *in pais* does not arise,—especially where the company itself was bound to inquire for other existing facts, and to rely upon them to sustain its theory and in such a case the insured may show that there was a mistake in the proof of loss. *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 14 Am. Rep. 239, Affirming 64 Barb. 536.

The policy of insurance in this case contained a condition that if the assured should have any other insurance on the property, etc., without notice to and consent of the company in writing, the policy should be null and void. The proofs of loss stated "that there was other insurance on the same property," and gave copies of the written part of the policies, but the claimant was not estopped by such statement as he did not declare in his proof of loss that he had other insurance, and only stated that there was an insurance, which statement he was bound to make by the terms of the policy as to the rendition of the proof of loss, and he had stated that which showed he had made the policy null and void, and had furnished to the company a defense upon which it must rely, and for this reason, therefore, the claimant was allowed to show that the other insurance was not upon the same property.

This case is distinguishable from the cases of *First Incorporated Presby. Congregation v. Williams*, 9 Wend. 147, and *Sheppard v. Hamilton*, 44 L. R. A.

ton, 29 Barb. 156, for the reason that in each of those cases the claimant had an option of two causes of action in which to enforce his claim against the company, and was led by the declaration of the company, calculated to mislead, to take one which he could not afterwards forsake without injury, but which he must be defeated in and forsake if the company was permitted to falsify his declaration, and for the further reason that those cases did not go upon the ground that the declaration of the company led the claimant to sue, but upon the ground that he, having a valid claim which might be sued in one form or another, or upon one instrument or another, dependent upon the existence of a certain fact, led to the adoption by the claimant of one of those causes to abandon which would be an injury to him. The court distinctly pointed out that in the case then before it the company's situation as to its liability was not changed, and it did not appear that relying upon the defense supposed to be furnished by the statement in the proof of loss any other tenable offense had the go-by.

And the fact that the proofs of loss under a fire policy are made out and signed and sent to the company, and contain the statement that a certain policy covered a portion of the same property insured by the company, is not such an admission of an additional insurance as concluded the claimant upon that question from recovering upon the policy, and do not estop him from showing that it was made by mistake and that as a matter of fact there was no such additional insurance, although without any explanation such declaration would have such effect. *Mead v. American F. Ins. Co.* 13 App. Div. 476, 482.

In *City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co.* 122 Mass. 165, 168, the proof of loss stated that there was other insurance upon the property, and the company contended that the insured was bound thereby and could not recover the full loss. The court held that if the proofs of loss furnished by the assured stated facts which constituted a defense, he could not contradict those facts at the trial unless he had furnished the assurers with an amended statement before the trial, but as in that case he did not contradict the facts stated in the proof of loss, the honest statement of the facts of the proof of loss could not enlarge the legal effect of the facts stated, and make them a defense if they would not otherwise be one.

h. Magistrate's certificate.

A magistrate's certificate produced by the assured in compliance with the conditions of his policy, as to proof of loss, is not the award of an arbitrator, or the certificate of a party by whose estimate the insurer expressly or impliedly agrees to be bound, but is merely the estimate of a party which the insurer sees fit to require by the conditions of the policy, and the insured furnishes such certificate as a performance of the condition, and not as admitting its accuracy or agreeing to be bound by it, and it is open to him notwithstanding such certificate to establish by witnesses the true amount of the loss. *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329.

E. W.

NEBRASKA SUPREME COURT.

FARMERS' & MERCHANTS' INSURANCE COMPANY, Plff. in Err.,v.
Iver JENSEN.

(56 Neb. 284.)

- *1. An insurance contract is a personal one between insured and insurer.
2. A provision in a fire-insurance policy that it should cease to be in effect if the insured conveyed the title of the insured property without the insurer's consent, is a reasonable and valid one.
3. An insured and his wife conveyed by warranty deed the insured property to their son, who at the same time conveyed the premises by warranty deed to the wife of the insured. This transaction occurred in pursuance of an agreement between the husband and wife that the latter should hold the title to the insured property in trust for her husband. The insurance policy provided that it should cease to be in force "in case any change shall take place in the title of the assured." Held, that the conveyance terminated the contract of insurance.

(October 5, 1898.)

ERROR to the District Court for Saunders County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinions.

Messrs. Halleck F. Rose and Wellington H. England, for plaintiff in error:

The deeds in this case stand as written admissions opposed to the testimony of the witnesses, and presenting a question of fact which the jury only can determine.

Kavanagh v. Wilson, 70 N. Y. 177; *Nicholson v. Conner*, 8 Daly, 212; *Lewis v. State*, 88 Ala. 13; *Smith v. Logan*, 52 Neb. 590; *Linton v. Cooper*, 53 Neb. 400; *Murphey v. Virgin*, 47 Neb. 693; *Tracey v. State*, 46 Neb. 365.

Neither husband nor wife is competent to testify in any case as to any communication between them made while the marriage subsisted.

Lihs v. Lihs, 44 Neb. 143; *French v. Wade*, 35 Kan. 391.

Parol evidence is not admissible to establish an express trust.

Farrington v. Barr, 36 N. H. 86; *Hansen v. Berthelsen*, 19 Neb. 440.

On all the proofs Mrs. Jensen by the deed acquired an insurable interest in the property.

This being established, it follows, as a matter of law, that the risk has been materially affected and the hazard increased, so that the company is no longer bound by the policy.

*Headnotes by RAGAN, C.

NOTE.—The above decision is somewhat novel in its discussion of the effect of the statute of uses.

As to the change of title to insured property, see *Erb v. German-American Ins. Co.* (Iowa) 40 L. R. A. 845. and *Forward v. Continental Ins. Co.* (N. Y.) 25 L. R. A. 637. 44 L. R. A.

Oakes v. Manufacturers' F. & M. Ins. Co. 131 Mass. 164; *Baldwin v. Phoenix Ins. Co.* 60 N. H. 164; *Langdon v. Minnesota Farmers' Mut. F. Ins. Asso.* 22 Minn. 193; *Milwaukee Mechanics' Mut. Ins. Co. v. Ketterlin*, 24 Ill. App. 188; *Milwaukee Trust Co. v. Lancashire Ins. Co.* 95 Wis. 192; *Dadman Mfg. Co. v. Worcester Mut. F. Ins. Co.* 1. Met. 434; *Savage v. Howard Ins. Co.* 52 N. Y. 502, 11 Am. Rep. 741.

On rehearing.

The statute of uses is not in force in Nebraska.

In the published reports of this court there is to be found no recognition of the statute of uses. It has never been held here that a *cestui que trust* takes the legal estate, or that the trustee cannot hold title in fee.

The uniform practice has been to decree the execution of the trust in equity.

Hoehne v. Breittkreitz, 5 Neb. 110; *Bear v. Koenigstein*, 16 Neb. 65; *Jones v. Johnson Harvester Co.* 8 Neb. 446; *Carter v. Gibson*, 29 Neb. 324; *Thomas v. Churchill*, 48 Neb. 266; *Dailey v. Kinsler*, 35 Neb. 835; *Blodgett v. McMurtry*, 39 Neb. 210; *Leader v. Tierney*, 45 Neb. 753; *Hewes v. Kenney*, 43 Neb. 815.

The statute of uses is inconsistent with the statutes of Nebraska establishing rules of conveyancing, evidently designed to be complete and to cover the whole subject.

Helpfenstine v. Garrard, 7 Ohio, pt. 1, 275; *Gorham v. Daniels*, 23 Vt. 609.

Messrs. Clark & Allen for defendant in error.

RAGAN, C., filed the following opinion:

This is an error proceeding instituted in this court by the Farmers' & Merchants' Insurance Company to review a judgment of the district court of Saunders county pronounced against it in favor of Iver Jensen. Jensen, in his petition, declared upon an ordinary insurance policy. The insurer interposed as a defense to the action that the contract of insurance provided that it should cease to be in force "in case any change shall take place in the title . . . of the assured in the above-mentioned property" without the consent of the insurer thereto indorsed on the policy; that after the delivery of the policy the insured—his wife joining therein—conveyed the real estate on which the insured property was situate by ordinary warranty deed to one John H. Jensen, and that the latter afterwards, by an ordinary warranty deed, conveyed the insured property to the wife of the insured; all without the knowledge or consent of the insurer. The insured attempted to meet this defense by a reply admitting the conveyance of the title by the insured to John H. Jensen, and by him to the wife of the insured, but alleging that these conveyances were made in pursuance of an agreement between the insured and his wife that the latter should and would hold the title to the property for the use and benefit of the insured, and subject to his direction and control. The judgment of

the district court cannot stand. The provision in the policy that it should cease to be in force if a change should take place in the title of the insured without the consent of the insurer is a valid and reasonable provision. An insurance contract is a personal one between the insured and the insurer. An insurance company might be very willing to guarantee against loss or damage of his property by fire, but unwilling to furnish such a guaranty to A's vendee; and it is for this reason that such a provision as the one under consideration is inserted in fire-insurance policies, so that, in case the insured shall transfer his title, the insurer may have notice thereof, and an opportunity to elect whether it will keep the policy in force in favor of the grantee or vendee. And it is because the courts recognize such a provision in an insurance policy to be a personal contract between the insurer and the insured that they hold that the violation thereof by the insured terminates the contract of insurance. *Milwaukee Mechanics' Mut. Ins. Co. v. Ketterlin*, 24 Ill. App. 188; *Langdon v. Minnesota Farmers' Mut. F. Ins. Assn.*, 22 Minn. 193; *Oakes v. Manufacturers' F. & M. Ins. Co.* 131 Mass. 164; *J. B. Ehrsam Mach. Co. v. Phenix Ins. Co.* 43 Neb. 554.

Counsel for the defendant in error insist that, since the wife of the insured holds the legal title to the insured property in trust for him, there has been no violation of the provision of the policy under consideration by the assured. This contention we think untenable. The provision of the policy is that, if any change should take place in the title of the assured, the policy should cease to be in force. Certainly, the execution and delivery of the warranty deed by the assured and his wife to John H. Jensen vested the latter with the legal title to these premises; and the execution and delivery by the latter of the warranty deed to the wife of the assured vested her with the legal title to these premises. There has been, then, a change in the title of the assured. The authorities cited by counsel for defendant in error do not sustain their contention. One of these cases is *Grable v. German Ins. Co.* 32 Neb. 645. In that case the assured, without the knowledge or consent of the insurer, entered into a contract in writing, agreeing to sell the insured property, and make a conveyance thereof, upon the payment of certain sums of money in future by the purchaser. This contract was interposed as a defense to a suit on the insurance policy, but the insurance company was held liable upon the ground that the contract agreeing to sell and convey was not an alienation of the title to the property. Another case cited is *Bailey v. American Cent. Ins. Co.* 13 Fed. Rep. 250. In that case the policy was issued to a mortgagee. He subsequently became the owner of the insured property, after which it was destroyed by fire. In a suit upon the policy the insurance company interposed the defense of a change of title without its knowledge or consent, but the court held that a mere increase of his interest in the insured property was not a change of title within the meaning of the contract.

44 L. R. A.

The judgment of the District Court is reversed, and the cause remanded.

A petition for rehearing having been filed, *Harrison*, Ch. J., on May 3, 1899, handed down the following response:

In an action instituted in the district court of Saunders county, the defendant in error recovered a judgment, which, on hearing in the error proceeding in this court, was reversed. A motion for a rehearing was sustained, not on the questions decided in the former opinion (56 Neb. 284) but to allow argument as to whether the rule of the statute of uses is in force or is of the law of this state. We are satisfied of the correctness of the former decision, and, relative to the points therein determined, announce at this time our adherence to what was then stated.

The issues presented by the pleadings in the suit were succinctly set forth in the former opinion, and we will reproduce the statement: "Jensen, in his petition, declared upon an ordinary insurance policy. The insurer interposed as a defense to the action that the contract of insurance provided that it should cease to be in force 'in case any change shall take place in the title, . . . of the assured in the above-mentioned property' without the consent of the insurer thereto indorsed on the policy; that after the delivery of the policy the insured,—his wife joining therein—conveyed the real estate on which the insured property was situate by ordinary warranty deed, to one John H. Jensen, and that the latter afterwards, by an ordinary warranty deed, conveyed the insured property to the wife of the insured,—all without the knowledge or consent of the insurer. The insured attempted to meet this defense by a reply admitting the conveyance of the title by the insured to John H. Jensen, and by him to the wife of the insured, but alleging that these conveyances were made in pursuance of an agreement between the insured and his wife that the latter should and would hold the title to the property for the use and benefit of the insured, and subject to his directions and control." The argument now is that the use, by reason of the operation of the rule of law embodied in what is termed "the statute of uses," was executed, and the title to the property was in Iver Jensen; that there was no change of title or interest; and the agreement of the policy of insurance was not violated, and the policy remained in force. The statute of uses is in part as follows: "Where any person or persons stand or be seised . . . of and in any . . . lands, tenements, . . . or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, . . . every such person and persons, and bodies politic, that have or hereafter shall have any such use, confidence, or trust, in fee simple, fee tail, for term of life, or for years, or otherwise, . . . shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of and in the same . . . lands, tenements, . . . and hereditaments, . . . of and in such like estates as they had or shall have in use,

trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seized of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them." Stat. 27 Hen. VIII. chap. 10. Counsel for defendant in error gives this exemplification of its effect: "If A owning real estate, shall convey or will it to B under an agreement between them that, notwithstanding the conveyance, A or some other person or corporation shall have the rents and profits arising from the real estate, notwithstanding the conveyance made by A under that agreement, he shall still have the title he had before he made the conveyance."

We deem it scarcely within our province, or necessary herein, if we felt equal to the task, to trace and set forth the evolution of transfers, conveyances of property, or titles thereto, from the early, primitive, and simple methods employed, down through, and following, the intricacies and complexities which came into being or existence when, as time advanced, the desires, designs, and ingenuities of mankind were drawn into and displayed therein. These may be sought in the commentaries and cases on the subject. Statutes were enacted by the proper bodies, one, and probably the main, aim, at least, of which was apparently to discountenance and discourage or prohibit what were deemed vicious practices in conveying, or, rather, to avoid the results condemned as pernicious of the conveyances. One of the statutes was that of uses. It has been said that the doctrine of the statute of uses is in force in the most of the United States, either by re-enactment or by adoption; and, where it has been expressly declared not of force, a knowledge of its doctrine is necessary to understand and apply the common or statutory forms of conveyances. 1 Perry, Tr. 4th ed. § 299, in a note to which there are statements of the condition of the law on the subject in many of the states of the Union; Walker, American Law, 311. In 2 Washb. Real Prop. p. 438, it is stated: "It would be difficult to define, with any satisfactory degree of accuracy, the extent to which the doctrine of uses has been applied in the systems of conveyance adopted by the several states of this country. In few, if any, of these are there any prescribed forms of deeds which it is necessary to follow in executing conveyances of lands. In a large proportion of them the form is that of bargain and sale, though other forms which clearly indicate the intention of the grantor to pass the estate are held sufficient." It is further said, on page 440: "It may be stated generally, that the cases in which resort has been had to the doctrine of uses have been where the parties, in undertaking to convey lands, have failed to follow the form in use in the state,

or have undertaken, by a form borrowed from the common law, to create an interest like a freehold *in futuro*, for instance, which could not be done by construing the conveyance as one deriving its validity from the common law, and resort has been had to the doctrine of uses in order to effectuate the intention of the parties." See further, Hill, Trustees, Wharton's ed. 233, note; 4 Kent, Com. 299-301. For an article on "The English Doctrine of Uses, as an Element of the American Law of Conveyance," see 5 Am. L. Reg. p. 641, and a second article in 6 Am. L. Reg. p. 65. These citations will suffice, at least, to direct to sources from which a full study of the subject may be made. The statute of uses and other parliamentary acts were modifications of the common law. The common law is composed of ancient maxims and customs. 1 Bl. Com. Cooley's 3d ed. *67.

A question which is here somewhat pertinent is, What has been adopted or is in force in this country,—the common law or the common law with statutory modifications? It has been stated by the Massachusetts court generally, and particularly in reference to the statute of uses: "The statute of uses being in force in England when our ancestors came here, they brought it with them, as an existing modification of the common law, and it has always been considered a part of our law." *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76. It has been observed "that English statutes passed before the emigration of our ancestors applicable to our situation, or an amendment or amelioration of the common law, are part and parcel of the common law of this country." 5 Am. L. Reg. 644, citing 2 Salk. 441; *Journal of Congress*, Oct. 14, 1774; *Patterson v. Winn*, 5 Pet. 233, 8 L. ed. 108. "Conflicting theories as to the origin of law in the North American Colonies have been entertained, but, whatever be the true one, it is well settled that, speaking broadly, the law of England, as it existed at the time of the colonial settlements, is the basis of the law of all the states, with the single exception of Louisiana." 19 Am. & Eng. Enc. Law, pp. 1035, 1036, and notes. In a decision filed March 30, 1897, it was said by the supreme court of Utah that "while the statute of uses never became a part of the English common law, and has never been adopted by the legislature of this state, the rule of law that vests a passive or naked trust in the person having the use is a part of the common law of this state." *Henderson v. Adams*, 15 Utah, 30. The supreme court of Vermont, in an opinion written by Redfield, J., expressed itself on the subject of the statute of uses, holding it not in force, as follows: "But so far as the conveyance of lands in this state is concerned, it seems to me that our statutes are fully adequate to all the ordinary incidents of the subject, and that in those extraordinary occasions, where the statute of uses might answer a good end, it will be safer, and better every way, to have resort to a court of equity, than to introduce a portion of the ancient common-law system of conveying real estate, most of the incidents of which having been materially modified, even is

England, since the separation of this country from that, it would become necessary immediately to resort to very extensive legislation, in order to render this addition to our present laws even tolerable. This view is certainly confirmed by the history of our jurisprudence upon this subject. Nothing ever existed in the history of this state calling, in the slightest degree, for the use of such a statute, except in those cases where, by some mistake, the parties have failed fully to effect their intention in the prescribed mode. The statute of uses would no doubt aid somewhat this class of cases. But its original purpose and design had not the remotest bearing or purpose in that direction even. And to adopt a portion of a system of laws which will in its train, very likely, draw in the whole, for the mere purpose of effecting some collateral purpose in a particular cause, seems almost absurd. We entertain no doubt that our system of conveyancing, so different from the English, so simple and intelligible to all, and so intended to be, by means of a thorough system of registry, from the very first, was designed to be entire in itself. And although most of its terms, and many of its forms of deeds even, like that of bargain and sale, derived their meaning and operation to some extent, from the common law and the English statutes, and that of uses among others, yet it was no doubt the purpose of the framers of our laws upon conveyancing to have them 'understood' of the people, without the necessity of resorting to the study of the subject in other quarters. Such has been the practical construction of the subject by all, professional or unprofessional, ever since. With rare exceptions, the profession in this state have never supposed any of the common-law modes of conveyancing could be regarded as in force here. The attempt to bar an entail, in this state, by a common recovery, or the rights of a married woman, by a fine, would, I think, strike the profession with some surprise." *Gorham v. Daniels*, 23 Vt. 609. In the state of Ohio, in 1826, in an opinion in the case of *Doe, Thompson, v. Gibson*, 2 Ohio, 339, it was stated: "The court were divided in opinion upon the point whether the statute of uses (27 Hen. VIII. chap. 10), had ever been in force in Ohio. Two judges held that that statute was in force in Ohio from 1795 to January 1806, for all the purposes that it was in force in Virginia or England. The other two judges held differently." In 1835 the question was again under consideration by the Ohio court and the statute was decided not in force at any time in the state. It was said in the opinion: "After a political organization, and the administration of justice by courts, within the state of Ohio, for a period of forty-eight years, we find no traces of the authority of the statute of uses at this time as a rule of property, and no distinction is known in practice between uses and trusts. And none seems necessary, since uses in our construction are not attended with those exceptionable privileges which they possessed in England before the statute, and every quality of trusts is attached to them. Our system of conveyancing, although 44 L. R. A.

it has grown out of the English system, does not depend upon the statute of uses, but has taken its form and derives its authority from our own statutes and local usages. Under these circumstances, the recognition of the power of this statute is not only unnecessary, but would be mischievous, by the introduction of new and complex rules of property." *Helfenstine v. Garrard*, 7 Ohio, pt. 1, p. 276.

We presume we are to ascertain whether the statute of uses is a component part of the law of this state. To appropriate some expressions of a quotation in the article in 5 Am. L. Reg. 641: "The consideration of what is reasonable or unreasonable makes no part of this question. We are inquiring now what the law is, not what it ought to be. Reason may be applied to show the impropriety or expediency of a law, but we must have either statute or precedent to show the existence of it. Junius, Letter XVI." It has been enacted by our legislative body: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory is adopted and declared to be law within said territory." Comp. Stat. chap. 15. In terms and ordinary import, the foregoing appears to be of the "common law of England," and not of the statutory laws, or of the former as modified by the latter. This state has statutory rules for conveyancing which include some directions for construction of instruments. See chapters 32 and 73, Comp. Stat., section 50 of the latter of which is as follows: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." This statutory system of conveyancing would seem sufficiently complete within and of itself and to have been intended so, and that this is true seems to have been concluded by the acts and opinions of the people, the practitioners, and the courts. We know of no instance of an authorizedly expressed or recorded opinion to the contrary. It is true that no specific form of conveyance is prescribed, and doubtless many or any sufficient may be employed; and it is also safe to say that, in construing any form which may be adopted by any parties, any and all rules generally applicable to like forms of conveyancing, in the ascertainment of the intent, may be pertinent, regardless of the doctrines in which the rules may have originated; but the statute of uses, in its direct action and execution of a use and absolute establishment of the results of conveyances, is not of the law of our system of conveyancing, as a statute or law. It has not been and is not recognized. In the case at bar, its effect, if allowed to prevail, would be to declare that the parties, by their conveyances, had accomplished just the opposite of what they therein asserted in unequivocal terms that they intended or did. If we thought that such was the law, it would be our duty so to say, but, believing differently, we must so state. *The judgment is reversed*, and the cause remanded.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Fourth Quarter of the Judicial Year Beginning with October 1, 1898, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS; ASSOCIATIONS; FRANCHISES.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARIES OR REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS; LIENS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

The addition of an enacting clause to a bill by a clerk of one branch of the legislature, to which the bill was sent from another house, is held void when no definite action was taken on it by the legislative body. (Mich.) 184.

A statute applicable to a particular county, changing the law as to jury trials, is held to violate a constitutional provision requiring uniformity in all laws of a general nature. (Ohio) 284.

The constitutionality of an extraordinary call of the legislature by the governor, attacked on the ground that no extraordinary occasion existed, is upheld on the ground that the governor's discretion in the matter is not reviewable. (Kan.) 464.

Parliamentary law.

A vote put by one of the members of a board, after the mayor, who was its presiding officer, had held the motion out of order and refused to put it, is held altogether void, although four of the five members entitled to vote supported it. (Conn.) 197.

Courts.

The duty of a judge to decide with respect to the issuance of a license upon application and objection, and upon hearing evidence, is held to be judicial, and not merely executive or administrative. (Md.) 485.

Taxation.

Taxation of telegraph and telephone lines by assessment fixed by a state board at the average rate of all taxes (general, municipal, and local) levied throughout the state during the previous year is held to be in violation of the constitutional rule of uniformity. (Mich.) 679.

Public Improvements.

See also *infra*, II.

Conferring power on municipal corporations to improve streets at the expense of the abutting owners is held not to violate the 44 L. R. A.

Texas Constitution, and a street-railway company is required to pave between its rails and for 6 inches each side. (Tex.) 716.

County.

See also *infra*, II.

The liability of a county for the lynching of a person, under the South Carolina Constitution and statute, is held to extend to the lynching of a person who was not a prisoner. (S. C.) 734.

A state is held to be estopped to deny the legal creation of a county, when for four years it has been recognized as such by every department of the state government. (Idaho) 122.

Municipal corporations.

A municipal corporation is held not liable for imprisonment of a person under sentence for violation of an ordinance, by a municipal court, although its judgment was erroneous, or even void. (Ga.) 795.

Reward.

The power of a city to offer a reward for testimony to secure the conviction of incendiaries is held to be within the general-welfare clause. (Mich.) 677.

The right of a sheriff to a reward for making an arrest within his county for an offense committed therein is denied on grounds of public policy. (Ill.) 809.

License.

An ordinance requiring a license for the purchase of claims is held unconstitutional as to a purchaser of unpaid claims against a city merely as an investment. (Ky.) 141.

An ordinance requiring a license for the business of contracting for public improvements is held unconstitutional as tending to a monopoly and to the increase of the burden of property owners on whom the cost of improvements is assessed by the frontage rule. (Ky.) 135.

Houses of ill fame.

An ordinance changing the limits beyond which houses of prostitution are prohibited is held constitutional, although property is depreciated by being brought within such limits by the change. (La.) 90.

Pest house.

The liability of a city for the establishment of a pest house near a residence is sustained, notwithstanding the fact that a statute makes officers expressly liable therefor, without any provision as to the city. (Ky.) 474.

Ferries.

A municipal corporation is held not to be liable for negligent operation of a ferry in its name by the common council, without lawful authority. (La.) 477.

Police.

Death from accident is held not to be from natural causes under a statute providing a fund for families of policemen. (Cal.) 114.

Highways.

An injunction against telephone poles in streets was sustained when there was an attempt to erect them without any permit, and

the fact that there were no ordinances or regulations on the subject was held immaterial. (Wis.) 565.

Riding a tricycle on a sidewalk is held not to be within the scope of an ordinance prohibiting bicycles on sidewalks, or another ordinance against beasts of burden or vehicles on sidewalks. (Iowa) 821.

Parks.

Public parks maintained at public expense, as well as buildings and appliances necessary to meet the demands of a fire department, are held to be within the terms of a constitutional provision exempting from taxation public property used for public purposes. (Ky.) 202.

Railway crossing.

Imperious necessity for an additional crossing of a street railway and a steam railroad at grade is held not to be shown by the fact that traffic has so increased that the present crossings are not sufficient to enable cars to be moved quickly; and the fact that the expense of avoiding the grade crossing would be very great is held immaterial, if it was reasonably practicable to make an overhead crossing. (Pa.) 269.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Arbitration.

A deposit to secure payment of an award is held forfeited on revocation of the arbitration, and subject to payment of the damages allowed by statute for revoking it, although it was made by a third person, who committed no breach of the agreement and had no control over the one who did so. (N. Y.) 227.

Assignment.

An assignee of accounts and other choses in action, who buys them in good faith, gets possession, and gives notice to the debtors, is held to have a perfect legal title as against a prior assignee, who did not give notice to the debtors or obtain possession of the accounts, but left them with the assignor for collection. (Cal.) 632.

The assignability of a cause of action for personal injuries is denied in an Illinois case on rehearing, thereby reversing the first decision, and it is also held that a contract to divest the party in whose name the action is brought, and to whom it belongs, of the right to control or compromise it, is void. (Ill.) 177.

Curing defects.

A statute curing defects in the acknowledgment and record of a deed of trust is held ineffectual to give it priority over a judgment lien which had been acquired before the defects were cured, on the ground that the displacement of his lien would impair the contract of the judgment creditor. (Va.) 306.

Bills, notes, and checks.

The existence of a debt due by the drawee of a bill of exchange to the payee is held a sufficient consideration to bind the drawer upon his promise to pay the bill and render him liable for the amount, although he was a stranger to the debt. (Ky.) 664.
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The right of a bank to send a check for collection directly to the drawee is denied, even if there is a custom of banks authorizing it. (Minn.) 504.

But in Oregon a custom of banks to send checks directly to the drawee bank for collection is held reasonable,—at least as applied to a plain, unindorsed check. (Or.) 236.

For the negligence of a notary who was the assistant cashier of a bank, in failing to give proper notice to an indorser of an inland draft which the bank held for collection, it is held that the bank is not liable, although no protest of the draft was necessary, where the statutes recognized the giving of notices as part of the official duty of a notary when protesting paper. (Iowa) 133.

The liability of the drawee bank to bear the loss when it pays a forged check is enforced notwithstanding the forgery of the first indorsement on the check and the possible negligence of the party who first cashes it and puts it in circulation. (Iowa) 131.

Pledge.

The pledgee of a promissory note is held entitled to enforce it against the maker only to the extent of his claim against the pledgor,—at least where the maker has a valid defense against the pledgor. (Mont.) 243.

Bonds of county.

The doctrine as to the rights of bona fide holders is held inapplicable to county bonds issued under authority of an unconstitutional statute, notwithstanding recitals in the bonds. (N. C.) 252.

Champerty.

The right of an attorney to contract for compensation contingent upon his success and payable by percentage or otherwise out

of the proceeds of the litigation is sustained, but it is held that his agreement, made prior to the suit, to pay the fees and costs thereof, renders the contract invalid, though this invalidity could not be asserted by one who was not a party to the contract. (Utah) 285.

Brokers.

A real-estate broker who produces a purchaser, with whom the owner actually makes an enforceable contract of sale, is held entitled to his commissions, whether the contract is actually enforced or not. (Neb.) 593.

Carriers.

The abandonment of a steamer trip from Seattle to Dawson after the steamer has reached Ft. Yukon, because the water in the Yukon river is too low, is held to require the steamer company to bring a passenger back to Seattle without charge, instead of leaving him through the winter in the Alaskan climate to await the completion of his trip the following summer. (Wash.) 557.

A contract to indemnify a common carrier against losses occurring from injuries to passengers carried by it is held not to be invalid as against public policy because it covers losses resulting from negligence. (N. J.) 213.

Theft of a valise taken through a window of a sleeping car while the train was running slowly at the crossing of another railroad is held not to make the carrier liable, where the back door of the car was locked, and the conductor and porter were guarding the front door, while the passenger was in the smoking car. (Ga.) 790.

Insurance.

The interest of a person to whom insurance on his father's life is payable, if his mother be not living at the father's death, is vested, though contingent, and will descend to his widow and children on his death during the mother's life. (Mich.) 689.

The murder of a person whose life is insured by an assignee of the policy, whose interest extends only to reimbursement for premiums paid, is held not to forfeit the policy altogether, but only the assignee's interest in it. (Va.) 305.

Proofs of loss as to the cause of death, made in good faith upon information from an attendant and physician, are held insufficient to estop the beneficiary in a life-insurance policy from showing that death resulted from a different cause. (Mich.) 846.

Insurance of an employer against injury to employees, providing for payment to him for their benefit, is held to give no right of

action to the personal representatives of an employee,—at least after a claim against the employer for negligence on account of the accident has been paid. (N. Y.) 512.

Guaranteeing the fidelity of officers and the performance of contracts is held to be insurance, within the meaning of a statute excepting insurance from the kinds of business for which corporations may be formed, although, when the statute was passed, such kinds of insurance were not known. (Ill.) 124.

The value of property which an insurer must pay to the purchaser who is in possession and has mostly paid the purchase price, although the title still remains in the vendor, is the cost to him, and not to the seller. (Pa.) 272.

Relief fund.

A contract by which a railroad employee is allowed his option between an action for damages against the employer or a claim on a relief fund, but denying him both, is held not to be within the prohibition of a statute against contracts to relieve a railroad company from liability for injury to an employee. (Ind.) 638.

By equal division of the court, it is held that an election by a railroad employee to take the benefits of a relief fund instead of bringing an action for damages against his employer shall operate to release the company, and that a contract giving him such option is not against public policy. (S. C.) 645.

Lease.

The retention of one room in a leased building for a few days because it is occupied by a member of the family who is too ill to be moved is held not to create a liability for a new term except for the time that the building is actually occupied. (N. Y.) 703.

Paving contract.

The bond of a street contractor to a city for the repair of a street for five years is held beyond the scope of the power of the city. (Or.) 527.

But a paving contract which requires all repairs within ten years which are necessary because of defects in the work or materials to be paid for by the contractor is upheld under a statute which requires a city to pay for all ordinary repairs. (Neb.) 534.

So, a contract requiring a street contractor to guarantee the durability of the pavement made by him for five years, and to repair at a stated price all openings made in the street during the same time, is held valid in New Jersey. (N. J.) 540.

III. CORPORATIONS; ASSOCIATIONS; FRANCHISES.

See also *infra*, VIII., as to Mandamus, and IX., as to Criminal Contempt.

The extension of corporate charters after the adoption of a law making all grants to corporations subject to amendment is held to make such charters subject thereto, notwithstanding irrevocable exemptions in the original charters. (Ky.) 825.
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Compelling operation.

The duty to operate a street railway which has been abandoned is held not to be a legal duty enforceable by writ of mandate, where the ordinances gave the privilege of using the streets subject to forfeiture, but without

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providing expressly that the line must be operated. (Mont.) 692.

Stock.

A purchaser of corporate stock at execution sale, with notice of a pledge to a third person, is held to take it subject to the pledgee's rights, though the pledge was not entered on the books of the company. (Mich.) 163.

Directors' liability.

The liability of directors of a corporation for the maintenance of a nuisance by storage of explosives in violation of law is held to depend upon their exercise of due care in the management of the business to prevent the maintenance of such a nuisance. (Mont.) 508.

Bank directors who have no reason to distrust the integrity or efficiency of their cashier are held not to be required to procure periodical expert examination of the books before dividends are declared or reports made to the comptroller of the currency, but they are required to cause examination of the discounted paper of the bank with reasonable frequency so as to keep informed about it and be able to pass intelligent judgment upon its value. (C. C. App. 2d C.) 761.

Building and loan associations.

The issuance of preferred stock by a building and loan association is held to be void as against public policy. (Ky.) 659.

The right to apply dues paid upon stock upon a mortgage to an insolvent loan association is denied in North Dakota. (N. D.) 261.

Winding up.

The preference of a debt by an insolvent corporation is held lawful, although the creditor is stockholder, director, and president of the company. (Ala.) 766.

A receiver of a bank is held not to be liable for a trust fund deposited in the bank in preference to the claims of other creditors, unless that fund can be identified or traced. (Mich.) 493.

Taxes assessed against a partnership are held not to be payable out of the assets of a corporation subsequently formed to carry on the business until after the payment of all corporate debts other than those which consisted of obligations of the partnership which had been assigned by the corporation. (Conn.) 786.

The person who is allowed to have full control and management of the business of a corporation is held entitled to make an assignment for its creditors. (Mich.) 844.

IV. DOMESTIC RELATIONS.

The power of the court to allow a gross sum out of the husband's estate as a part of the permanent alimony of the wife in addition to a monthly allowance is sustained under statutes authorizing an allowance which the court may deem just and reasonable. (Wis.) 725.

The custody of an infant held under an agreement with the parent, which is not

binding on the infant, is held to be nevertheless such as the court may uphold in the interest of the child. (S. C.) 277.

The restoration to their parents of children who have been duly committed to a charitable institution is held to be within the general powers of the New York supreme court as a court of chancery, and also authorized by statute. (N. Y.) 699.

V. FIDUCIARIES OR REPRESENTATIVES.

Settlement of a suit brought by an infant and a discharge of a judgment already entered therein, by the infant's attorney of record, although he had been discharged, is

held binding on the infant, although the attorney absconded with the proceeds. (N. H.) 167.

VI. TORTS; NEGLIGENCE; INJURIES.

The unsoundness of mind of a co-conspirator is held ineffectual to relieve the others from liability for injury caused by the conspiracy. (Ind.) 129.

One who drew another in front of him to serve as a shield against a threatened explosion is held not to be liable for the injuries sustained by the person grasped by him, which resulted from the explosion, when that was caused by a third party, and there is nothing to show that he would not have received the same injuries if he had not been drawn out of his original position to shield the other person. (N. Y.) 216.

Sale of poison.

The duty of druggists to put a label marked "poison" on every poisonous substance is held not to extend to medicines compounded 44 L. R. A.

from a physician's prescription. (Tenn.) 540.

Dangerous premises.

The maintenance of dangerous machinery on private grounds, unprotected from the visits of trespassing children, is held such negligence as will render the owner liable, if he knows that children and others are accustomed to frequent the place and climb upon the structures which support the dangerous machinery. (Kan.) 655.

Leaving a shattered pane of glass in a window above a sidewalk is held to be negligence creating liability to a person who is injured by the fall of the glass during a wind. (Mich.) 500.

The landlord who takes the platform from a well in order to put it in proper condition,

and leaves the well open and unguarded a few feet from the kitchen door, is held liable to a guest of his tenant who falls into the well in the night. (Ind.) 815.

The lessor of a building which has a door opening at some height into space, and unprovided with bars or guards, is held not to be liable for an injury to a person who steps out of it while the lessee is in possession of the premises. (Tex.) 279.

Gas.

Furnishing natural gas at a pressure so great that it sets a building on fire is held to be negligence for which a gas company is liable. (W. Va.) 92.

False imprisonment.

The unreasonable refusal of a passenger who tendered a mileage ticket to tell the conductor whether the name thereon was his own or not is held to be no justification for the conductor's procurement of his arrest without a warrant on a charge of fraudulently evading payment of fare, but the passenger's fault was held sufficient to prevent his recovering more than nominal damages for the false imprisonment. (Me.) 673.

Passenger's negligence.

Riding on the front of the platform of an electric street car is held not negligence as matter of law. (Me.) 157.

Carrier's negligence.

A woman with a transfer ticket approaching a street car to get on, when she is injured by the breaking of a trolley pole as a motorman was changing it for reversing the direction of the car, is held to be a passenger, to whom the high degree of care required of common carriers is due. (Pa.) 546.

The duty of a railroad company to stop a train and rescue a passenger who has fallen or been thrown from it and is likely to perish or suffer great injury if not rescued is held to exist only when this can be done without risk of collision with other trains. (Ky.) 823.

Permitting salt water to run through pens provided by a carrier for live stock is held such negligence as to render the carrier liable for injuries thereby caused to animals placed in the pens. (Va.) 299.

Failure of a railroad company carrying

horses or mules from one state to another to comply with U. S. Rev. Stat. § 4386, by unloading the stock for rest, food, and water after being confined twenty-eight hours is held to make the carrier liable for negligence in an action in a state court, and the statute is held applicable to horses and mules as well as to animals used for food. (Va.) 449.

Negligence of contractor.

Employing an independent contractor to excavate near a neighbor's house and several feet below its foundations, in a populous city, is held not to relieve the proprietor from the duty of seeing that the contractor uses due care, or else notifying the neighbor in order that he may protect his own house. (Md.) 482.

Running street car.

The gripman of a cable street car is held not guilty of negligence in failing to stop or slacken speed when he sees boys standing near the track in the street in front of the car, one of whom, when the car is near, suddenly starts to run across the track. (Ill.) 127.

Servant's tort.

The act of a brakeman in throwing coal at a boy on the tender of an engine, thereby knocking him off or frightening him so that he jumps off, causing him to be run over and killed by the engine, is held to render the railroad company liable. (N. C.) 316.

Negligence toward employee.

The failure to furnish automatic car couplers for freight cars is again held to be negligence *per se*, and to constitute continuing negligence, which precludes the defense of contributory negligence. (N. C.) 313.

For the negligence of the foreman of a steam sawmill in calling on an employee suddenly to take a dangerous position, without giving him any instructions or explanation of the movements of the machinery or the risk to be incurred, with which the employee had no acquaintance, the proprietor is held responsible to the servant. (La.) 33.

On leased railroad.

The liability of the lessor of a railroad for negligent operation by the lessee is denied where the lease is authorized by statute and is general in its terms. (Kan.) 737.

VII. PROPERTY RIGHTS; WILLS; LIENS.

Boundary.

Naming a meander line on the bank of a river as a boundary is held to carry title at least to the water line with riparian rights, if not to the thread of the stream. (Ind.) 814.

Canal.

The rights of riparian owners are held to be changed by a contract which establishes a canal built originally without right as a substitute for the natural watercourse. (Wis.) 728.

Life estate.

The liability of a life tenant to rebuild in case of accidental fire is held not to exist in Rhode Island by force of the statute of 44 L. R. A.

Gloucester, and not to be assumed by accepting a devise requiring the life tenant to keep the premises in repair. (R. I.) 711.

Land titles.

A statute providing for the registration of land titles, similar to the Torrens law, is held valid against various objections. (Ill.) 801.

Deeds.

The rule that no interest can pass by deed to a person not *in esse* is applied to a case in which the deed was made to the grantor's son and his own brothers and sisters, one of whom was born after the deed was executed. (Ill.) 489.

Fixtures.

Bath tubs standing on legs, attachable to

any heating apparatus, hot water heaters attached to a building only by plumbing, and stock mantels made and sold separately for use in any building, are held not to be fixtures as matter of law. (Wash.) 559.

Gift.

A valid gift of savings-bank deposits is held not to be made by depositing them in the name of both donor and donee as joint owners, payable to the order of either or to the survivor, where the donor retains possession of the pass book. (Md.) 208.

Trust.

A deposit in a savings bank in trust for the owner of the money and another person as joint owners, payable to the order of either, and the balance to belong to the survivor on the death of either, is held to create a valid trust. (Md.) 205.

A trust deed by an intemperate and improvident person, containing no power of revocation, is held irrevocable. (Pa.) 542.

The statute of uses is held not to be a part of the law of Nebraska. (Neb.) 861.

Oil or gas lease.

The discovery of oil or gas is held to be a condition precedent to the continuance or vesting of a lease for oil or gas for the period of five years and as much longer as oil or gas is found in paying quantities, where there is no consideration for the lease except oil royalties and gas rentals. In such a case, if the first well proves unproductive, the

lease is declared to be invalid and of no binding force as to any of its provisions. (W. Va.) 107.

Mortgage.

One who takes special title to a mortgage by assignment, for purpose of foreclosure only, is held to have no such interest as will vest in or devolve upon his administrator. (Md.) 479.

Foreclosure.

The right of possession of property sold under foreclosure of a mortgage during the year allowed by statute for redemption is held to be in the purchaser, where the mortgage passes title, leaving only an equity of redemption in the mortgagor, and is silent as to possession. (Ark.) 193.

Tradename.

The use of a name sufficiently similar to that rightfully used by another party engaged in the same business to mislead the public is held unlawful even if it is the name of the person using it. (Mich.) 841.

Probate of will.

After the end of the term at which a will is admitted to probate it is held that the court has no jurisdiction to admit to probate a codicil which is entirely inconsistent with the original will. (Ky.) 136.

Lien.

The lien of an innkeeper or keeper of live stock is held not to be lost by levying an attachment on the property. (W. Va.) 561.

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Who may sue.

The right of a wife to sue on a contract for her benefit between her husband and a third person is upheld in a case where the contract was to pay her a part of the proceeds of a successful will contest, and she, although not a legal heir, had strong moral and family claims to be so regarded. (N. Y.) 170.

The benefit of a contract between a town and a street-railway company, limiting rates of fare, is held to be available to a passenger who sues for trespass on account of being ejected after tendering the rate fixed by the contract. (R. I.) 273.

Recommencement of action.

The right to recommence an action in a state court after the dismissal of an action for the same cause by a Federal court to which it had been removed is denied on the ground that the exclusive jurisdiction of the Federal court acquired by the removal includes the recommencement of the action or the bringing of a new action for the same cause. (Ohio) 520.

Action for death.

The cause of action for personal injuries which survives the death of the person injured under Wisconsin statutes is held to be distinct from that given to surviving relatives for the death. (Wis.) 579.

Seduction.

The right of a parent to maintain an action for seduction of a daughter is held to

be no longer dependent upon loss of her services as a servant under a code of procedure which abolishes fictions in pleading and requires a statement of the actual facts. (Kan.) 757.

Garnishment.

No situs for purpose of garnishment of a foreign insurance company is held to exist in a state where it has an agency, when the money is due to a nonresident for a loss of property insured in another state in which the loss is payable. (Del.) 115.

Judgment against a garnishee of a nonresident debtor on a contract utterly void at the latter's domicile, and when the latter did not appear and was not personally served in the state, is held to be no protection to the garnishee in such state, when sued by the principal debtor. (W. Va.) 101.

Injunction.

An injunction against the maintenance of a house of ill fame is sustained at suit of a private owner whose property is so near that the enjoyment of it is affected by disgusting scenes and sounds in such house. (Or.) 522.

A suit for an injunction against assessments upon a member of a foreign mutual insurance association, and to prevent the forfeiture of his policy for nonpayment of the assessments, is held to be beyond the jurisdiction because it involves a control of the internal management of a foreign corporation. (Md.) 149.

A mandatory injunction equivalent to specific performance is upheld for the enforce-

ment of a lease requiring the operation of a leased railroad. (Va.) 297.

Mandamus.

Mandamus to compel a board of examiners to indorse a diploma of a dental college is denied after the indorsement has been refused by the board, where the statute provides for their indorsement when satisfied of the character of the institution. (Cal.) 635.

Replevin.

An action of replevin for a corpse is held not to be maintainable where statutes require the affidavit to be made for goods or chattels, and provide that judgment for defendant shall be for a return of the property or for its value. (Mich.) 242.

Supplementary proceedings.

The examination of a wife in supplementary proceedings against her husband is held "not to be for or against him" within the meaning of statutes as to testimony by husband or wife. (Wash.) 311.

Judgment by confession.

A judgment by confession entered in another state in accordance with a warrant of attorney executed there by a resident is held to be entitled to full faith and credit in another state, although it was entered without any personal service on the defendant. (Mass.) 840.

Evidence.

An assignment purporting to be signed by the mark of a woman holding a life-insurance policy on her husband's life and delivered with the policy by the husband to his

creditor is not sufficiently proved nearly twenty-five years afterwards, by the testimony of an attesting witness to the effect that he certainly saw her sign the paper or he would not have put his name there, when he is unable to recall the circumstances or the place of the alleged signing,—especially when there is no proof that she made or authorized the delivery of the policy to the alleged assignee, or that the assignment was read or explained to her, while it appears that she could not read. (Md.) 142.

The burden of proof as to negligence of a carrier when goods lost were shipped under a contract limiting its liability for negligence is held to be on the carrier. (N. C.) 515.

An oral promise by the payee of a note to renew it until the improvement in business will enable the maker to proceed in business without such assistance is held not to be enforceable in equity. (Mass.) 319.

Proving claim for dividends.

A surety who has paid the debt is held entitled to prove the entire debt against the insolvent estate of his cosurety, and receive dividends thereon until reimbursed for that part of the obligation which it belongs to the cosurety to pay. (Va.) 459.

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The rule that a person injured by negligence cannot recover for such damage as results from his failure to exercise reasonable care to avoid the consequences of the injury is held not to apply to a case of wilful injury. (Tex.) 553.

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A corporation is held liable for criminal contempt in publishing a newspaper article at a place where a cause is on trial, which is calculated to prejudice the jury and prevent a fair trial. (Mass.) 159.
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False token.

That a person cannot be himself a false token is held in a case where one obtained money from a woman under a promise of marriage, by falsely pretending that he was unmarried and by using a fictitious name. (Or.) 266.

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2. A judicial separation at the suit of the wife, although it does not dissolve the marriage, does so far terminate or suspend the relation of husband and wife that the husband cannot be guilty of the statutory offense of abandonment or desertion. *Id.*

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5. A covenant by a vendee to repair a ditch which has become a substitute for a natural watercourse cannot be invoked by third persons who may profit incidentally by its enforcement. *Case v. Hoffman* (Wis.) 728

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6. A cause of action under the common law against a city for establishing a pest house near a residence, claiming compensatory damages only, cannot be joined with an action against officers under a statute for punitive damages, although both causes of action arise out of the same transaction. *Clayton v. Henderson* (Ky.) 474

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2. Legislative power to enlarge the jurisdiction of the court of appeals by providing for a review of certain judgments of inferior courts that were not reviewable before is not taken away by the provision of N. Y. Const. art. 6, § 9, that the legislature may further restrict such jurisdiction. *People, Comrs. of Public Charities & C., v. Cullen* (N. Y.) 420

3. The party relying on the exception in a statute permitting appeal from judgments or orders finally determining actions, excepting unanimous decisions that there is evidence to sustain a finding of fact, must show from the record that the decision was unanimous. *Laidlaw v. Sage* (N. Y.) 216

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4. Questions made on a demurrer need not be embodied in a motion for a new trial in order to be saved for appeal. *Wise v. Morgan* (Tenn.) 548

5. A request that the court hold that, under the law of the case, the plaintiff could not recover, is in the nature of a demurrer to the evidence, and preserves the question

of law for review on appeal. *Hogan v. Stophlet* (Ill.) 809

6. To get an omitted fact into the record for the purpose of presenting a question of law under Conn. act 1897, it must appear to have been an admitted or undisputed fact, and that its statement is necessary to properly present a question of law decided adversely to appellant. *Hoadley v. Savings Bank of Danbury* (Conn.) 321

7. A finding by the trial judge is unnecessary when the appeal is used as a substitute for a former motion in error. *Id.*

8. The finding by the trial judge when an appeal is used as a substitute for a motion for new trial may contain a statement of facts on which the judgment is founded, or which are necessary to present a question of law which was made at the trial and decided by the judge, or it may contain a recital of what took place at the trial for the purpose of presenting for review rulings upon questions of evidence or other ruling not directly affecting the judgment. *Id.*

9. Bills of exception in criminal trials should be signed by the trial judge; and a mere note of a reservation of exceptions, or a bill signed by the clerk only, is insufficient. *State v. Haines* (La.) 837

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10. A broadside exception "to the charge as given" will not be considered. *Pierce v. North Carolina R. Co.* (N. C.) 316

11. The rendition of judgment cannot be questioned on appeal unless the defect or mistake in it is particularly pointed out by the objection. *Tucker v. Hyatt* (Ind.) 129

12. An objection that a witness is not an expert is insufficient to raise the question of the competency of opinion evidence on the question involved. *Detzur v. B. Stroh Brewing Co.* (Mich.) 500

13. An objection that a hypothetical question is insufficient does not raise the point that the question is not in proper form because it includes the witness's understanding of the testimony of another witness. *Id.*

14. An objection to the incompetency of the admissions of the president of a defendant corporation, made a few hours after an accident, does not raise the question of his authority to make a settlement, or of his being engaged in the company's business, or in an attempt to make a compromise. *Id.*

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15. Conclusions of the trial court from subordinate facts found may be reviewed on appeal. *Hoadley v. Savings Bank of Danbury* (Conn.) 321

16. The legal sufficiency of evidence to support a finding by the court is a question of law on appeal. *Texas Loan Agency v. Fleming* (Tex.) 279

17. The necessity for instituting contempt proceedings to vindicate its authority in case of publication of newspaper articles calculated to prejudice the jury in a pending trial is for the trial court, and will not be considered on appeal. *Telegram Newspaper Co. v. Com.* (Mass.) 159

18. The decision of municipal authorities as to who among several bidders is the lowest cannot, if resting on legal evidence, be reviewed on writ of error. *State, Wilson, v. Trenton* (N. J. Err. & App.) 540

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20. The amount of damages is a question of fact for the jury upon all the evidence, and, if there is any evidence to support the verdict, the Utah supreme court is not at liberty, under the Constitution, to set it aside. *Croco v. Oregon Short-Line R. Co.* (Utah) 285

21. The sum of \$3,500 is not so excessive a recovery for a stiff arm that it will be interfered with on appeal. *Detzur v. B. Stroh Brewing Co.* (Mich.) 500

22. A finding by the jury will be accepted as correct upon appeal, unless it clearly appears to have been erroneous. *James v. Rapides Lumber Co.* (La.) 33

23. The findings of the trial court on conflicting evidence will not be disturbed unless they are clearly against the preponderance of the evidence. *Case v. Hoffman* (Wis.) 728

24. An allowance of alimony by the trial court will not be disturbed unless manifestly unjust. *Hooper v. Hooper* (Wis.) 725

25. Testimony introduced on an immaterial matter not in issue cannot be considered on appeal in an equity case tried *de novo*, although no exception was taken to its admission. *Blagen v. Smith* (Or.) 522

26. An insufficient complaint which was tested by demurrer cannot be aided on appeal by reading into it a fundamental fact from the findings of the jury. *Pittsburg, C. C. & St. L. R. Co. v. Moore* (Ind.) 638

27. A demurrer treated in the trial court as waived or withdrawn must be so considered on appeal. *Chesapeake & O. R. Co. v. American Exch. Bank* (Va.) 449

Grounds of reversal.

28. The court on writ of error will not reverse the judgment in a case tried to the court without a jury, merely because of the admission of improper evidence. *Lunney v. Healey* (Neb.) 593

29. Overruling a demurrer to a bad paragraph of a complaint is not available error if the judgment rests on a good paragraph. *Pittsburg, C. C. & St. L. R. Co. v. Moore* (Ind.) 638

30. The omission of admitted or undisputed facts from a finding is not an error that affects the judgment, unless by correcting the record and including them in the finding it appears that the court erred in some ruling of law material to the judgment. *Hoadley v. Savings Bank of Danbury* (Conn.) 321

31. On vacating a judgment which was void because the qualified members of the court were equally divided the court, instead of entering judgment, may order a reargu-

ment, if it sees fit to do so. *Case v. Hoffman* (Wis.) 728

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32. A decision on a former appeal is the law of the case so far as it is applicable to the facts established on the second trial. Id.

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An instrument binding children to the service of a person during their minority, though signed by him and by their parents, is void as to them as an indenture of apprenticeship under S. C. Rev. Stat. 1893, § 2206, unless signed by the infants, although the statute does not expressly provide for their signature. *Anderson v. Young* (S. C.) 277

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1. A deposit made to secure payment of an award under an arbitration agreement becomes forfeited upon revocation of the arbitration, and subject to payment of the damages allowed by statute against one who revokes an arbitration, although made by a third person who committed no breach of the agreement and had no control over the one who did so. *Union Ins. Co. v. Central Trust Co.* (N. Y.) 227

2. That an arbitration agreement provides that the costs shall not become part of the amount for which a deposit made to secure payment of the award shall be liable will not, in case the deposit is forfeited by revocation of the award, prevent the deposit from becoming chargeable with the costs which the statute casts upon the one who revokes an arbitration. Id.

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A boy upon whom a locomotive engineer throws hot water and steam to drive him off from the engine is entitled to recover from the railroad company for the assault, regardless of injuries which resulted from his attempt to get off in consequence of such act. *Galveston, H. & S. A. R. Co. v. Zant-zinger* (Tex.) 553

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1. A right of action for personal injuries is not assignable. North Chicago Street R. Co. v. Ackley (Ill.) 177

2. An assignment of accounts and other choses in action to a purchaser in good faith, who obtains actual possession of them and immediately notifies the debtors, gives him a perfect legal title thereto as against a prior assignee to whom they were assigned for security, but who, without obtaining possession of them or giving notice to the debtors, left them with the assignor for collection. Graham Paper Co. v. Pembroke (Cal.) 632

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1. A final disposition of a cause may be made by agreement of the attorney of record, as to whose authority no limitation is known or might be known by reasonable inquiry by the opposite party, which is entered of record, made an order of court, and executed by the adversary in good faith. Beliveau v. Amoskeag Co. (N. H.) 167

2. A discharged attorney who is permitted to remain the attorney of record without notice to the opposite party may enter into an agreement for settlement of the suit, which will bind his former client. Id.

3. An attorney employed by the next friend of an infant to prosecute a suit on the infant's behalf has power to make a settlement of the suit which will bind the infant. Id.

4. That an agreement by an attorney for settlement was not brought to the attention of the court, and did not obtain its sanction before it was entered of record, does not impair its effect. Id.

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1. Bank directors are not required to procure periodical expert examination of the books in order to verify by personal examination such details of the bank's condition as they ought to know before declaring dividends, or which are required to be reported to the comptroller of the currency, if there is no reason to distrust the integrity or efficiency of the cashier. Warner v. Penoyer (C. C. App. 2d C.) 761

2. Directors of a national bank are required to cause examination of the discounted paper of the bank due, with reasonable frequency, and to keep themselves sufficiently informed about it to enable them to pass an intelligent judgment upon its value. Id.

3. Directors of a national bank who are members of the discount and examining committees will be held liable for losses occasioned by the reckless loans of the cashier, where they made not even a cursory examination of the discounts or overdrafts beyond looking at such notes as the cashier saw fit to consult them about. Id.

4. Mere failure to attend meetings of the board will not render directors of a national bank liable for defalcation of the cashier. Id.

Forged checks.

5. The drawee bank which pays the good-faith holder of a forged check cannot recover back the money paid. First Nat. Bank v. Marshalltown State Bank (Iowa) 131

6. Negligence of a bank which first cashes a forged check and puts it in circulation cannot be imputed to a subsequent good-faith holder of the check, so as to make him liable to the drawee, from whom he has obtained payment of the check. Id.

7. The forgery of an indorsement on a forged check will not make a good-faith holder liable to the drawee, which has paid the check. Id.

Collections.

8. A custom of banks to send a check direct to the drawee bank for collection and return is not unreasonable, at least as applied to the collection of a plain, unindorsed check. Kershaw v. Ladd (Or.) 236
But see next case.

9. A collecting bank must not transmit checks or drafts directly to the bank or party by whom payment is to be made. Minneapolis Sash & D. Co. v. Metropolitan Bank (Minn.) 504

10. Notice to a depositor by a collecting bank that it will be responsible only for the selection of agents according to its judgment and means of knowledge, and will assume no risk or responsibility on account of their

omission, neglect, or failure, will not relieve the bank from liability for sending a check directly to the bank by which payment is to be made. *Id.*

11. An established usage and custom existing among banks will not justify a collecting bank in sending a check or a draft by mail directly to the drawee because there is no other bank of good standing in the same town. *Id.*

12. A bank receiving for collection a check the proceeds of which it is to retain to the drawer's credit will be regarded as receiving sufficient compensation for its services to make it liable for negligence in attempting to make the collection. *Kershaw v. Ladd (Or.)* 236

13. The retention by a collecting bank of a dishonored check until after the drawee bank has closed does not create any liability to the sender, unless he was injured thereby. *Id.*

14. The negligence of a notary public in failing to learn the residence of an indorser of an inland draft, and give him proper notice of its dishonor, is not chargeable to a bank of which he is assistant cashier, and which placed the draft, which it held only for collection, in his hands for protest, although no protest of the draft was required by law, but the law recognizes the giving of notices in case of protest as part of the official duty of the notary. *First Nat. Bank v. German Bank (Iowa)* 133

Insolvency.

15. A receiver of a bank in which a trust fund was deposited cannot be required to repay it in preference to the claims of other creditors, unless the trust fund can be identified or traced into some other specific fund or property. *Marquette Fire & W. Comrs. v. Wilkinson (Mich.)* 493

16. Public moneys deposited by an officer in a bank of which he was a partner constitute a trust fund, even if he had the legal title to the money. *Id.*

NOTES AND BRIEFS.

Banks; liability for negligence of notary.	133
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BENEVOLENT SOCIETIES.

See **INSURANCE**, 19, 20.

BICYCLE.

See also **HIGHWAYS**, 4.

A tricycle is not within the scope of an ordinance prohibiting the use of "all varieties of vehicles known by the general name 'bicycles,'" on sidewalks. *Wheeler v. Boone (Iowa)* 821

BID.

See **APPEAL AND ERROR**, 18.

BILL.

See **STATUTES**, 1.

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BILLS AND NOTES.

See also **ACTION OR SUIT**, 8; **BANKS**, 14; **EVIDENCE**, 13, 14; **PLEADING**, 2.

1. That a draft is to the knowledge of the payee drawn by the agent of the drawee to pay the latter's debt will not relieve the drawer from personal liability thereon if he directs the amount to be charged to his account. *Citizens' Bank v. Millett (Ky.)* 664

2. The existence of a debt due by the drawee of a bill of exchange to the payee is a sufficient consideration to bind the drawer upon his promise to pay the bill, and render him liable for the amount, although he was a stranger to the debt. *Id.*

3. The pledgee of a promissory note as collateral security can enforce it against the maker only to the extent of his claim against the pledgor,—at least where the maker has a valid defense against the enforcement of the note by the pledgor. *Yellowstone Nat. Bank v. Gagnon (Mont.)* 243

NOTES AND BRIEFS.

Bills and notes; extent of recovery by pledgee on negotiable paper which pledgor could not collect:—(I.) The general rule; (II.) limitation to unpaid advances made without notice; (III.) application to accommodation paper; (IV.) matters of procedure. 243

BILLS OF EXCEPTION.

See **APPEAL AND ERROR**, 9.

BILLS OF LADING.

See **CARRIERS**, 9.

BONA FIDE PURCHASER.

See **BANKS**, 6, 7; **BONDS**, 7.

BONDS.

See also **HOSPITAL**, 1.

1. The fact that the bond is voluntary and founded upon a valid consideration will not enable a city to enforce a bond by a street contractor to repair a street for five years, when the contract is entirely beyond the general scope of the powers of the city, even if it has been fully executed by the city. *Portland v. Portland Bituminous Paving & Improv. Co. (Or.)* 527

2. A bond to a city by a street contractor or which constitutes an independent undertaking by the latter to keep the street and pavement in repair for five years, and which covers in effect all injuries liable to arise from whatsoever source, is not authorized by statutory power to take security by bonds for the performance of the contract. *Id.*

3. The legislature cannot by a sweeping statute give all counties in the state the right to issue railroad-aid bonds without regard to the restrictions imposed by the Constitution thereon. *Wilkes County v. Call (N. C.)* 252

4. County bonds issued under authority of a statute passed in violation of the state Constitution are null and void. *Id.*

5. Recitals in a county bond will not estop the county from denying its validity, if they point to an unconstitutional statute as the authority under which the bond was issued. Id.

6. The holder of a county bond which recites that it was issued under a particular statute which is adjudged unconstitutional will be estopped from contending that it was issued under another statute. Id.

7. There can be no bona fide holder of county bonds issued under authority of an unconstitutional statute. Id.

8. An issue of county bonds may be declared void at the suit of the county commissioners, although only one bond is represented before the court, if a full defense is made and other bondholders have an opportunity to come in and be heard. Id.

BOUNDARIES.

Mentioning a meander line on the bank of a river as a boundary will convey the property at least to the water line, with riparian rights, if not to the thread of the stream, unless a contrary intent clearly appears from the deed itself. *Sizor v. Logansport* (Ind.) 814

NOTES AND BRIEFS.

Boundaries; controlling effect of monuments; meander lines. 814

BROKERS.

See also EVIDENCE, 11.

1. Where a real-estate broker contracts to produce a purchaser who shall actually buy he has performed his contract by the production of one financially able, with whom the owner actually makes an enforceable contract of sale. The failure to carry out that contract, even if the default be that of the purchaser, does not deprive the broker of his right to commissions. *Lunney v. Healey* (Neb.) 593

2. That a broker was not given the exclusive sale of property, and that the owner himself made the sale, will not defeat the broker's right to commissions if he was the procuring cause of sale. *Hoadley v. Savings Bank of Danbury* (Conn.) 321

3. A broker may be found to be the procuring cause of sale, where he calls a person's attention to a certain piece of property, and gives him information as to how to obtain admission thereto, although the owner, without the broker's knowledge, subsequently takes up the negotiation and completes the sale. Id.

4. That one who is led to begin negotiation for property which he finally purchases through the intervention of a broker had been engaged at some prior time in a bootless negotiation for the same property, and that he finally completes the sale through secret negotiations with the owner, do not deprive the broker of his right to commissions. Id.

5. After a broker has rendered the services which make him the procuring cause of sale the owner cannot escape liability by telling him that no commission will be paid in case the property brings only a certain price. Id.

NOTES AND BRIEFS.

When real-estate broker is considered as the procuring cause of the sale or exchange effected:—(I.) Procuring cause of sale: (a) general rule; (b) evidence to establish procuring cause; (c) acts held sufficient to establish; (d) acts held not sufficient to establish; (II.) when several brokers are employed; (III.) in case of a sale by his principal: (a) general rule governing; (b) negotiations by principal; (c) before broker has reasonable opportunity to reap results of his efforts; (d) pending broker's negotiations with purchaser; (e) after suspension of negotiations; (f) after withdrawal or termination of agency, etc.; (g) after broker has failed to secure purchaser or to close negotiations; (h) within time limited by contract; (i) when broker has option or sole agency; (j) effect of modification of terms. 321

Performance by a real-estate broker of his contract to find a purchaser or effect an exchange of his principal's property:—(I.) General rule; (II.) custom as affecting performance; (III.) the necessity of a written contract; (IV.) necessity of consummated sale; (V.) time of performance; (VI.) in case of a special contract; (VII.) in case of an exchange; (VIII.) negotiations by principal; (IX.) acceptance of purchaser by principal; (X.) broker's presence at sale by principal; (XI.) ratification of broker's acts; (XII.) position of purchaser found; (XIII.) effect of purchaser's default; (XIV.) failure of broker to report purchaser; (XV.) acts held sufficient performance; (XVI.) acts held not to constitute performance. 593

BUILDING AND LOAN ASSOCIATIONS.

1. The issuance of preferred stock by a building and loan association which is based on principles of co-operation, equality, and mutuality is void as against public policy. *Sumrall v. Columbia Finance & T. Co.* (Ky.) 659

2. A guaranty that preferred stock in a building and loan association shall mature at a certain time, and that the common stock shall constitute a guaranty therefor, constitutes a guaranty for the accumulation of sufficient profits or dividends to mature the preferred stock, and does not control a distribution of the capital and assets of the concern on the winding up of the association, when there are no profits on hand. Id.

3. A member of a building and loan association who borrows money from the association, and bids a premium for the privilege of obtaining the loan, and executes his bond for the amount of the loan and premium, and gives a mortgage to secure the payment of such bond, and also assigns to such association his shares of stock as collateral security for such payment, is not en-

titled, in an action brought to foreclose such mortgage by the receiver of such association (said association being insolvent), to apply the amounts he has paid as dues upon his stock in reduction of his indebtedness. *Hale v. Cairns* (N. D.) 261

NOTES AND BRIEFS.

Building and loan associations; preferred stock in. 659

Rights of members in case of insolvency; application of dues. 261

BUILDINGS.

See FIXTURES; NEGLIGENCE, 3; TRIAL, 4; WRIT AND PROCESS, 4.

BULKHEAD.

See CANALS.

BURDEN OF PROOF.

See EVIDENCE, 1-10.

BY-LAWS.

See INSURANCE, 7.

CABLE RAILWAY.

See STREET RAILWAYS.

CANAL.

See also CONTRACTS, 7; NOTICE, 1.

1. The owner of a canal who acquires it with notice of the rights of other persons to have a certain quantity of water supplied from it, for which a dam or bulkhead in the canal is required, must maintain such dam or bulkhead as long as he continues to use the canal. *Case v. Hoffman* (Wis.) 728

2. The owner of a canal which has become a substitute for a natural watercourse, although he acquires it with notice of certain rights and privileges of other persons thereon, which are open, visible, and notorious, which require the maintenance by him, so long as he uses the canal, of a dam or bulkhead to furnish them water from the canal, can free himself from this obligation by the abandonment of his use of the canal. *Id.*

CAR COUPLERS.

See MASTER AND SERVANT, 7.

CARRIERS.

See also ACTION OR SUIT, 1, 2; ACT OF GOD; DAMAGES, 3; EVIDENCE, 8, 9; FALSE IMPRISONMENT, 2; INSURANCE, 3; PLEADING, 5; TRIAL, 6.

1. A woman with a transfer ticket approaching a street car to get on, when she is struck by a piece of the trolley pole, which breaks while the motorman is trying to change it to the other end of the car, is a passenger to whom the high degree of care which a common carrier owes to passengers is due. *Keator v. Scranton Traction Co.* (Pa.) 546

2. A railroad company is under obligation to stop a train, and rescue a passenger who has been thrown or pushed therefrom without any fault on its part, where he is 44 I. R. A.

liable to perish or suffer great injury unless rescued, only when it can stop the train long enough to rescue him without endangering the safety of other passengers by collisions. *Reed v. Louisville & N. R. Co.* (Ky.) 823

3. Riding on the front platform of an electric street-car is not negligence as a matter of law. *Watson v. Portland & C. E. R. Co.* (Me.) 157

Abandoning trip.

4. It is the duty of a transportation company legitimately to inform itself concerning the stages of water on a route over which it contracts to transport a passenger, and he may rely upon the carrier's information concerning the practicability and feasibility of the trip. *Smith v. North American Transp. & T. Co.* (Wash.) 557

5. A steamer compelled to abandon for the season its trip from Seattle to Dawson after it reaches Ft. Yukon because of the low stage of the water in the Yukon river, owes to a passenger whom it has agreed to transport to Dawson by September 15 of the current year the duty of bringing him back to Seattle without charge, and has no right to leave him where he will be forced to remain over winter in the Alaskan climate, to await the convenience of the carrier for completing the transportation the following summer. *Id.*

Arrest of passenger.

6. The unreasonable refusal of a passenger to state his name when asked by a conductor to whom he tenders a mileage ticket if the name thereon is his own does not justify the conductor in procuring his arrest without a warrant, on the charge of fraudulently evading payment of fare. *Palmer v. Maine C. R. Co.* (Me.) 673

Sleeping car.

7. A sleeping-car company is not liable to a passenger for the loss by theft of personal effects taken into the car by a passenger for his own use and retained in his possession, either under the rules governing innkeepers or those relating to carriers' liability for baggage, but the carrier is liable only for failure to exercise reasonable care to guard the property. *Pullman's Palace-Car Co. v. Hall* (Ga.) 790

8. Theft of a passenger's valise from the sleeping car by one who took it out of the car window by catching on to the car as it slackened speed while crossing another railroad, will not render the sleeping-car company liable, where it had locked the back door of the car, and the conductor and porter were guarding the open door in front, while the passenger himself was in the smoking car. *Id.*

Contracts as to shipments.

9. A shipper's contract with a carrier cannot be changed by handing a receipt or bill of lading to his clerk. *Rudell v. Ogdensburg Transit Co.* (Mich.) 415

10. A contract by a carrier to deliver goods at destination at a certain time, which allows the usual period for making the trip, is within the general authority of the carrier's agent. *Id.*

11. In Virginia a common carrier cannot contract for exemption from liability for injury or loss caused by its own neglect. *Harman v. Norfolk & W. R. Co. (Va.)* 289

Live stock.

12. A carrier of live stock cannot relieve itself from liability for the death of animals by showing that they died in possession of a connecting carrier, if its own negligence was the cause of their death. *Id.*

13. Failure of a railroad company to provide suitable and safe facilities for loading and unloading stock, and also for watering and feeding them, while being carried over its line of road, is negligence against which a common carrier is not permitted to contract. *Chesapeake & O. R. Co. v. American Exch. Bank (Va.)* 449

14. Horses and mules, as well as animals intended for food, are within the provisions of U. S. Rev. Stat. § 4386, requiring "cattle, sheep, swine, or other animals" when carried from one state to another to be unloaded for rest, water, and feeding, if confined for twenty-eight hours. *Id.*

15. "Other accidental causes" within the meaning of U. S. Rev. Stat. § 4386, making a railroad company liable for failure to unload cattle when confined for twenty-eight hours, unless prevented by "storm or other accidental causes," must be taken to mean other inevitable accidental causes. *Id.*

16. Permitting salt water to run through pens provided by a carrier of live stock to facilitate shipments, so that it is accessible to animals placed in the pens, is negligence which will render the carrier liable for injuries caused to animals placed in the pens for shipment, by drinking of the water. *Harman v. Norfolk & W. R. Co. (Va.)* 289

17. The knowledge of the sellers of live stock to be delivered in the shipping pen of a railroad, of the existence of salt water therein, does not charge the buyer, who has contracted for their transportation, with contributory negligence precluding recovery for damages to stock from drinking such water. *Id.*

Discrimination.

18. Discrimination between localities in facilities for transportation, such as a better supply of cars at a terminus of the road than at some other point on the road, when there are not cars enough to supply all, does not make the railroad company liable to an action for a penalty under Ark. act March 24, 1887, providing that "all individuals, associations, and corporations shall have equal rights to have persons and property transported, . . . and no unjust or undue discrimination shall be made. . . in facilities for transportation," and that "no discrimination in . . . facilities for transportation shall be made between transportation companies and individuals, or . . . any preferences in furnishing cars." The act does not apply to discrimination in facilities at different localities. *Little Rock & Ft. S. R. Co. v. Oppenheimer (Ark.)* 353

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Liability of sleeping-car company for passenger's property. 791

Negligence in riding on street-car platform. 157

Ejection of passenger as an assault. 274

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Duties of carriers of live stock as to pens or yards at stations:—(I.) The general rule; (II.) application generally; (III.) commencement and termination of risk; (IV.) effect of contributory negligence; (V.) relief from liability by contract. 289

Statutory duties of carriers of live stock with reference to care of stock during transportation:—(I.) Scope of note; (II.) the United States statute; (III.) the South Carolina statute; (IV.) the Texas statute; (V.) miscellaneous statutory provisions. 449

Unlawful discriminations by. 353

CARS.

See CARRIERS, 18.

CASES CERTIFIED AND REPORTED.

1. The very question to be decided, which the court of civil appeals is by statute authorized to certify to the supreme court, is not an abstract question which may determine the issue as presented to that court, but the issue itself. *Galveston, H. & S. A. R. Co. v. Zantzing (Tex.)* 553

2. The question of the right of a boy to recover from a railroad company whose engineer turns hot water and steam on him to drive him from the engine, for the loss of his leg in attempting to get off, in the event that his action succeeding the assault was negligent, does not arise upon an instruction to find for plaintiff if the engineer's act was negligent, without specifying whether the recovery was to be for loss of leg or for the assault, so that it can be certified by the court of civil appeals to the supreme court; but the right of his mother to recover does so arise, since her recovery, if any, must be based on the loss of the leg. *Id.*

CASHIER.

See BANKS, 4.

CHAMPERTY.

See also PLEADING, 1.

1. Defendant cannot avail himself, as a defense, of the champertous character of a contract between the plaintiff and his attorney with reference to the prosecution of the suit. *Oroco v. Oregon Short-Line R. Co. (Utah)* 285

2. The common-law rule as to champertous agreements between attorneys and

clients is modified by Utah Comp. Laws 1888, § 3683, providing that the measure and mode of compensation of attorneys and counselors at law shall be left to the agreement, express or implied, of the parties; and under that section it is competent for the attorney and client to agree that the former's compensation shall be contingent upon success, and payable, by percentage or otherwise, out of the proceeds of the litigation; but it is not competent to agree that the attorney shall pay the advance fees and costs of the suit thereafter to be commenced. Id.

3. A conveyance by the administrator of land of which one holding a bond for title from his intestate is in possession is void as being a conveyance of land held adversely. *Heard v. Phillips* (Ga.) 369

NOTES AND BRIEFS.

Champertry; in attorney's contract. 286

CHARITIES.

See INFANTS, 3.

CHECKS.

See also BANKS, 5-7; EVIDENCE, 10, 15, 29, 30.

1. Failure of the payee of a check to promptly present the same to the bank for payment will release the maker from liability if he is injured thereby where the bank subsequently fails, although his general deposit in the bank was overdrawn at the time where he had a special deposit in the bank and had reasonable grounds to believe that the check would be paid because of a promise by the cashier to allow him to check against such special deposit. *Hamlin v. Simpson* (Iowa) 397

2. The maker of a check which the payee fails to present for some time and until after the bank has failed is damaged thereby so as to be discharged from liability on the check, where at the time of the failure he had general and special deposits in the bank for which he holds collateral security which would be insufficient to pay the amount which would remain in the bank if the check were paid. Id.

NOTES AND BRIEFS.

Checks; delay in presentment of. 398

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See EVIDENCE, 28.

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COLLATERAL SECURITY.

See BILLS AND NOTES, 3, NOTES AND BRIEFS.

COLLEGE.

See PLEADING, 3; STATE INSTITUTIONS, NOTES AND BRIEFS.

COMMISSIONERS.

See PUBLIC MONEYS.

COMMON LAW.

See SEDUCTION.

COMPOUNDING CRIME.

See EVIDENCE, 23.

COMPROMISE AND SETTLEMENT.

See ATTORNEYS, 2-4; CONTRACTS, 8.

CONFIDENTIAL

TIONS.

See EVIDENCE, 19.

COMMUNICA-

CONFLICT OF LAWS.

1. The liability of an employer for injury to an employee by a fellow servant in a state which has by statute abolished the common-law rule can be enforced in another state in which the common-law rule still prevails. *Chicago & E. I. R. Co. v. Rouse* (Ill.) 410

2. The responsibility of the master for the act of a fellow servant is governed by the law of the place where the cause of action arose. Id.

NOTES AND BRIEFS.

Conflict of laws; as to liability of master to servant. 410

CONSPIRACY.

1. The unsoundness of mind of a co-conspirator at the time of the trial of an action to recover for injuries caused by the conspiracy is no defense to any of the guilty parties. *Tucker v. Hyatt* (Ind.) 129

2. Co-conspirators are not relieved from liability for injuries caused by the conspiracy, by the fact that one of their number was of unsound mind. Id.

CONSTITUTIONAL LAW.

See also COURTS, 4; INTOXICATING LIQUORS; RAILROADS, 4, 5; STATUTES, 3.

1. The rule of construction by long and continued usage should be applied to a constitutional provision only in cases of doubt. *Pingree v. Dix* (Mich.) 679

2. An ordinance requiring a license fee to be paid as a condition of buying claims is unconstitutional in case of a person who buys, merely as an investment, a few claims against a city, which are admitted to be just and due, but which are not paid because of the lack of funds. *Bitzer v. Thompson* (Ky.) 141

3. An ordinance requiring a license for the business of contracting for public work is unconstitutional because it tends to create a monopoly and increase the burden of prop-

erty owners, where the statutes require the cost of improvements to be assessed upon abutting owners by the front foot. *Figg v. Thompson* (Ky.) 135

Due process of law.

4. A landowner is not deprived of his property without due process of law by a statute which provides that, after the title has been judicially determined and registered, the tenure of the owner, the right of transfer and encumbrance, and all rights subsequently accruing shall be determined in accordance with the rules prescribed by that statute. *People, Deneen, v. Simon* (Ill.) 801

5. A statute authorizing service of process on an agent of a foreign corporation, "no matter what character of agent such person may be," if the corporation has any transaction with any person or concerning any property in the state through any agency whatever within the state, is not unconstitutional as authorizing judgment without due process of law, at least when the service is on an agent who may be reasonably presumed to give notice thereof to the corporation. *Connecticut Mut. L. Ins. Co. v. Spratley* (Tenn.) 442

Police power.

6. An ordinance changing the limits outside of which houses of prostitution are prohibited does not unconstitutionally deprive a citizen of his property because it is depreciated in value in consequence of being included within such limits, as the ordinance is an exercise of the police power. *L'Hote v. New Orleans* (La.) 90

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Constitutional law; validity of curative statute. 307

Depriving of property without due process; delegation of power. 803

CONTEMPT.

See also **APPEAL AND ERROR**, 17.

1. A corporation may be held liable for criminal contempt for publishing, in a newspaper printed and circulated in a place where a trial is had, an article concerning the cause on trial, which is calculated to prejudice the jury and prevent a fair trial. *Telegram Newspaper Co. v. Com.* (Mass.) 159.

2. Publishing in a newspaper the figures named by the respective parties to a suit on trial in an effort to compromise the controversy, so that they are likely to be brought to the notice of the jury, is punishable as a contempt of court, although there is no intent to pervert the course of justice. *Id.*

3. A formal complaint is not necessary to authorize a court to take cognizance of a contempt consisting in publishing newspaper articles calculated to prejudice the jury in a trial pending before it. *Id.*

4. That the jurors did not in fact see a newspaper article published during a trial in such a way as to be likely to come to their notice and prejudice their judgment will not relieve the publisher from contempt of court. *Id.*

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Contempt; by publication pending trial; procedure. 160

CONTRACTOR.

See **RECEIVERS**, 2.

CONTRACTS.

See also **ACTION OR SUIT**, 2, 3; **ACT OF GOD**; **INSURANCE**, 3; **SPECIFIC PERFORMANCE**.

1. A foreign company executing a power of attorney to the secretary of state, in accordance with Tenn. act 1875, authorizing him to accept service of process, does not thereby make a contract with the state which precludes the state from authorizing service to be made on agents of the company. *Connecticut Mut. L. Ins. Co. v. Spratley* (Tenn.) 442

Statute of frauds.

2. A court of equity cannot give effect to a contract declared void by the statute of frauds under the pretext of aiding an attempt to execute a contract. *Bloomfield State Bank v. Miller* (Neb.) 387

3. The exception of the statute of frauds in reference to estates arising by act or operation of law does not embrace cases where the creation of the estate depends solely upon the contract. *Id.*

4. An oral promise by a wife who is the beneficiary of her husband's certificate in a fraternal beneficiary society, to pay his debts, is within the statute of frauds. *Fisher v. Donovan* (Neb.) 383

5. The vote of the directors of a corporation assuming payment of the debt of a third person, duly recorded, is a sufficient memorandum in writing, and the signature of the recording officer in attestation of the minutes a sufficient signing of the party to be charged, to satisfy the statute of frauds. *Lainkin v. Baldwin & L. Mfg. Co.* (Conn.) 786

Validity.

6. A contract invalid as to one of the parties is invalid also as to the other. *Portland v. Portland Bituminous Paving & Improv. Co.* (Or.) 527

7. One whose water rights have been injured by diverting a watercourse by a canal constructed across his land without his consent may make a valid contract for the continuance of the canal and a supply of water therefrom. *Case v. Hoffman* (Wis.) 728

8. A contract by which a person in whose name an action is brought and to whom it belongs attempts to transfer his control over it so as to restrict him from compromising or settling the claim is not valid. *North Chicago Street R. Co. v. Ackley* (Ill.) 177

9. A contract by which the acceptance of benefits from a relief organization by a railroad employee who has been injured will operate to release the railroad company from liability to damages, but which gives him the option to accept such benefits or to decline them and retain his right of action against the railroad company, is not against

public policy. *Johnson v. Charleston & S. R. Co.* (S. C.) 645

10. A contract that a railroad company shall be relieved of liability for the injury or death of an employee by the acceptance of benefits from a relief fund which the railroad company helps to provide, but leaving the employee or those entitled to maintain an action for his death the option of choosing the benefits of the relief fund or bringing an action against the company, does not violate Ind. Acts 1893, chap. 130, p. 294, § 5, prohibiting contracts to relieve railroad companies from liability to employees. *Pittsburg, C. C. & St. L. R. Co. v. Moore* (Ind.) 638

Impairment.

11. An enlargement of the liability of a street-railway company for paving a street is not unconstitutional, where the company's rights were acquired subject to Tex. Const. 1895, art. 1, § 17, providing that all privileges and franchises shall be subject to legislative control, and that there shall be no irrevocable or uncontrollable grant of special privileges or immunities. *Storrie v. Houston City Street R. Co.* (Tex.) 716

12. A statute curing the defective acknowledgment of a deed of trust and the consequent defect in the record of the deed is ineffectual to give it priority over a judgment lien which had been acquired before the defect was cured, as the displacement of the judgment creditor's lien would impair the obligation of his contract. *Merchants' Bank v. Ballou* (Va.) 306

NOTES AND BRIEFS.

See also RAILROAD RELIEF ASSOCIATION.

Contracts; indefiniteness of. 320

CORPORATIONS.

See also BANKS; BUILDING AND LOAN ASSOCIATIONS; CONSTITUTIONAL LAW, 5; CONTEMPT, 1; CONTRACTS, 5, 11; COURTS, 1-3; EVIDENCE, 27; INJUNCTION, 5; INSOLVENCY; RAILROADS, 6; RECEIVERS, 1; TAXES, 8; WRIT AND PROCESS.

1. The *de facto* character of a corporation will not be varied by the fact that it was insolvent from the beginning. *Lamkin v. Baldwin & L. Mfg. Co.* (Conn.) 786

Name.

2. The name "Lamb Glove & Mitten Company," or any name in which the word "Lamb" occurs when used in connection with the business of manufacturing gloves and mittens by what is known as the Lamb stitch, cannot lawfully be used, even by the man named Lamb who invented the stitch, when he has transferred his right in a similar business previously carried on to a corporation named "Lamb Knitting Goods Company," which conducts such business in another town in the same state. *Lamb Knitting Goods Co. v. Lamb Glove & M. Co.* (Mich.) 841

Charters.

3. Charters granting exemptions from 44 L. R. A.

taxation, passed after the enactment of a general law which provides that all charters subsequently enacted shall be subject to amendment or repeal, may, unless a contrary intent was plainly expressed therein, be amended or repealed at the pleasure of the legislature, so as to deprive the corporation of the exemption. *Deposit Bank v. Daviess County* (Ky.) 825

4. Statutes granting extension to corporate charters, passed after the adoption of an act making all grants to corporations subject to amendment, will be subject to that act, although the original charters contained exemptions which were irrevocable. *Id.*

Officers.

5. The liability of a director of a corporation in tort is not to be avoided by his vicarious character, where a tort of the corporation has been committed through the directors. *Cameron v. Kenyon-Connell Commercial Co.* (Mont.) 508

6. It is the duty of the directors of a corporation to avoid the creation of nuisances by their corporation through its employees acting within the line of their duties. *Id.*

7. A director who knows nothing of a nuisance maintained by the corporation, and who could not, by exercising ordinary diligence in control, have known of it, or who has performed his duty of taking care, is not personally responsible for the nuisance. *Id.*

8. Nonexecution of the duty of directors, which results in the positive act of a creation and maintenance of a continuing nuisance by the corporation, on account of which a third person is killed, amounts, unless explained, to a misfeasance on their part, or, if they have actual knowledge of and authorize the nuisance, to malfeasance, and is not merely a nonfeasance for which the liability can be limited to the corporation only. *Id.*

9. It is the duty of the directors of a corporation dealing in explosives to exercise such reasonable supervision over the management of their company's business as will result in the observance of the utmost care on the part of the subordinates who direct or handle the explosives. *Id.*

10. The liability of the officers of a corporation for negligence in storing giant powder in violation of law depends upon their exercise of reasonable diligence in the control and supervision of the business. *Id.*

Stock.

11. A purchaser at execution sale of corporate stock, with notice that it has been pledged to a third person, takes subject to the rights of the pledgee, although the pledge has not been entered on the books of the corporation. *May v. Cleland* (Mich.) 163

Assuming partnership liabilities.

12. The insertion in a deed conveying the assets of a partnership to a corporation organized to continue the business and which has agreed to pay partnership debts to a certain amount, of a clause obligating it to pay "all the liabilities" of the partnership,

will not operate to extend its liability beyond the amount specified, unless the insertion of such clause was authorized or ratified by the corporation. *Lamkin v. Baldwin & L. Mfg. Co.* (Conn.) 786

13. To entitle a creditor of a partnership to payment out of assets of a corporation which was organized to continue the partnership business and received a conveyance of the partnership assets upon undertaking to pay a specified amount of the partnership liabilities, which proves to be less than all, he must show that his claim was among those estimated in fixing the amount so specified. *Id.*

14. That an organization never became more than a *de facto* corporation will not relieve it from liability for the debts of a partnership whose business it was organized to continue, and whose assets it received upon undertaking to pay its liabilities. *Id.*

Insolvency.
15. An agent to whom are intrusted the entire management and control of a corporation whose stockholders hold no meetings has power to make an assignment of its property for its creditors. *Conely v. Collins* (Mich.) 844

16. Taxes due by a partnership whose business a corporation is organized to continue, which receives the partnership assets upon undertaking to pay its liabilities, are not, in case the corporation becomes insolvent, entitled to preference out of assets in the hands of its receiver, where the statute gives such preference to taxes assessed against the insolvent debtor. *Lamkin v. Baldwin & L. Mfg. Co.* (Conn.) 786

17. Debts of the partnership must be postponed to those contracted by the corporation after its organization, where a corporation is organized to continue the business of a partnership whose assets are transferred to it upon its undertaking to pay the partnership debts, and the corporation becomes insolvent. *Id.*

18. The preference of a creditor of an insolvent corporation is not invalid because he was a stockholder, director, and president of the company, and as such participated in the transaction by which he was given a preference over other creditors. *Corey v. Wadsworth* (Ala.) 766

NOTES AND BRIEFS.

Corporations; *ultra vires* contracts of; contract of stockholders. 659
Unrecorded transfer of stock. 163
Liability of officers of, for nuisance. 508
Custom as to power of officers; power of officers to contract. 632
Power to make assignments for creditors. 846
Preference of debts to officers. 766

CORPSE.

See also REPLEVIN.

NOTES AND BRIEFS.

Corpse; property in; right to control. 242

COSTS.

See ARBITRATION, 2.

COUNTIES.

See also BONDS, 3-6, 8; RAILROADS, 5.

1. The state is estopped from questioning the regularity of the passage of an act creating a county, when for four years the county has been recognized by each of the co-ordinate branches of the government as a county and legal subdivision of the state. *People, Attorney General, v. Alturas County* (Id.) 122

2. The liability of a county "in all cases of lynching when death ensues," under S. C. Const. art. 6, § 6 (S. C. Acts 1896, p. 213), is not limited to cases in which the persons lynched were prisoners or in custody of the court, although the provision contains the words "without regard to the conduct of the officers," as these mean that this liability is without reference to other provisions respecting the lynching of prisoners. *Brown v. Orangeburg County* (S. C.) 734

NOTES AND BRIEFS.

See also MOBS.

Counties; established by acquiescence in invalid statute. 122

COURTS.

See also APPEAL AND ERROR, 2; EVIDENCE, 2; INFANTS, 3; INTOXICATING LIQUORS; LEGISLATURE, 3; WILLS.

1. Jurisdiction of an inquiry into and control over the internal management of a foreign corporation is not conferred by a statute which in broad and comprehensive terms provides for all actions, suits, or proceedings against foreign corporations. *Condon v. Mutual Reserve Fund L. Assn.* (Md.) 149

2. The motive or effect of acts within the internal management of a foreign corporation cannot make them cognizable by a court which does not otherwise have jurisdiction over them. *Id.*

3. An accounting between a foreign mutual insurance association and a member involves an inquiry into the internal affairs of the company, which cannot be made by a court outside of the state in which the corporation has its home. *Id.*

4. Judicial power is not conferred upon a registrar of deeds, within the prohibition of a constitutional provision separating the departments of government, by a statute requiring him to make certain entries when it appears to him that the person intending to create a charge on property "has the title and right to create such charge," and that the person in whose favor it is to be made "is entitled by the terms of the act to have the same registered,"—especially where a party aggrieved is given the right to apply to a court of equity for relief. *People, Deneen, v. Simon* (Ill.) 801

5. A civil action against a railroad company by the owner of injured cattle, to recover damages for violation of U. S. Rev. Stat. § 4386, requiring cattle to be unloaded for rest, water, and feeding when confined for

twenty-eight consecutive hours, can be maintained in a state court, and is not within the rule which prohibits one state from enforcing the penal laws of another state or country, although there is a penalty provided for violating the statute, which is payable to the United States. *Chesapeake & O. R. Co. v. American Exch. Bank (Va.)* 449

6. A constitutional question is not involved in a case, so as to require the calling in of the judges of the circuit courts to assist in its decision upon failure of the judges of the supreme court to agree, under the provisions of S. C. Const. art. 5, § 12, where the record does not show that the question was presented to and considered by the trial judge. *Johnson v. Charleston & S. R. Co. (S. C.)* 645

7. Although a constitutional question is involved in a case, yet the circuit judges, need not be called in to assist in its decision, under S. C. Const. art. 5, § 12, in case of failure of the judges of the supreme court to agree, if there is another question involved not requiring the construction of the Constitution, which is decisive, and upon which the conclusions reached manifestly turned. *Id.*

8. Propositions assumed by the court to be within the case, and questions presented, considered, and deliberately decided by the court, leading up to the final conclusion reached, are not obiter dicta, but, if dicta at all, are judicial dicta, and are as effectually passed upon as the ultimate questions solved. *Brown v. Chicago & N. W. R. Co. (Wis.)* 570

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Courts; what constitutes jurisdiction. 101

Interference with business of foreign corporation. 150

Power to say proclamation is not lawful. 466

Rule of *stare decisis*. 123

COVENANT.

See ACTION OR SUIT, 5.

CREDITORS' BILL.

A creditors' bill will not lie against a municipal corporation to reach money due from it to a contractor who is a debtor of the complainant. *Addyston Pipe & S. Co. v. Chicago (Ill.)* 405

NOTES AND BRIEFS.

Creditors' bill against municipality. 405

CRIMINAL LAW.

See also CONTEMPT, 1; RAPE, 2.

1. A plea of former jeopardy should be sustained where, after the evidence for the state had been introduced at the former trial, the judge, when absent from the courtroom, and in the absence of the prisoner, released a juror upon representations as to the dangerous sickness of his wife, which resulted

in the discharge of the jury without a verdict. *Upchurch v. State (Tex.)* 694

2. Under a statute permitting discharge of the jury in a felony case upon one of them becoming sick, or in case of accident or circumstance occurring to prevent their being kept together, the necessary facts must be judicially determined; and if the judge, when absent from the courtroom, and in the absence of the prisoner, acts upon representations made to him, and excuses a juror, the prisoner will be entitled to release. *Id.*

3. The "face of the record" considered on a motion in arrest of judgment on indictment embraces not only the face of the indictment, but the entire record as made up to that point. *State v. Haines (La.)* 837

NOTES AND BRIEFS.

Criminal law; former jeopardy by reason of the discharge of the jury in the prisoner's absence:—(I.) Introduction; (II.) general rule; (III.) plea allowed; (IV.) plea disallowed. 694

Evidence on motion in arrest. 839

CROSSING.

See RAILROADS, 7, 8.

CURATIVE ACTS.

See CONTRACTS, 12.

CUSTOM.

See also BANKS, 8, 11; EVIDENCE, 4.

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Custom; as affecting negligence. 237

DAMAGES.

See also APPEAL AND ERROR, 20, 21; PLEADING, 6.

1. The fact that a dealer has been fully paid for an article which he sold will not preclude a recovery by him from the party from whom he bought it, on breach of warranty, to the full extent of defects existing in it. *Western Twine Co. v. Wright (S. D.)* 438

2. One on whom a wilful injury is inflicted is not precluded, by his mere failure to exercise reasonable care to avoid the consequences of the injury, from recovering for so much of the damage as results from that failure. *Galveston, H. & S. A. R. Co. v. Zantzinger (Tex.)* 553

3. Ten dollars is a sufficient compensation for a passenger's injured pride, wounded sensibility, and mortification caused by public arrest, where it was procured by a conductor in the belief that the passenger was fraudulently evading payment of fare, when he in fact tendered a valid mileage ticket, but unreasonably refused to state whether the name on the ticket was his own. *Palmer v. Maine C. R. Co. (Me.)* 673

DAMS.

See CANALS.

DEAD BODY.

See REPLEVIN.

DEATH.

1. A widow's release of a right of action for the death of her husband does not affect her right to maintain an action for her child in her representative capacity, under Burns's (Ind.) Rev. Stat. 1894, § 285 (Horner's Rev. Stat. 1897, § 284). *Pittsburg, C. C. & St. L. R. Co. v. Moore* (Ind.) 638

2. A cause of action for personal injuries which survives by force of Wis. Rev. Stat. § 4253, is separate and distinct from the cause of action in favor of surviving relatives under § 4255. *Brown v. Chicago & N. W. R. Co.* (Wis.) 579

NOTES AND BRIEFS.

Death; right of action for injuries causing. 580

DEEDS.

Deposit of, see MORTGAGE, 1, 2.

See also CHAMPERTY, 3; CONTRACTS, 12; REAL PROPERTY; TRUSTS, 3, 4.

1. A deed to a son of the grantor and "his own brothers and sisters" gives no interest to a child born a short time after the execution of the deed. *Morris v. Caudle* (Ill.) 489

2. A deed executed before the birth of a child, but not delivered until after the birth and also the death of the child, conveys no interest either to the child or those claiming under the child, although the child would have been a grantee if *in esse* when the instrument took effect. Id.

NOTES AND BRIEFS.

Deeds; infant *en ventre sa mere* as grantee in deed:—(I) Ordinary conveyances; (II.) conveyances of uses, trusts, remainders, etc. 48

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See CORPORATIONS, 1, 14.

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See CHAMPERTY, 1.

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See PLEADING, 4; POLICE; TAXES, 1.

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See MANDAMUS, 2.

DEPOSIT.

See ARBITRATION.

DEPOSITIONS.

See TRIAL, 3.

DESCENT.

See INSURANCE, 16.

DESERTION.

See ABANDONMENT, 2.

DISORDERLY HOUSES.

See also INJUNCTION, 2, 3.

1. The power to assign limits by ordinance, outside of which houses of prostitution are prohibited, is not exhausted by its first exercise, but the limits may be changed by a subsequent ordinance. *L'Hote v. New Orleans* (La.) 90

2. An ordinance confining houses of prostitution within certain limits is not unconstitutional on the ground that it sanctions vice or undertakes to punish vice. Id.

NOTES AND BRIEFS.

Disorderly house; injunction against. 523

DITCH.

See ACTION OR SUIT, 5.

DIVIDENDS.

See PRINCIPAL AND SURETY.

DOMICIL.

See VOTERS AND ELECTIONS, 2.

DRAFT.

See BILLS AND NOTES.

DRUGGIST.

See also PROXIMATE CAUSE, 3.

The duty to put a label containing the word "Poison" on every poisonous liquid or substance, which is imposed on druggists by Shannon's (Tenn.) Code, § 6745, does not extend to medicines compounded upon the prescription of a physician, though they contain poison. *Wise v. Morgan* (Tenn.) 549

NOTES AND BRIEFS.

Druggists; liability for negligence of. 549

DUE PROCESS.

See CONSTITUTIONAL LAW, 4, 5.

DYNAMITE.

See CORPORATIONS, 10; EXPLOSIONS.

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See LEGISLATURE, 2.

ELECTRIC RAILWAY.

See CARRIERS, 3.

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See INSURANCE, 4-6.

EQUAL DIVISION.

See APPEAL AND ERROR, 31.

EQUITY.

See INFANTS, 3; INJUNCTION.

ESTOPPEL.

See also BONDS, 5, 6; COUNTIES, 1; INSURANCE, 14; NAME.

A municipality will be estopped to enforce the performance of a contract under the same or like conditions that an individual will be estopped to proceed against it. *Portland v. Portland Bituminous Paving & Improv. Co.* (Or.) 527

EVIDENCE.

See also **APPEAL AND ERROR**, 12-14, 25, 28; **TRIAL**, 1-3; **WITNESSES**.

Presumptions and burden of proof.

1. The statute of a sister state will be presumed to be similar to that of the forum, in the absence of proof to the contrary. *Fisher v. Donovan* (Neb.) 383

2. It will be presumed that a court of record in another state which entered judgment upon a warrant of attorney had jurisdiction to do so, and that its proceedings were regular. *Van Norman v. Gordon* (Mass.) 840

3. The law never presumes fraud, but the presumption is always in favor of innocence and honesty. *New York L. Ins. Co. v. Davis* (Va.) 305

4. Usages are presumed to be reasonable, and the person attacking them has the burden of showing their unreasonableness. *Kershaw v. Ladd* (Or.) 236

5. The mere fact that a building furnished with gas at an unusual pressure was set on fire from the gas does not justify an inference that the increased pressure caused the fire. *Barrickman v. Marion Oil Co.* (W. Va.) 92

6. A contract made by telegrams is a contract in writing, for which a consideration is presumed under S. D. Comp. Laws, § 3538. *Western Twine Co. v. Wright* (S. D.) 438

7. The presumption is that a telegram properly addressed and deposited in the telegraph office, with charges prepaid, reached its destination and was delivered in accordance with the obligation which the law imposes upon telegraph companies. *Id.*

8. A carrier has the burden of showing its want of negligence, when property is lost in transit, although shipped under a contract which limits the carrier's liability to a loss resulting from its negligence. *Mitchell v. Carolina C. R. Co.* (N. C.) 515

9. The breaking of a trolley pole while being manipulated in the usual way to reverse the direction of the car imposes upon the carrier the burden of proving its lack of negligence, in an action by a passenger injured by the accident. *Keator v. Scranton Traction Co.* (Pa.) 548

10. The payee of a check who does not promptly present it for payment to the bank which fails before it is presented has the burden of proving that the maker was not injured thereby. *Hamlin v. Simpson* (Iowa) 397

Documentary.

11. A letter written by a broker to his principal pending the latter's negotiations for a sale of the property, stating that the purchaser was procured through his efforts, is admissible in evidence in an action for commissions, not to support the truth of the statement, but as a fact relating to the conduct of the parties in respect to the transaction in dispute. *Hoadley v. Savings Bank of Danbury* (Conn.) 321
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12. A telegram received from a telegraph operator, which purports to be in reply to one which the recipient had previously deposited with the operator, with charges prepaid and properly addressed, is admissible in evidence against the person by whom it purports to have been sent, without any proof that he actually executed or authorized such dispatch, or that it was ever transmitted. *Western Twine Co. v. Wright* (S. D.) 438

Parol as to writing.

13. Parol evidence is not admissible to show that a draft drawn by one as an individual was drawn in accordance with a parol agreement between him and the payee that he should not be bound thereon. *Citizens' Bank v. Millett* (Ky.) 664

14. An oral promise by the payee of a note to renew it until such time as the improvement in the business situation will enable the maker to proceed in business without such assistance is not enforceable in equity. *Hall v. First Nat. Bank* (Mass.) 319

15. Oral evidence of an agreement by the cashier of a bank to allow a depositor to check against a special deposit for which certificates of deposit had been issued is admissible in an action against such depositor by one to whom he had given a check for the amount of a debt which check was not duly presented, for the purpose of showing that he had reasonable ground to believe that such check would be paid, although he had no general deposit in the bank. *Hamlin v. Simpson* (Iowa) 397

Opinions.

16. The opinion of a witness that the glass in a broken window was unsafe is incompetent, where that is one of the principal points in the case. *Detzur v. B. Stroh Brewing Co.* (Mich.) 500

17. A witness after testifying that, in his judgment, employment about a certain machine in a mill is quite dangerous, may state whether he considers it necessary to instruct a new man to that effect. *James v. Rapides Lumber Co.* (La.) 33

Declarations.

18. Loose declarations of a grantor, made twenty years after the date of a deed, cannot be proved to impeach it. *Wilson v. Anderson* (Pa.) 542

19. An agreement made openly in court and participated in by the parties, their counsel, and the district attorney, has no element of confidential professional communication in it which will preclude testimony concerning it by one of the attorneys. *Kramer v. Kister* (Pa.) 432

Relevancy.

20. Evidence that a declaration of homestead was made is not admissible as tending to prove the intention with which articles in controversy, claimed to be fixtures, were affixed to the premises. *Philadelphia Mortgage & T. Co. v. Miller* (Wash.) 559

21. Evidence that farmers who purchased twine were troubled by its breaking is admissible on behalf of the dealer, as against

the party from whom he bought it, in order to show the worthlessness of the twine, where there is no claim made for injury to the farmers. *Western Twine Co. v. Wright* (S. D.) 438

22. Evidence of the value of articles belonging to plaintiff, but taken from his house by an officer who broke into it to execute a writ of replevin which did not cover those articles, is admissible in trespass against him. *Kelley v. Schuyler* (R. I.) 435

23. Evidence of an agreement to compound a prosecution for felony is not inadmissible because the agreement is void, when offered to contradict a party who has denied that there was such an agreement. *Kramer v. Kister* (Pa.) 432

24. Evidence of defendant's wealth, property, and business is not admissible in a suit for negligent injuries. *Laidlaw v. Sage* (N. Y.) 216

25. Upon the question whether or not one person held another in front of him as a shield from an impending explosion, evidence is not admissible that one whom witness took to be the former said he was not injured because protected from the explosion. *Id.*

26. Evidence of the pressure shown usually by the gauge of another gas company is not admissible in an action for negligently furnishing natural gas at a pressure so great as to cause the burning of a building. *Barrickman v. Marion Oil Co.* (W. Va.) 92

27. In an action by a creditor of a partnership to recover his debt from a corporation which was organized to continue the partnership business and received its assets upon undertaking to pay its debts, evidence is admissible to show the true character of the transaction out of which his equity arose, as compared with the form which it assumed in the proceedings incident to the organization of the corporation. *Lamkin v. Baldwin & L. Mfg. Co.* (Conn.) 786

Sufficiency.

28. Connection with a conspiracy may be established by circumstantial evidence. *Tucker v. Hyatt* (Ind.) 129

29. A finding that defendant did not know that a bank upon which he drew a check in favor of plaintiff was insolvent at the time is sustained by evidence that two days thereafter he made a large deposit in the bank although he took security for special deposits made by him therein, where such deposits were made at a time when banks were failing all over the country. *Hamlin v. Simpson* (Iowa) 397

30. A finding that the cashier of a bank agreed to allow defendant to check against the amount of a special deposit in the bank is sustained by positive evidence by defendant to that effect and by evidence that the bank although hopelessly insolvent and making desperate efforts to keep its doors open permitted defendant to overdraw his general account. *Id.*

31. A charge that defendant drew plain-
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tiff in front of him to serve as a shield from an impending explosion is not supported by the uncorroborated evidence of plaintiff, whose memory was seriously affected by the accident, so as to justify submission of the case to the jury where this testimony is contradicted by defendant, several disinterested witnesses, and by well-known and recognized physical facts about which there is no conflict. *Laidlaw v. Sage* (N. Y.) 216

32. The evidence to establish a gift must be explicit and convincing in support of every element needed to constitute a valid donation. *Whalen v. Milholland* (Md.) 208

33. An assignment purporting to be signed by the mark of a woman holding an insurance policy on her husband's life, and delivered with the policy by the husband to his creditor, is not sufficiently proved, nearly twenty-five years afterward, by the testimony of an attesting witness to the effect that he certainly saw her sign the paper or he would not have put his name there, when he is unable to recall the circumstances or the place of the alleged signing,—especially when there is no proof that she made or authorized the delivery of the policy to the alleged assignee, or that the assignment was read or explained to her, while it appears that she could not read. *Wienecke v. Arbin* (Md.) 142

NOTES AND BRIEFS.

See also INSURANCE.

Burden of proof as to waiver of proofs of loss. 425

Admissibility of telegram on behalf of person receiving it in reply to another. 438

Proof of signature by mark when attesting witnesses thereto are dead or cannot remember the transaction:—(I.) Of testator: (a) where the attesting witness is dead; (b) where the attesting witness is forgetful; (II.) of maker of other instruments: (a) where the attesting witness is dead; (b) where the attesting witness is forgetful. 142

Conclusion of witness on matter of fact; questions of experts; presumption as to negligence in case of accident. 501

Of declarations as to trust. 543

Of injuries not described in complaint. 286

EXCEPTIONS.

See APPEAL AND ERROR, 10-14.

EXECUTION.

See also JUDICIAL SALE.

Examination of a wife on supplementary proceedings against her husband, with respect to property in her possession, is not an examination "for or against her husband," within the meaning of 2 Hill's (Wash.) Code Proc. § 1649, requiring the husband's consent to her examination for or against him. *Frankenthal v. Solomonson* (Wash.) 311

EXECUTORS AND ADMINISTRATORS.

A special title acquired by an assignee of a mortgage for the purpose of foreclosure only will not vest in or devolve upon his administrator upon his death. *Taylor v. Carroll* (Md.) 479

NOTES AND BRIEFS.

Executors and administrators; estoppel to dispute sale by. 370

EXEMPTION.

See HOMESTEAD; LEVY AND SEIZURE, NOTES AND BRIEFS; TAXES, 4.

EXPLOSIONS.

See also CORPORATIONS, 10; EVIDENCE, 25, 31; PROXIMATE CAUSE, 2; TRESPASS.

An explosion of giant powder kept by a corporation within the city limits, in violation of law, renders the corporation liable for the damages thereby caused. *Cameron v. Kenyon-Connell Commercial Co.* (Mont.) 508

EXPLOSIVES.

A city ordinance cannot authorize a larger quantity of explosive powder to be kept within the city limits than the state statute allows. *Cameron v. Kenyon-Connell Commercial Co.* (Mont.) 508

EXTRAORDINARY SESSION.

See LEGISLATURE, 3.

FALSE IMPRISONMENT.

See also CARRIERS, 6; MUNICIPAL CORPORATIONS, 4, NOTES AND BRIEFS.

1. A private individual who has procured the arrest of an innocent person by an officer without a warrant cannot justify by showing that he acted in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds. *Palmer v. Maine C. R. Co.* (Me.) 673

2. The settlement of an unwarranted prosecution of a passenger for alleged fraudulent evasion of the payment of fare, made by payment of the fare due and all costs of prosecution, and by an acknowledgment of the conductor of complete satisfaction "for evading his railroad fare," is not a bar or waiver of a cause of action by the passenger for false imprisonment. *Id.*

FALSE PERSONATION.

NOTES AND BRIEFS.

False personation; what constitutes; person as false token. 266

FALSE PRETENSES.

A person cannot be himself a false token so as to be indictable for obtaining money by means of a false token and false pretenses, when he procures money from a woman by a promise of marriage, and by offering himself to her under a fictitious name, and by falsely stating that he is unmarried. *State v. Renick* (Or.) 226
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FELLOW SERVANT.

See MASTER AND SERVANT, 6.

FERRIES.

See also MUNICIPAL CORPORATIONS, 5.

NOTES AND BRIEFS.

Ferry; municipal liability for. 478

FICTION.

See SEDUCTION.

FIDELITY INSURANCE.

See INSURANCE, 2.

FINDING.

See APPEAL AND ERROR, 7, 8, 22, 23, 30.

FIRE.

See EVIDENCE, 5; GAS, 1; LIFE TENANTS.

FIRE INSURANCE.

See INSURANCE.

FIXTURES.

Stock mantels sold separately and made adaptive to any kind of a house, and which support themselves without any fastenings, or may be fastened merely by screws to render them more stable, and bath tubs resting upon legs and attachable to any heating system, and a hot-water heater attached to a building only by its plumbing connections,—do not constitute fixtures as matter of law, but may be found by a jury to be removable. *Philadelphia Mortg. & T. Co. v. Miller* (Wash.) 559

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Fixtures; fastened to building. 559

FORECLOSURE.

See LIS PENDENS; MORTGAGE.

FOREIGN CORPORATIONS.

See COURTS, 1-3; INJUNCTION, 5; RECEIVERS, 1; WRIT AND PROCESS.

FOREIGN JUDGMENT.

See JUDGMENT, 3.

FORFEITURE.

See ARBITRATION, 1; INSURANCE, 12.

FORGERY.

See BANKS, 5-7.

FORMER JEOPARDY.

See CRIMINAL LAW.

FRAUD.

See EVIDENCE.

GARNISHMENT.

See also CREDITORS' BILL; WRIT AND PROCESS, 3.

1. A judgment against a garnishee of a nonresident debtor, who does not appear and is served by constructive service only, when the action is based on a contract which is ut-

terly void in the state where the principal debtor resides, will not protect the garnishee when sued by the latter. *Stewart v. Northern Assur. Co. (W. Va.)* 101

2. A demand against a foreign insurance company has no situs for the purpose of garnishment in a state where it has an agency, when the demand is due to a nonresident for a loss of property insured in another state in which the loss is payable. *National Bank v. Furtick (Del.)* 115

NOTES AND BRIEFS.

Garnishment; situs of debt; of debt to nonresident. 101

Service of writ of. 115

GAS.

See also EVIDENCE, 5, 26; MINES.

1. A gas company which negligently and carelessly permits the pressure of the gas which it furnishes to be unreasonably great is liable for the burning of a dwelling supplied by it, which results therefrom. *Barrickman v. Marion Oil Co. (W. Va.)* 92

2. A person or corporation furnishing natural gas for use in dwellings is bound to exercise care, skill, and diligence proportionate to the danger. *Id.*

NOTES AND BRIEFS.

Gas; negligence in use of. 92

GIANT POWDER.

See CORPORATIONS, 10; EXPLOSIONS.

GIFT.

See also EVIDENCE, 32; TRUSTS, 2.

1. A gift of savings bank deposits is made by delivery of the pass book from the donor to the donee, describing them as joint owners, and making the money payable to the order of either, or the survivor when it was done with the intention of donating the fund, and preserving no control over it. *Whalen v. Milholland (Md.)* 208

2. No perfected gift is made of a savings bank deposit by depositing it in the names of donor and donee, making it payable to the order of either or to the survivor, and by the words "Joint owners" stamped on the pass book, where the donor continues in possession of the pass book, and therefore retains dominion over the funds, with the right at any moment to withdraw the whole of it. *Id.*

NOTES AND BRIEFS.

Gift; of bank deposit. 208

Revocation of. 385

GOVERNOR.

See LEGISLATURE, 3.

GRIPMAN.

See STREET RAILWAYS.

GUARANTY.

See BUILDING AND LOAN ASSOCIATIONS, 2.

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HABEAS CORPUS.

NOTES AND BRIEFS.

To release apprentice. 277

HIGHWAYS.

See also BONDS, 1, 2; INJUNCTION, 4; PUBLIC IMPROVEMENTS.

1. One contracting with a city for the right to maintain a well in a public street is bound to take notice that the city has no power to bind itself by such a contract, and may revoke it at any time. *Snyder v. Mt. Pulaski (Ill.)* 407

2. Permission to use a well in a city street, given as part of an electric-light franchise, is a mere license revocable at the pleasure of the municipality, although the licensees has made expenditures on the faith of it, and would not have accepted the franchise without such permission. *Id.*

3. The duty of a city to keep a sidewalk in suitable condition to walk over extends to a person rightfully riding on the walk in a tricycle; and the test of the city's liability to him is the same as if he had been walking. *Wheeler v. Boone (Iowa)* 821

4. A tricycle in which a person unable to walk is traveling on a sidewalk is not within the scope of an ordinance against leading, riding, or placing "any beast of burden or vehicle on any sidewalk," or an ordinance prohibiting riding or driving other than between curb lines of the street. *Id.*

5. Placing telephone lines in a city street without any permit or direction from the city authorities, and without even giving the board of public works, to which the city charter gave authority in the matter, any time to act on an application for a permit, is not justified by the fact that there were no ordinances of the common council or regulations of the board of public works in relation to pole setting. *Marshfield v. Wisconsin Teleph. Co. (Wis.)* 565

NOTES AND BRIEFS.

Highways; maintaining wells in. 408

Use of sidewalks; riding vehicles on. 821

HOMESTEAD.

See also EVIDENCE, 20.

1. The loss of the family after acquiring a homestead will not terminate the homestead right. *Gowdy v. Johnson (Ky.)* 400

2. An increase in the value of a homestead will not authorize a revaluation and reassignment,—at least when there has been no rapid or extraordinary increase of value, or any unreasonable outlay on the premises. *Id.*

3. A mistake of mere judgment with respect to the value of the lands set apart for a homestead will not be ground of impeaching the determination by which the homestead was set aside. *Id.*

NOTES AND BRIEFS.

Homestead; revaluation or reassignment of homestead for appreciation or depreciation

of value:—(I.) When the question arises; (II.) change from fluctuation in prices; (III.) change from improvements and additions; (IV.) homestead in decedent's estate. 400

HONESTY.

See EVIDENCE, 3.

HORSE.

See LIENS, 2.

HOSPITAL.

See also MUNICIPAL CORPORATIONS, 3.

1. A surety on the bond of a pest house keeper is not, by executing the bond, rendered liable for the maintenance of the pest house within forbidden limits. *Clayton v. Henderson* (Ky.) 474

2. Ministerial officers only are liable for the erection of a pest house within a mile of a city in violation of Ky. Stat. § 3909. *Id.*

3. The restriction against locating a pest house within a mile of a city, made by Ky. Stat. § 3909, is not repealed by the act of June 14, 1893, providing that the common council of a city of the third class shall have power to make quarantine laws and enforce them within ten miles of the city, to establish hospitals, and other institutions, and acquire and hold land for such purposes within or beyond the boundaries of the city. *Id.*

HOUSE OF ILL FAME.

See DISORDERLY HOUSES.

HUSBAND AND WIFE.

See also ABANDONMENT; ACTION OR SUIT, 4; APPEAL AND ERROR, 24; EXECUTION; FALSE PRETENSES; RAPE, 1.

The permanent alimony granted to a woman on divorce need not be limited to an allowance payable at stated periods sufficient for her support, but the allowance of a gross sum out of the husband's estate in addition to a monthly allowance is within the power of the court, under Wis. Rev. Stat. § 2304, authorizing such alimony as the court shall deem just and reasonable, regarding the husband's ability to pay, the special estate of the wife, and all the circumstances of the case. *Hooper v. Hooper* (Wis.) 725

NOTES AND BRIEFS.

Amount of alimony allowable. 725

INCOMPETENT PERSONS.

See CONSPIRACY; TRUSTS, 3.

INDEPENDENT CONTRACTOR.

See LATERAL SUPPORT.

INFANTS.

See also APPRENTICES; TRIAL, 8.

1. The real welfare of a child is the principal consideration in awarding its custody as between conflicting claims thereto. *Anderson v. Young* (S. C.) 277

2. The custody of a minor by virtue of a fair agreement with the parent, not prejudicial to the welfare of the minor, although 44 L. R. A.

not binding upon him, is not unlawful or against public policy, so as to constitute such an illegal restraint as a court must relieve at the will or caprice of the parent. *Id.*

3. The restoration to their parents of infants committed to a charitable institution by a court or magistrate of competent jurisdiction, under N. Y. Pen. Code, § 291, is within the general jurisdiction of the supreme court of New York as a court of chancery, and is also within the power conferred on the court by N. Y. Laws 1884, chap. 438, providing for the return of pauper children to the custody of their parents, when the interests of the children shall be promoted thereby, and the parents are fit, competent, and able to give them proper support and education. *Re Knowack* (N. Y.) 690

NOTES AND BRIEFS.

See also DEEDS.

Infant; power of attorney of. 168

Power of courts as to custody of. 699

INHABITANT.

See VOTERS AND ELECTIONS, 2.

INJUNCTION.

1. Equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of a private person who suffers therefrom a special and peculiar injury distinct from that suffered by him in common with the public at large. *Blagen v. Smith* (Or.) 522

2. The rule that an injunction will not be granted against the continuance of a nuisance in a locality mainly occupied for business does not apply where the nuisance is *malum in se*, such as a house of ill fame. *Id.*

3. Owners of property so near to a house of ill fame that their enjoyment of their property is affected by disgusting scenes and sounds in such house sustain an injury different in kind from that suffered by the public at large, which entitles them to an injunction against the maintenance of the nuisance. *Id.*

4. An injunction is properly granted in a suit by a city against an unauthorized obstruction of a street by telephone poles. *Marshfield v. Wisconsin Teleph. Co.* (Wis.) 565

5. An injunction cannot be granted against illegal assessments upon members by a foreign insurance association, although they are alleged to be unnecessary and made with the dishonest and fraudulent purpose of forcing members to lapse, as this would involve an inquiry into the internal management of the association. *Condon v. Mutual Reserve Fund L. Asso.* (Md.) 149

6. A decree for the continuous operation of a leased railroad as it was then operated is not objectionable as disregarding the exigencies that may arise, when the existing train service is such as the lessee has for several years deemed proper and necessary. *Southern R. Co. v. Franklin & P. R. Co.* (Va.) 297

7. Equity may compel the continued operation of a leased railroad during the term of the lease by a mandatory injunction, which is in fact a decree of specific performance, as the remedy at law would be neither complete nor adequate. Id.

NOTES AND BRIEFS.

Injunction, mandatory rule as to granting. 298

Against bawdy house. 523

By municipalities against nuisances by railroads and electrical companies:—(I.) Railroads; (II.) telegraph and telephone poles. 565

Against use of name. 842

INNKEEPER.

See LIENS, 1.

INNOCENCE.

See EVIDENCE, 3.

INSOLVENCY.

See also BANKS, 15, 16; CORPORATIONS, 15; PRINCIPAL AND SURETY.

A conveyance of property of a corporation in trust to be sold and the proceeds applied to the payment of indebtedness, also authorizing the trustee to collect accounts and use the proceeds in payment of debts, but providing that any surplus shall be returned to the corporation or its assigns, is an assignment for the benefit of creditors, and not a mere mortgage. *Conely v. Collins* (Mich.) 844

NOTES AND BRIEFS.

Insolvency; assignability of cause of action for personal injuries in case of. 177

Proof of secured claims for dividends. 450

What constitutes assignment for creditors; power to make assignment. 846

INSURANCE.

See also ACTION OR SUIT, 7; CONTRACTS, 4; COURTS, 3; GARNISHMENT, 2; POLICE.

1. Insurance of a kind not known at the time of its passage is within a provision of a statute excepting insurance from the kinds of business for the transaction of which corporations may be formed under it, although provision is made in another statute for corporations to transact all kinds of insurance then known. *People, Kasson, v. Rose* (Ill.) 124

Fidelity insurance.

2. Guaranteeing the fidelity of officers and the performance of contracts is insurance within the meaning of a statute excepting the business of insurance from those for which corporations may be formed. Id.

Of common carriers.

3. A contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers carried by it is not invalid as against public policy because it covers losses resulting from its negligence or the negligence of its servants. *Trenton* 44 L. R. A.

Pass. R. Co. v. Guarantor's Liability Indemnity Co. (N. J. Sup.) 213

Of employers.

4. Recovery against an employer for the death of an employee precludes any right of the latter's representatives to recover on an insurance policy taken out by the employer, which includes a clause insuring against death or injury of employees or other persons, and providing for payment therefor to the employer "for the benefit of the injured person or persons, or their legal representatives in case of death." *Embler v. Hartford Steam Boiler Insp. & Ins. Co.* (N. Y.) 512

5. Insurance of an employer against loss of life or injury to person either of his employees or other persons, caused by a peril insured against, making the insurance payable to him for the benefit of the injured person or persons, or their legal representatives in case of death, and not contingent upon his legal liability, does not create any right of action in favor of an employee or his legal representatives,—especially in case of one who was not employed when the insurance was taken. [*Per Gray, J.*] Id.

6. A father who sues for injuries sustained by his minor son in a mill in which the latter was employed is not entitled to recover from the employer insurance money which may be ultimately received by the latter under an accident policy in which he is the beneficiary, although the premiums were paid with sums exacted monthly from the wages of the employee. *James v. Rapides Lumber Co.* (La.) 33

Mutual companies.

7. The contract between a mutual insurance association and a member cannot be construed when the application, constitution, and by-laws, which form part of the contract, are not before the court. *Condon v. Mutual Reserve Fund L. Asso.* (Md.) 149

8. Assessments paid for a series of years to a mutual insurance association by a member cannot be recovered back simply because he failed to read or to understand the provisions of his contract. Id.

Insurable interest.

9. The insurable interest of a creditor in the life of his debtor is limited to the amount of the indebtedness, although that may include the cost of taking out and keeping up the insurance, if made a charge against the debtor or his estate, or upon the proceeds of the policy when collected. *Exchange Bank v. Loh* (Ga.) 372

Assignment.

10. One having no insurable interest in the life of another may acquire by assignment a valid policy upon his life, and enforce it to the full amount. *Steinback v. Diepenbrock* (N. Y.) 417

11. A life insurance policy taken out by one upon his own life for the purpose of assigning it to another having no insurable interest will be invalid. Id.

Murder of insured.

12. The murder of a person whose life is

insured, by an assignee of the policy, whose claim to it is valid only for a reimbursement of premiums paid, forfeits only the assignee's part of the insurance, and not the residue thereof, to which the estate of the insured is entitled. *New York L. Ins. Co. v. Davis (Va.)* 305

Amount.

13. The cost to the purchaser in possession, and not to the seller who attempted to retain a secret lien for the purchase money, is the value of property which must be paid by an insurer under a policy stating that the loss is payable to vendor and vendee as their interests may appear, it being understood that the title is in the vendor, where the property has been turned over to the purchaser absolutely for a sum evidenced by cash and notes, which has mostly been paid so that the seller asserts no claim under its lien. *Post Printing & Pub. Co. v. Insurance Co. of N. A. (Pa.)* 272

Proofs of loss; waiver.

14. A beneficiary in a life insurance policy is not estopped by statements in the proofs of loss as to the cause of death, which were made in good faith, upon information received from the attending physician, from showing that the death resulted from another cause. *John Hancock Mut. L. Ins. Co. v. Dick (Mich.)* 846

15. The waiver of proofs of loss, effected by the insurer's demand for arbitration, is not affected by the failure of the arbitrators to agree, without fault of the assured, so that such proofs can be subsequently demanded. *Pretzfelder v. Merchants Ins. Co. (N. C.)* 424

Interest in life insurance.

16. Children to whom a policy of insurance on their father's life is payable, if their mother be not living at his death, have a vested, though contingent, interest, and on the death of one of them before the mother's death his interest will descend to his widow and children. *Voss v. Connecticut Mut. L. Ins. Co. (Mich.)* 689

17. An insurance policy issued without change, except as to amount, from one which was surrendered merely for reduction, is to be construed, with reference to the interest of a beneficiary, who has died before the surrender, as of the date of the original contract. *Id.*

18. Courts should not concern themselves with the disposition of the proceeds of wagering policies. *Exchange Bank v. Loh (Ga.)* 372

19. A promise by a wife to her husband, that she will pay his debts, does not create a trust in a benefit certificate on his life of which she is the beneficiary. *Fisher v. Donovan (Neb.)* 383

20. A member of a fraternal beneficiary society has no interest or property in the proceeds of a certificate payable to his widow or other dependent persons, that he can impress such proceeds with a trust in favor of his creditors. *Id.*
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Interest in fire insurance.

21. A life tenant receiving insurance for the loss of a building by fire must hold any excess of the amount received over the value of his life interest as a trustee for the remainderman, unless the money is used to rebuild. *Sampson v. Bagley (R. I.)* 711

NOTES AND BRIEFS.

Insurance; what constitutes.	125
On life; murder of insured.	305
On life; nature of; insurable interest of creditor.	372
On life; trust in; parol trust, change of beneficiary.	384
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Against liability to employees; right of action on.	513
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Effect of change of title.	861

Conclusiveness of proofs of loss as against insured or his beneficiaries:—(I.) General rule; (II.) in life insurance: (a) in general; (b) misstatements as to dates, etc.; (c) as to condition of mind of insured; (d) as to cause of death: (1) in general; (2) coroner's inquests, suicide; (3) doctor's certificates, etc.; (III.) in fire insurance: (a) in general; (b) misstatements as to cause of fire; (c) amount of loss; (d) misstatements as to occupancy and use of premises; (e) misstatements as to ownership, etc.; (f) discrepancy as to building; (g) other insurance; (h) magistrate's certificate. 846

Condition as to furnishing proofs of loss; waiver of proofs by demands for appraisal. 425

INTOXICATING LIQUOR.

The determination as to the issuance of a license by a judge of the circuit court under Md. act 1894, chap. 6, § 7, upon an application by the clerk, when an objection has been filed, is required to be made upon notice to the applicant and objector and after hearing the evidence, and is, therefore, judicial in its nature, and not the exercise of a purely executive or administrative function which cannot be imposed upon the court. *McCrea v. Roberts (Md.)* 485

JAILS.

See MUNICIPAL CORPORATIONS, 4.

JEOPARDY.

See CRIMINAL LAW.

JOINDER.

See ACTION OR SUIT, 6.

JUDGES.

See COURTS.

JUDGMENT.

See also CONTRACTS, 12; EVIDENCE, 2; GARNISHMENT, 1.

1. Entering separate judgments in favor of principal and sureties who separately an-

swered, and in whose favor separate verdicts were rendered, is not improper, when it does not injure the plaintiff. *Western Twine Co. v. Wright* (S. D.) 438

2. A decree *pro confesso* entered on default of defendant to a bill in chancery concludes him only as to the averments of the bill, and not as to the sufficiency of the bill itself, or the averments contained in it to justify the decree. *North Chicago Street R. Co. v. Ackley* (Ill.) 177

3. A judgment by confession entered in another state in conformity to the terms of a warrant of attorney executed in that state, by a person who was at the time a resident thereof, must be given full faith and credit as a judgment rendered by consent, although it was rendered without any personal service on the defendant. *Van Norman v. Gordon* (Mass.) 840

NOTES AND BRIEFS.

Judgment; of courts of other states; effect of. 101

Power of attorney to satisfy. 168

Rendered without jurisdiction on merely substituted service. 802

JUDICIAL SALE.

A judgment creditor who, in good faith, buys land at a proper execution sale, on his own valid judgment, does not take the land subject to prior secret equities. *Pugh v. Highley* (Ind.) 302

NOTES AND BRIEFS.

Judicial sale; bona fide purchase at. 392

JURISDICTION.

See COURTS; GARNISHMENT; WILLS.

JURY.

Questions for, see TRIAL.

See also STATUTES, 4, 5.

LANDLORD AND TENANT.

1. The lease of a building which has a door opening at considerable height into space, and unprovided with bars and guards, does not render the landlord liable to a person who is injured in consequence of the failure of the lessee or other person during the lease to keep the door properly fastened. *Texas Loan Agency v. Fleming* (Tex.) 279

2. A lessor who removes the platform from a well in order to put it in proper condition as required by his lease, and leaves the well open and unguarded at a distance of about 3 feet from the kitchen door near a path that leads to a privy, is liable to a guest of the lessee who falls into the well in the night while attempting to go to the privy without knowing that the platform has been taken off from the well. *Barman v. Spencer* (Ind.) 815

3. The collection of rents from a subtenant does not operate by law as a cancellation of the original lease and an assumption of 44 L. R. A.

the possession of the property by the lessor. *Texas Loan Agency v. Fleming* (Tex.) 279

4. The retention of one room in a leased building for fifteen days after the expiration of the lease, because it is occupied by a member of the tenant's family, who is too ill to be safely moved, is not such a holding over, where prior notice of intention to surrender the premises has been given, and the usual notice to let has been placed on the building by the landlord, as will create an implied contract or duty imposed by law on the tenant to pay rent for the remainder of a new term after the premises are completely surrendered. *Herter v. Mullen* (N. Y.) 703

NOTES AND BRIEFS.

Landlord's liability to third persons injured on premises. 280

Unavoidable holding over by tenant. 703

LATERAL SUPPORT.

The employment of an independent contractor to make an excavation upon a lot in near proximity to a neighbor's house, in a populous city, and to the depth of several feet below the level of the foundation of that house, does not relieve the proprietor from the obligation either to see that the contractor in doing the work protects the neighbor's wall by the exercise of due care, or to give the neighbor timely notice of the nature and extent of the intended excavation that he may take due precautions for the protection of his own wall. *Bonaparte v. Wiseman* (Md.) 482

NOTES AND BRIEFS.

Lateral support; right to. 482

LAW.

See EVIDENCE, 1.

LAW OF PLACE.

See CONFLICT OF LAWS.

LAW OF THE CASE.

See APPEAL AND ERROR, 32.

LEASE.

See LANDLORD AND TENANT; MINES; RAILROADS, 1-3, NOTES AND BRIEFS.

LEGISLATURE.

1. The legislature may fix the commencement of the term of office of its members, when the Constitution fixes the term, but does not expressly provide when the term shall begin. *Farrelly v. Cole* (Kan.) 464

2. The apportionment of a state into representative districts, repealing all prior acts in conflict with the new law, does not terminate the existence of the legislature which passes the act, or shorten the term of office of its members. 1d.

3. The question of the existence of an extraordinary occasion of sufficient gravity to justify a call for an extra session of the legislature is to be determined by the gov-

error alone in the exercise of his discretion as a sworn officer, which is not subject to challenge or review by the courts. Id.

NOTES AND BRIEFS.

Legislature; special session of; changing terms of members of. 466

LETTER.

See EVIDENCE, 11.

LEVY AND SEIZURE.

A nonresident may claim an exemption of household furniture from attachment under Hill's (Or.) Ann. Laws, § 282, subd. 4, providing that household furniture to a specified value shall be exempt from execution if owned by a householder and in actual use or kept for use by and for his family, or when being removed from one habitation to another on a change of residence. Bond v. Martin (Or.) 430

NOTES AND BRIEFS.

Levy; right of nonresidents to claim exemptions. 430

LICENSE.

See also CONSTITUTIONAL LAW, 2, 3; HIGHWAYS, 2; INTOXICATING LIQUORS.

NOTES AND BRIEFS.

License; by ordinance; revocability. 409

LIENS.

1. The lien of an innkeeper or keeper of live stock is not lost by his levying an attachment upon the property. Lambert v. Nicklas (W. Va.) 561

2. One who keeps a horse or other live stock for compensation has a lien thereon for such compensation, under W. Va. Code 1891, chap. 100, § 15. Id.

NOTES AND BRIEFS.

Lien; of bailee of animal; waiver of. 561

LIFE INSURANCE.

See INSURANCE.

LIFE TENANTS.

See also INSURANCE, 21.

1. The mere acceptance by a life tenant of a devise of real estate, containing a direction to keep in repair, does not impose upon him the duty to rebuild in case of the accidental destruction of buildings by fire. Sampson v. Bagley (R. I.) 711

2. The liability of a tenant for life for loss by an accidental fire, as established by the English statute of 6 Edw. I., chap. 5, known as the statute of Gloucester, does not exist in Rhode Island, as that statute, though in force except as modified, is practically superseded by the Rhode Island statutes. Id.

NOTES AND BRIEFS.

Life tenants; liability to repair or rebuild. 711

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LIGHTS.

See MUNICIPAL CORPORATIONS, 2.

LIMITATION OF ACTIONS.

A statute will be construed as a limitation law if it can be upheld by such construction while a literal construction of it would destroy vested rights. People, Deenen, v. Simon (Ill.) 801

LIS PENDENS.

More than twenty years' delay in proceeding with a foreclosure after it has been begun will relieve a purchaser of the property from the effect of the *lis pendens* as notice, if there is no satisfactory excuse or explanation of the delay. Taylor v. Carroll (Md.) 479

NOTES AND BRIEFS.

Lis pendens; effect of. 480

LIVE STOCK.

See CARRIERS, 12-17.

LYNCHING.

See COUNTIES, 2; MOB, NOTES AND BRIEFS.

MALICIOUS PROSECUTION.

See TRIAL, 11.

MANDAMUS.

See also PLEADING, 3.

1. A writ of mandamus does not lie to control judicial discretion. McCrea v. Roberts (Md.) 485

2. A writ of mandate cannot be issued to compel the board of dental examiners to indorse a diploma on the ground that it was issued by a reputable dental college, when the board has decided to the contrary, under Cal. Stat. 1885, p. 110, § 5, requiring the board to indorse such diploma "when satisfied of the character of such institution." Van Vleck v. Board of Dental Examiners (Cal.) 635

3. The operation of a line of street railway which has been abandoned cannot be specially enjoined as a legal duty by writ of mandate, where the right of the corporation to use the streets was given by ordinance granting it the franchise and easement of maintaining its railway in the street, subject to forfeiture for failure to operate it, and there is no express provision requiring the maintenance or operation of the line. State, Knight, v. Helena Power & L. Co. (Mont.) 692

NOTES AND BRIEFS.

Mandamus; to compel action by officers. 493

To compel operation of street railway. 692

MARK.

See EVIDENCE, 33, NOTES AND BRIEFS.

MARRIAGE.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See also ASSAULT; CONFLICT OF LAWS; CONTRACTS, 10; LATERAL SUPPORT.

1. The release of the liability of a railroad company by an employee's election to accept the benefits of a relief fund in lieu of his right of action for damages, is not prohibited by S. C. Const. 1895, art. 9, § 15, giving such employees the same rights and remedies allowed to persons who are not employees in certain cases, and providing that any waiver of the benefit of that section shall be null and void. *Johnson v. Charleston & S. R. Co.* (S. C.) 645

2. A servant is held to the same degree of care in the performance of whatever is intrusted to him by the master to do that the law would hold the master to were he acting for himself. *Cameron v. Kenyon-Connell Commercial Co.* (Mont.) 508

3. An employee who is suddenly called on by the foreman in a mill to take the place of an absent workman, in a position that is dangerous, of the duties of which he has no knowledge and concerning which he is not instructed, may recover for an injury sustained by him and due to his inexperience. *James v. Rapides Lumber Co.* (La.) 33

4. The violation of an ordinance regulating speed and signals of trains is not a risk assumed by a railroad employee, but obedience to the ordinance is a duty owing by the railroad company to its employees. *Pittsburg, C. C. & St. L. R. Co. v. Moore* (Ind.) 638

5. Continuing negligence of an employer, such as the failure to furnish safe appliances in general use, which would have prevented the possibility of injury, precludes the defense of contributory negligence. *Troxler v. Southern R. Co.* (N. C.) 313

6. Failure to furnish proper and safe appliances, whereby a servant is injured, cannot be attributed to the negligence of a fellow servant. *Id.*

7. Failure to furnish automatic car couplers in common use for freight cars is negligence *per se*, which renders a railroad company liable to an employee for injuries received in attempting to couple cars having skeleton drawheads of unequal height. *Id.*

8. The master is liable for injury done by the wanton, wilful, and malicious act of an employee within the scope and in the discharge of his duties. *Pierce v. North Carolina R. Co.* 316

9. The tortious act of a brakeman in throwing coal at a boy on the tender of an engine, by which he knocks him off or frightens him so that he jumps off, causing him to be run over and killed by the engine, renders the railroad company liable. *Id.*

NOTES AND BRIEFS.

The duty of a master to instruct and warn his servants as to the perils of the employment:—(I.) Introductory; (II.) actual knowledge of servant, existence of duty to instruct negatived by; (III.) constructive

knowledge of servant as bearing upon the duty of the master to instruct him: (a) generally; (b) ordinary perils of an employment, no duty to instruct as to; (c) extraordinary risks of employment; (d) fact that danger was or was not discoverable by ordinary care; (IV.) experience of servant as a special factor bearing upon the master's duty of instruction: (a) generally; (b) circumstances under which no instruction is necessary; (c) circumstances under which instruction is necessary; (V.) minority of servant as a special factor bearing upon the master's duty of instruction: (a) general principles stated; (b) minor employees usually on the same footing as adults, after proper instruction has been given; (c) constructive knowledge of dangers, when a bar to an action by minor servants; (d) circumstances to be considered in determining whether knowledge of a danger is to be imputed to a minor; (e) illustrative cases in regard to the constructive knowledge of minor servants; (VI.) what knowledge of scientific facts is imputed to servants (adults and minors): (a) in case of adults; (b) in case of minors; (VII.) duty to warn servant against transitory and sporadic dangers: (a) introductory; (b) cases involving customary methods of doing business and departure from such methods; (c) perils due to transitory changes in the condition of the place of work; (d) perils due to the recurrent movements of railway cars and other heavy bodies; (VIII.) what instruction and warning will be sufficient: (a) in the case of adults; (b) in the case of infants; (c) as to sporadic and transitory dangers; (IX.) no recovery by servant unless failure to instruct was efficient cause of injury; (X.) duty of instruction considered with reference to the doctrine of common employment. 33

Contracts to limit master's liability.

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Duty of master as to safe appliances. 313

Liability for wanton and malicious act of employee. 316

Liability for act of independent contractor. 482

MAXIMS.

1. *Expressio unius est exclusio alterius.* *Blagen v. Smith* (Or.) 522

2. *Noscitur a sociis.* *Chesapeake & O. R. Co. v. American Exch. Bank* (Va.) 449
Brown v. Chicago & N. W. R. Co. (Wis.) 579

MEANDER LINE.

See BOUNDARIES.

MEMORANDUM.

See CONTRACTS, 5.

MINES.

1. A lease for the purpose of operating for oil and gas, without other consideration than prospective oil royalty and gas rental, is voidable, if not void, at the pleasure of

either party, where it does not bind the lessee to diligent search for oil and gas. *Steel-smith v. Gartlan* (W. Va.) 107

2. A lease for the purpose of operating for oil and gas for five years and as much longer as oil or gas is found in paying quantities, without other consideration than prospective oil royalty and gas rental, vests no present title in the lessee except the mere right of exploration, but the title remains inchoate and contingent on the finding under explorations provided for in such lease of oil and gas in paying quantities, and the completion of a nonproductive well, even though at great expense, vests no title in such lessee. Id.

3. A lease for the purpose of operating for oil and gas for five years and as much longer as oil or gas is found in paying quantities, without other consideration than prospective oil royalty and gas rental, becomes invalid and of no binding force as to any of its provisions, after an unsuccessful attempt to bore a well is abandoned, where there is no provision contained therein for the boring of a second well if the first well proves nonproductive. Id.

NOTES AND BRIEFS.

Mines; oil lease; effect of; forfeiture of. 107

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MONOPOLY.

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MORTGAGE.

See also EXECUTORS AND ADMINISTRATORS; LIS PENDENS; NOTICE, 2.

1. The English doctrine of an equitable mortgage by a deposit of title deeds does not obtain in Nebraska, since it contravenes the object and purpose of the statute of frauds and also the recording acts. *Bloomfield State Bank v. Miller* (Neb.) 387

2. A court of equity cannot enforce a mortgage by deposit of title deeds because the loan which the deposit was made to secure has been actually received by the depositor. Id.

3. The right of possession of property sold under foreclosure of a mortgage, during the year allowed by statute for redemption, is in the purchaser, where the mortgage transfers the title, leaving only an equity of redemption in the mortgagor, and the statute is silent as to the right of possession after sale. *Danehower v. Dawson* (Ark.) 193

4. The right of redemption from a sale under foreclosure of a mortgage is given by the Arkansas statute in every case, and is not limited to sales at a second offering re-

quired by the statute because a bid of two thirds the appraised value of the property is not received at the first offering. Id.

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MOTION.

See APPEAL AND ERROR, 4; PARLIAMENTARY LAW.

MOTIVE.

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MUNICIPAL CORPORATIONS.

See also ACTION OR SUIT, 6; APPEAL AND ERROR, 18; BONDS, 1, 2; CONSTITUTIONAL LAW, 2, 6; CREDITORS' BILL; DISORDERLY HOUSES, 2; ESTOPPEL; EXPLOSIVES; HIGHWAYS, 1; PARLIAMENTARY LAW; PUBLIC IMPROVEMENTS; WATERS.

1. The offer of a reward for testimony that shall secure the conviction of persons who set fire to buildings within city limits is within the general power to make regulations for the safety and general welfare of the inhabitants. *People, Maynard, v. Holly* (Mich.) 677

2. Water and lights are not in themselves such necessary expenses of a town, within the meaning of N. C. Const. art. 7, § 7, that an unusual levy of tax may be made or a debt incurred without proper legislative authority and the approval of the popular vote. *Thrifty v. Elizabeth City* (N. C.) 427

3. A city is liable for the damages caused by the erection of a pest house near the residence of a person, notwithstanding the fact that it is erected within a mile of the city, contrary to a statute which expressly makes the officers liable therefor, without declaring the city liable. *Clayton v. Henderson* (Ky.) 474

4. A municipal corporation is not liable, in an action for false imprisonment, for damages occasioned by imprisonment for violation of an ordinance under a judgment of a municipal court, although it may have been irregular, erroneous, or even void. *Bartlett v. Columbus* (Ga.) 795

5. A municipal corporation is not liable in damages for the negligent operation of a ferry operated and controlled by the common council in the name of the city, without any lawful authority. *Hoggard v. Monroe* (La.) 477

NOTES AND BRIEFS.

See also PUBLIC IMPROVEMENTS.

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Right to offer reward. 677

Liability of municipal corporations for false imprisonment and unlawful arrest:—
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spondeat superior; (IV.) liability as affected by ratification; (V.) reasons for the rule; (VI.) English and Canadian decisions. 795

Liability for acts of agents; for running of ferry. 478

MURDER.

See INSURANCE, 12.

MUTUAL INSURANCE COMPANIES.

See COURTS, 31; INSURANCE, 7, 8.

NAME.

See also CORPORATIONS, 2.

A man who, as agent for a corporation using his name, has negotiated a sale of the property, business, and goodwill of the company, is estopped from asserting that the name is not rightfully used by the purchaser. *Lamb Knit-Goods Co. v. Lamb Glove & M. Co. (Mich.)* 841

NATURAL GAS.

See GAS.

NEGLIGENCE.

See also ASSAULT; CARRIERS; EVIDENCE, 8, 9; GAS; LANDLORD AND TENANT, 1, 2; MASTER AND SERVANT, 5; PROXIMATE CAUSE; TRIAL, 4-8.

1. Dangerous machinery on private grounds, when attractive to children and unprotected from their visits, which the owner knows to be frequent, renders him liable in damages to the next of kin of a boy fourteen years old who was caught and killed by such machinery. *Biggs v. Consolidated Bar-Wire Co. (Kan.)* 655

2. A guest at a private residence is not guilty of negligence in attempting to go from the house to the privy after dark, without inquiring as to the safety of the way or requesting a light, where at the time of a previous visit the way was safe, and no knowledge on her part of a change in condition exists. *Barman v. Spencer (Ind.)* 815

3. Permitting a shivered pane of glass to remain in a window above a street where pedestrians are frequently passing, when there is an apparent danger of the pieces falling or being shaken out by the wind or otherwise, is such negligence as will create a liability to a person who is struck by a piece of the glass while on a sidewalk below the window. *Detzur v. B. Stroh Brewing Co. (Mich.)* 500

4. The act of a locomotive engineer in throwing steam and water upon a trespasser standing upon the footboard between the engine and a flat car, in order to make him get off, must be deemed to be wilful so that the negligence of the trespasser in placing himself there cannot deprive him of the right to recover for an injury received in attempting to get off. *Galveston, H. & S. A. R. Co. v. Zantzing (Tex.)* 553

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Negligence; continuing; contributory.

As to dangerous premises; contributory. 815

Liability for dangerous premises; injuries to trespassing children. 656

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See CONTEMPT.

NEW TRIAL.

See also APPEAL AND ERROR, 4.

A new trial may be made dependent upon a refusal to remit a portion of the verdict for unliquidated damages. *Detzur v. B. Stroh Brewing Co. (Mich.)* 500

NONFEASANCE.

See CORPORATIONS, 8.

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See LEVY AND SEIZURE.

NOTARIES.

See also BANKS, 14.

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Notaries as independent officers. 133

NOTICE.

See also CARRIERS, 17; REAL PROPERTY, 4.

1. The location of a canal and the open enjoyment of rights and privileges appurtenant thereto constitute notice of such rights to subsequent purchasers of property affected thereby. *Case v. Hoffman (Wis.)* 728

2. Notice to trustees in a deed of trust of the existence of a prior encumbrance is not ineffectual to subordinate the second deed to the first because of the fact that they did not know of the intent to make the later deed to them or of its record at the time it was made. *Merchants' Bank v. Ballou (Va.)* 306

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See CORPORATIONS, 6-8; INJUNCTION, 2.

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See COURTS, 8.

OFFICERS.

See also HOSPITAL, 2; PUBLIC MONETYS; QUO WARRANTO; REWARD, 1; VOTERS AND ELECTIONS, 1; WRIT AND PROCESS, 4.

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OPINIONS.

See EVIDENCE, 16, 17.

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See CONSTITUTIONAL LAW, 2, 3; DISORDERLY HOUSES, 1; HIGHWAYS, 4; MASTER AND SERVANT, 4; WATERS.

PARENT AND CHILD.

See APPRENTICES; INFANTS; SEDUCTION.

PARKS.

See TAXES, 3.

PARLIAMENTARY LAW.

A vote of a city board over which it is the mayor's duty to preside, on a motion which the mayor has declared out of order and declined to put, but which is thereupon put by a member of the board and declared by him to be carried, without the mayor's request or any appeal from the mayor's decision, or any request by him to put the motion, is wholly void, although four of the five members entitled to vote have cast their votes in the affirmative. *State, Southey, v. Lashar* (Conn.) 197

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See CORPORATIONS, 12-14, 17; EVIDENCE, 27.

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See BONDS, 1, 2; PUBLIC IMPROVEMENTS.

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Payment; agent taking something other than money. 505

PENALTY.

See also CARRIERS, 18; COURTS, 5.

A statutory penalty will not be imposed except when the case is brought within the strict letter of the law. *Little Rock & Ft. S. R. Co. v. Oppenheimer* (Ark.) 353

PERPETUITIES.

See WATERS.

PEST HOUSE.

See ACTION OR SUIT, 6; HOSPITAL; MUNICIPAL CORPORATIONS, 3.

PLEADING.

Filing of Petition, see TIME.

See also APPEAL AND ERROR, 26, 27, 29.

1. To avail one's self of the plea that a contract was champertous it must be pleaded. *Croco v. Oregon Short-Line R. Co.* (Utah) 285

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2. A petition in an action against an indorser of a bill of exchange which is annexed thereto need not aver protest of the bill or waiver of protest, where the bill has the words "No protest" indorsed on its face. *Citizens' Bank v. Millett* (Ky.) 664

3. Allegations that a certain institution was a reputable college, and that sufficient evidence of that fact was at the command of a board of examiners to whom a diploma from that college was presented, and that the petitioner furnished evidence satisfactory to the board, are not sufficient to show that the board found those facts so as to make a petition for mandamus good on demurrer. *Van Vleck v. Board of Dental Examiners* (Cal.) 635

4. An averment that a railroad yard and telegraph office were maintained "at" a certain city, in which there was an ordinance in force regulating speed and signals of trains, and that a telegraph operator was killed while passing from his office to deliver an order to a train, in consequence of negligence in running a train in violation of the ordinance, sufficiently shows that the place of injury was within the corporate limits of the city. *Pittsburg, C. C. & St. L. R. Co. v. Moore* (Ind.) 638

5. A petition against a railroad company for failure to rescue a passenger who fell, or was thrown, from a train, is not sufficient, when it does not allege that the train could have been stopped to rescue him without risk of collision with other trains, or that there was any means by which the trainmen could have procured others to rescue him. *Reed v. Louisville & N. R. Co.* (Ky.) 823

6. Plaintiff in an action for personal injuries need not specially plead damages which are the natural and proximate consequences of, or are traceable to, and necessarily result from, the injury; but such damages may be recovered under the general allegation of the complaint, and only the damages which are not the probable and necessary result of the injury are required to be specially pleaded. *Croco v. Oregon Short-Line R. Co.* (Utah) 285

PLEDGE.

See BILLS AND NOTES, 3, NOTES AND BRIEFS; CORPORATIONS, 11.

POISON.

See also DRUGGISTS; PROXIMATE CAUSE, 3.

NOTES AND BRIEFS.

Poisons; liability for negligence as to.

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POLES.

See HIGHWAYS, 5; INJUNCTION, 4.

POLICE.

Death caused by accident is not from natural causes, within the meaning of Cal. act March 4, 1889, § 7, providing an insurance fund for the families of policemen who die from natural causes. *Stevin v. Board of Police Pension Fund Comrs.* (Cal.) 114

POWER.

See WRIT AND PROCESS, 2.

POWER OF ATTORNEY.

See CONTRACTS, 1.

PREFERRED STOCK.

See BUILDING AND LOAN ASSOCIATIONS, 1, 2.

PRESUMPTION.

See EVIDENCE, 1-10.

PRINCIPAL AND AGENT.

See BROKERS; CARRIERS, 10; WRIT AND PROCESS, 1.

PRINCIPAL AND SURETY.

See also HOSPITAL, 1.

A surety who has been obliged to pay the obligation can prove the entire debt against the insolvent estate of his cosurety, and receive dividends upon the entire debt until reimbursed that half of the common burden belonging to the cosurety. *Pace v. Pace* (Va.) 459

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 19.

PROCESS.

See WRIT AND PROCESS.

PRO CONFESSO.

See JUDGMENT, 2.

PROMISSORY NOTES.

See BILLS AND NOTES.

PROSTITUTION.

See CONSTITUTIONAL LAW, 6; DISORDERLY HOUSES.

PROTEST.

See BANKS, 14.

PROXIMATE CAUSE.

See also TRESPASS.

1. An injury which is the natural consequence of negligence, and might have been foreseen and reasonably anticipated as the result, is due to that negligence as the proximate or direct cause, in the absence of intervening negligence. *Barrickman v. Marion Oil Co.* (W. Va.) 92

2. The explosion, and not the act of one in drawing another in front of him to act as a shield when an explosion of dynamite by a third person is impending, is the proximate cause of such other's injuries which are not shown to have been increased by such act. *Laidlaw v. Sage* (N. Y.) 216

3. Negligence in failing to put on a bottle a label marked "Poison" is the proximate cause of the death of an irresponsible child who gets the bottle from a mantel where its mother had left it, not knowing of its dangerous character, and drinks the contents. *Wise v. Morgan* (Tenn.) 548

4. An ordinary wind which blows broken

glass out of a window is not the proximate cause of an injury caused by the fall of the glass, when there was negligence in leaving the window in such condition that the glass was liable to fall out. *Detzur v. B. Stroh Brewing Co.* (Mich.) 500

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Proximate cause; what is; rule of. 217, 548

PUBLICATION.

See CONTEMPT.

PUBLIC IMPROVEMENTS.

See also BONDS, 1, 2; CONSTITUTIONAL LAW, 3; CONTRACTS, 11.

1. When a special assessment is levied for the pavement laid under a contract, containing a guaranty for five years and a provision for repaving, property owners may show that the price nominally charged for paving was really charged in part for the guaranty and the repaving, and thus may keep the assessment within the fair value of the paving itself, beyond which they are not chargeable. *State, Wilson, v. Trenton* (N. J. Err. & App.) 540

2. It is not unlawful for municipal authorities contracting for paving a street, to embody in the same contract provisions binding the contractor to guarantee the durability of the pavement for five years, and to repave at a stated price all openings made in the street during the same time. *Id.*

3. The use of a concrete foundation on which a cedar-block pavement has been laid for a vitrified brick pavement does not make the improvement a case of ordinary repairs, instead of a repavement, under a statute requiring the repairs to be made by the city. *Robertson v. Omaha* (Neb.) 534

4. A paving contract which provides that all repairs which may become necessary within ten years from any imperfection in the work or material shall be at the expense of the contractor is not in violation of Neb. Comp. Stat. 1891, chap. 12a, § 69, which provides that ordinary repairs must be paid for by the city. *Id.*

5. A street-railway company is included in the general procedure provided by the Houston (Tex.) city charter, §§ 23c *et seq.*, for the enforcement of assessments for street paving, although some of the provisions are strictly applicable only to abutting property, since the charter expressly creates a liability of the street-railway company to assessment, and there is no distinct procedure provided for enforcing it. *Storrie v. Houston City Street R. Co.* (Tex.) 716

6. A legislative grant to municipal corporations of the right to improve public highways at the cost of adjacent property supposed to be benefited thereby is not prohibited by Tex. Const. art. 3, § 48, providing that the legislature shall not levy taxes or impose burdens upon the people except to raise revenue sufficient for the economical administration of the government, as that refers to taxes and burdens imposed by the

legislature itself with a view to the administration of the state government. Id.

NOTES AND BRIEFS.

Public improvements; power of city to bind contractor to repair pavement which he makes:—(I.) When the question arises; (II.) agreements including repairs; (III.) agreements constituting mere guaranty; (IV.) single agreements for construction and repair; (V.) separable agreements; (VI.) express statutory authority. 527

Assessments on street railways; necessity of benefits. 717

PUBLIC MONEY.

See also BANKS, 16.

A deposit of public moneys by a treasurer of a board of fire and water commissioners, under direction of the board, in a bank of which he was a partner, is in violation of Mich. Pub. acts 1875, p. 158 (1 How. Ann. Stat. §§ 424, 427), prohibiting an officer to mingle public money with that of himself or any other person, or to receive, directly or indirectly, any pecuniary or valuable consideration as an inducement for the deposit thereof. *Marquette Fire & W. Comrs. v. Wilkinson* (Mich.) 493

NOTES AND BRIEFS.

Public money; deposit of, in bank. 493

PUBLIC PURPOSE.

See TAXES, 3.

QUO WARRANTO.

An information in the nature of a quo warranto against a respondent for exercising the functions of an office to which he has not been duly elected rests in sound judicial discretion and may be denied if the office is of small importance or to continue for a short time only, but not when the office is that of an alderman in a large city and is to continue for nearly two years. *State, Goodell, v. McGeary* (Vt.) 446

RAILROAD RELIEF ASSOCIATION.

See also CONTRACTS, 9, 10; MASTER AND SERVANT, 1.

NOTES AND BRIEFS.

Railroad relief association; validity of contracts of. 639, 645

RAILROADS.

See also BONDS, 3; CARRIERS; INJUNCTION, 6; MASTER AND SERVANT, 7, 9; NEGLIGENCE, 4.

1. A decree requiring the operation of a leased railroad may include a branch road owned by the lessee, which is essential to the operation of the other. *Southern R. Co. v. Franklin & P. R. Co.* (Va.) 297

2. The obligation of the lessee of a railroad to maintain and operate the road during the term of the lease is a necessary implication, where the road was built with the aid of county subscriptions to give railroad 44 L. R. A.

connection to the county seat and with the expectation of making the lease, while the lease provides for equipping the road as may be necessary to its use and enjoyment, and that the receipts shall be applied to the annual expenses of running the road and keeping it in repair, then to reimburse the lessee for the annual rent, etc., although there is no express covenant requiring the operation of the road. Id.

3. The lessor of a railroad is not liable to third persons for injuries resulting from the negligent operation of the line by the lessee, where the lease is general in its terms, giving an exclusive right to operate the road, without reserving any control over it, and is authorized by statute. *Caruthers v. Kansas City, Ft. S. & M. R. Co.* (Kan.) 737

4. A provision of an ordinance of a constitutional convention, that all counties subscribing to stock of railroads shall do so subject to the same rules, regulations, and restrictions set forth in the charter of a particular company; confers no affirmative authority to make such subscriptions. *Wilkes County v. Call* (N. C.) 252

5. A general provision of an ordinance of a constitutional convention, that capital stock of a railroad company may be created by subscriptions on the part of counties, will not of itself authorize a subscription by a particular county. Id.

6. Mere legislative authority given a railroad to receive subscriptions to stock from municipal corporations, for which no consideration is given and which there has been no attempt to exercise, is not a contract, but may be revoked at any time. Id.

7. A crossing by a street railway of the tracks of a steam railroad at grade should not be permitted under a statute forbidding it when it is reasonably practicable to avoid it, where an overhead crossing would cost only \$150,000 to \$200,000, although the capital of the street railway is only \$500,000, if it expects to carry 3,000,000 passengers annually, and passenger trains on the railroad average one in fourteen minutes. *Chester Traction Co. v. Philadelphia, W. & B. R. Co.* (Pa.) 269

8. An imperious necessity for an additional crossing by a street railway of the tracks of a steam railroad at grade is not shown by the fact that traffic has so increased that its present crossings are not sufficient to enable it quickly to move its cars. Id.

NOTES AND BRIEFS.

See also INJUNCTION.

Railroads; compelling operation of. 297

Liability of lessor of railroad for injuries caused by negligence of another company using the road under a lease, license, or other contract:—(I.) General principles as to; (II.) under railway leases: (a) the general rule; (b) application to particular subjects; (c) authority to lease construction; (d) effect of authority: (1) conflict of opinion; (2) rule requiring special statutory exemp-

tion; (3) rule that general authority to lease is sufficient; (4) necessity of entire control by lessee; (5) limited to injuries in operation of road; (6) operation and charter duties distinguished; (III.) under running privileges or arrangements; (IV.) under contracts for construction or otherwise; (V.) under ineffectual attempt to consolidate; (VI.) occupation must be authorized; (VII.) injuries to employees; (VIII.) provisions for joint liability; (IX.) effect of lease or other contract upon failure of duty to fence. 737

RAPE.

1. A husband cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract. *State v. Haines* (La.) 837

2. A man jointly indicted with another for rape of the wife of the former cannot be convicted after the other has been acquitted, although he is indicted as a principal in the offense, since he could be guilty only as an aider and abettor. *Id.*

REAL ESTATE BROKER.

See **BROKERS**.

REAL PROPERTY.

See also **CONSTITUTIONAL LAW**, 4; **COURTS**, 4.

1. A statute permitting a registrar of deeds to record a transfer of land held in trust, upon the written opinion of two examiners that the transfer is in accordance with the true intent and meaning of the trust, which registration shall be conclusive in favor of the grantee, merely abrogates the rule which requires the purchaser of trust property to see to the application of the purchase money, and does not confer judicial power upon the registrar. *People, Deneen, v. Simon* (Ill.) 801

2. A statute making a judicial determination of title to land forever binding and conclusive upon all persons after the lapse of two years may be given effect against parties to the proceeding and persons who must bring legal proceedings to establish their rights, although it would be void in favor of persons in possession of all they claim who were parties to the proceeding. *Id.*

3. A statute providing for the registration of land titles after they are established in a court of equity may be upheld as against all upon whom service of process is properly made, although it contains a void provision permitting judgment against a resident of the state notified only by publication. *Id.*

4. The rule of law as to the notice afforded by the registration of a transfer of property which is subject to a condition or trust may be changed by the legislature. *Id.*

NOTES AND BRIEFS.

Real property; reliance on recording acts in purchase at judicial sale. 393

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REARGUMENT.

See **APPEAL AND ERROR**, 31.

RECEIVERS.

See also **CORPORATIONS**, 16; **TAXES**, 8, 9.

1. A receiver of the assets of a foreign corporation within the jurisdiction of the court cannot be appointed merely because the corporation is insolvent, if the court has no jurisdiction over the subject-matter of the proceeding. *Condon v. Mutual Reserve Fund L. Asso.* (Md.) 149

2. A person employed to cut merchantable timber by a contract which provides for a settlement each month, but for the retention of 25 per cent of the amount due until the sum of \$500 shall be held as a forfeiture for the satisfactory completion of the job, is a contractor, and not an employee or person in the employ of the owner of the timber, within the meaning of Md. act 1878, chap. 108, providing for a receiver of an employer who fails to pay employees as required by the act. *Clark v. Renninger* (Md.) 413

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Receivers; right of action in other states. 261

RECITALS.

See **BONDS**, 5.

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See **APPEAL AND ERROR**, 4-9.

REDEMPTION.

See **MORTGAGE**, 4.

REFORMATORY.

See **INFANTS**, 3.

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See **COURTS**, 4; **REAL PROPERTY**, 1.

REINSTATEMENT.

See **ACTION OR SUIT**, 9.

RELEASE.

See **MASTER AND SERVANT**, 1.

REMITTITUR.

See **NEW TRIAL**; **TRIAL**, 10.

REMOVAL OF CAUSES.

See **ACTION OR SUIT**, 9.

RENT.

See **LANDLORD AND TENANT**.

REPLEVIN.

See also **WRIT AND PROCESS**, 4, **NOTES AND BRIEFS**.

An action of replevin will not lie for a corpse, under statutes requiring an affidavit in replevin to state the unlawful taking or detention of "personal goods and chattels," and providing that a judgment for defendant shall be for a return of the property or for its value. *Keyes v. Konkel* (Mich.) 242

RÉSUMÉ.

For résumé of contents of book, see 865

REWARD.

See also MUNICIPAL CORPORATIONS, 1.

1. A sheriff cannot claim a reward for making an arrest, within his county, of a resident thereof for a felony committed therein, which it was his official duty to make. *Hogan v. Stophlet* (Ill.) 809

2. Extraordinary efforts and the incurring of expense not covered by legal fees will not entitle an officer to a reward for making an arrest which it was his legal duty to make. Id.

NOTES AND BRIEFS.

Reward; offered by municipality. 677

RIVER.

See BOUNDARIES.

SALE.

See DAMAGES, 1.

SALT.

See CARRIERS, 16, 17.

SAVINGS BANK.

See GIFT; TRUSTS, 2.

SEALED VERDIOT.

See TRIAL, 12.

SECRETARY OF STATE.

See CONTRACTS, 1.

SEDUCTION.

The common-law rule that an action by a parent for the seduction of a daughter must be brought in the capacity of a master for the loss of her services as a servant, although permitting a recovery for injury sustained in the parental relation, was the rule of a legal fiction which is abrogated by the Kansas Code, which abolishes fictions in pleading and requires a statement of the actual facts in controversy. *Anthony v. Norton* (Kan.) 757

NOTES AND BRIEFS.

Seduction; parent's right of action for. 757

SEPARATION.

See ABANDONMENT.

SHAREHOLDERS.

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SHERIFF.

See REWARD, 1.

SHIELD.

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SHIPPING.

See CARRIERS, 4, 5.

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SIGNATURE.

See EVIDENCE, NOTES AND BRIEFS.

SITUS.

See GARNISHMENT, 2.

SPECIFIC PERFORMANCE.

See also INJUNCTION, 6, 7.

Hardship will not prevent specific performance of a contract which was fairly and justly made, when it results from miscalculation or from contingencies which might have been foreseen, and for which the complainant is not in fault. *Southern R. Co. v. Franklin & P. R. Co.* (Va.) 297

NOTES AND BRIEFS.

Specific performance; of contract to operate railroad. 297

SPECIFIC TAX.

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STATE.

See also COUNTIES, 1.

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State; estoppel of, as to organization of county. 122

STATE INSTITUTION.

1. A bequest to the State University is subject to Cal. Civ. Code, § 1313, limiting charitable gifts to one third of the distributable estate. *Re Royer's Estate* (Cal.) 364

2. The University of California, created by the act of 1868, and continued and declared to be a public trust by the state Constitution of 1879, is an entity capable of taking by bequest, although the regents are by law made the governing body under a separate incorporation, and the organic act, providing in terms that grants and gifts may be made to the regents of the state, does not in terms provide that they may be made to the university. Id.

STATE UNIVERSITIES.

NOTES AND BRIEFS.

State universities; as quasi corporations. 365

STATUTES.

See also LEGISLATURE, 3; LIMITATION OF ACTIONS; REAL PROPERTY, 3.

1. A bill in which the enacting clause is not inserted by the legislature is void under a constitutional provision requiring it to contain such clause. *People v. Dettenthaler* (Mich.) 164

2. The clerk of one branch of the legislature has no power to amend a bill which has been sent over from the other house, so as to add an enacting clause, without definite action by the legislative branch upon the matter. Id.

3. A constitutional requirement that no bills of a certain kind shall be passed unless the yeas and nays on the second and third

reading shall have been entered on the journal is mandatory, and invalidates all statutes of the kind referred to not so passed. *Wilkes County v. Call* (N. C.) 252

4. A statute affecting the right of trial by jury is general legislation which must be uniform throughout the state, under Ohio Const. art. 2, § 26. *Silberman v. Hey* (Ohio) 264

5. A statute providing that the right of trial by jury shall be deemed waived, unless, a certain time before the term at which the issues are required to be made up, a demand for a jury is made, attended with a deposit of money for the jury fund, is one which affects the right of trial by jury, and must therefore be uniform in its operation, under Ohio Const. art. 2, § 26. Id.

6. Statutes procured by a railroad company for its own benefit will be strictly construed against it. *Wilkes County v. Call* (N. C.) 252

7. The maxim *noscitur a sociis* has no application to a statute which is too plain to admit of construction. *Brown v. Chicago & N. W. R. Co.* (Wis.) 579

8. That a statute is to take effect only after a favorable vote by counties does not make it void as an attempt to delegate legislative power or as making the law a special one. *People, Deneen, v. Simon* (Ill.) 801

9. Things apparently within the words of a statute are outside of its purview if there was no intent to include them. *Condon v. Mutual Reserve Fund L. Asso.* (Md.) 149

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STEAMER.

See ABANDONMENT, 5.

STOCK.

See BUILDING AND LOAN ASSOCIATIONS, 1, 2.

STOCKHOLDERS.

See CORPORATIONS, 11.

STREET RAILWAYS.

See also CARRIERS, 1, 3; CONTRACTS, 11; MANDAMUS, 3; PUBLIC IMPROVEMENTS, 5; RAILROADS, 7, 8; TRIAL, 5.

The gripman of a cable street-car is not guilty of negligence in failing to stop or slacken speed upon seeing boys standing near the curb, 12 feet from the track, in the street, in front of the car, so as to render the company liable for injury to one who suddenly starts to run across the track after the car has reached a point where it cannot be stopped before striking him. *Rack v. Chicago City R. Co.* (Ill.) 127
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See EXECUTION.

SURETIES.

See PRINCIPAL AND SURETY.

SURVIVAL.

See DEATH, 2.

TAXES.

See also CORPORATIONS, 3, 16.

1. Specific taxes within the meaning of the Michigan Constitution, which appropriates them to educational funds and excepts property paying such taxes from the rule of uniformity, do not include an ad valorem tax on property such as a tax on telegraph and telephone lines levied by a state board in lieu of all other taxes. *Pingree v. Dix* (Mich.) 679

2. A tax on telegraph and telephone lines under Mich. Pub. Acts 1881, No. 168 which is levied by the state board at the average rate of taxes (general, municipal, and local) levied throughout the state during the previous year, in lieu of all other taxes, violates the rule of uniformity imposed by Mich. Const. art. 14, § 11, as the rate of taxation is determined in a different way and is different in amount from that imposed upon other property. Id.

3. Public parks maintained at public expense, and buildings and appliances necessary to meet the demands of the fire department of a city, are within the terms of a constitutional provision exempting from taxation public property used for public purposes. *Owensboro v. Com., Stone* (Ky.) 202

4. National banks doing business in a state are subject to have the same tax imposed upon their shares of stock as are imposed upon the shares of stock in state banks whose charters were passed after the adoption of a statute making the charters subject to amendment, although there are in the state banks not subject to such taxation because of irrevocable exemptions in their charters. *Deposit Bank v. Daviess County* (Ky.) 825

5. The acceptance by a bank of the provisions of a statute fixing its taxes at a certain amount which shall be in lieu of all other taxes, which statute is made subject to amendment at the pleasure of the legislature,

is a waiver of tax exemptions in its charter; and it will thereafter be subject to such taxation as the legislature sees fit to impose upon it; and a repeal of the new statute will not restore the provisions of the old one.

Id.

6. Consent in writing by banks to be governed by the provisions of a statute fixing the rate of taxation which the state agrees shall be in lieu of all other taxation upon the banks does not effect an irrevocable contract, where the statute expressly provides that it shall be subject to the provisions of another law making all grants to corporations subject to amendment at the pleasure of the legislature.

Id.

7. A proviso to a statute making privileges and franchises granted to corporations subject to amendment, that no amendment shall impair other rights previously vested, does not include an exemption from taxation, since that is a franchise and as such subject to amendment, and not a vested right.

Id.

8. Taxes against the real estate of a corporation will be entitled to preference in payment, in case the corporation goes into the hands of a receiver. *Lamkin v. Baldwin & L. Mfg. Co. (Conn.)* 796

9. Real estate of a corporation which has passed into the hands of a receiver is properly listed for taxation in the name of the corporation, where the right of possession only, and not the title, vests in the receiver.

Id.

NOTES AND BRIEFS.

Taxes; exemption of public parks.	202
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TELEPHONES.

See HIGHWAYS, 5; INJUNCTION, 4, NOTES AND BRIEFS; TAXES, 2.

TIME.

The Sundays are to be counted in computing the number of days preceding a term of court within which a petition must be filed to make it returnable to that term. *Heard v. Phillips (Ga.)* 369

TITLE.

See REAL PROPERTY.

TITLE DEEDS.

See MORTGAGE, 1, 2.

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TREASURER.

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TRESPASS.

See also ACTION OR SUIT, 2; EVIDENCE, 22; WRIT AND PROCESS, 4.

One who draws another in front of him to serve as a shield from an impending explosion cannot be held liable for injuries received by the latter from the explosion, if it is not shown that the injuries were increased by such act. *Laidlaw v. Sage (N. Y.)* 216

TRIAL.

See also APPEAL AND ERROR, 10; STATUTES, 4, 5.

1. An action for injuries caused by being drawn in front of another to serve as a shield from an impending explosion should not be submitted to the jury in the absence of any evidence beyond mere conjecture, tending to show that plaintiff's injuries were thereby increased. *Laidlaw v. Sage (N. Y.)* 216

2. For the purpose of showing that a person's act in the face of an impending explosion was voluntary, his admission that everything he did was intentional cannot be submitted to the jury without his qualifying statements denying the commission of the act with which he is charged. Id.

3. It is within the discretion of the trial court to admit a portion of a deposition in chief and the remainder in rebuttal. *Hoadley v. Savings Bank of Danbury (Conn.)* 321

Questions for court or jury.

4. The question of negligence in leaving cracked windows above a sidewalk is for the jury, where the testimony tends to show a dangerous condition of the windows. *Detzur v. B. Stroh Brewing Co. (Mich.)* 500

5. The question whether or not a person riding on the front platform of an electric street-car took such precautions to avoid injury as the obvious and usual dangers of his position required is for the jury, where the facts are disputed or are susceptible of more than one conclusion. *Watson v. Portland & C. E. R. Co. (Me.)* 157

6. The safety and suitability of a platform used by a railroad company for unloading horses from a car is a question for the jury, when the evidence is conflicting. *Chesapeake & O. R. Co. v. American Exch. Bank (Va.)* 449

7. Negligence in maintaining machinery in a dangerous condition by allowing a set-screw, which projected 4 or 5 inches from a beam and revolved so rapidly that the screw could not be seen, to remain unprotected, with notice that the structure was used by

boys and men as a fishing platform,—is a question for the jury. *Biggs v. Consolidated Barb-Wire Co.* (Kan.) 655

8. Whether a boy fourteen years old has sufficient intelligence to render him capable of contributory negligence is a question for the jury, where he was injured by being caught by a set-screw projecting 5 or 6 inches from a beam which was revolving so fast that the screw could not be seen. *Id.*

Instructions.

9. An instruction as to the recovery of damages for future pain and suffering is improper in the absence of any evidence to warrant it. *Wheeler v. Boone* (Iowa) 821

Verdict.

10. A trial court may permit the filing of a remittitur of part of the verdict, and enter judgment for the balance. *Tucker v. Hyatt* (Ind.) 129

11. To authorize a judgment for plaintiff upon a special verdict in an action for malicious prosecution, the verdict need not state that the prosecution was without probable cause, since that is a question for the court. *Id.*

12. The dissent from a sealed verdict by one juror when the jury is polled, after sealing a verdict and separating, on the ground that he did not agree to it except because he thought he was obliged to, makes it necessary to discharge the jury, and, if they are sent out again and render a verdict, it will not be sustained. *Kramer v. Kister* (Pa.) 432

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Trial; rule as to submitting case to jury. 217

By jury; special law as to. 264

Correction of verdict; polling jury on sealed verdict. 432

TRICYCLE.

See BICYCLE; HIGHWAYS, 3, 4.

TROLLEY.

See CARRIERS, 1; EVIDENCE, 9.

TRUSTS.

See also BANKS, 15, 16; GIFT; INSURANCE, 19-21.

1. The statute of uses is not a part of the law of Nebraska. *Farmers' & M. Ins. Co. v. Jensen* (Neb.) 861

2. A deposit in a savings bank in trust for the owner of the money and another person as joint owners, subject to the order of either, and the balance at the death of either to belong to the survivor, constitutes a valid declaration of trust, which transfers to the trustee the legal title for the benefit of the survivor as to the balance of the fund remaining in bank at the death of either, even though the settlor retains possession of the bank book. *Milholland v. Whalen* (Md.) 205

3. A trust deed prompted by intemperate and improvident habits of the grantor, created

ing a trust to pay the income to him during life and at his death to convey to certain persons, without reserving any power of revocation, makes an irrevocable trust. *Wilson v. Anderson* (Pa.) 542

4. An intent to revoke a trust created by deed is not shown by a will which does not mention it but revokes "all other wills," where the testator has for years treated the deed as in full force, and has other real and personal estate not covered by the deed on which the will operates. *Id.*

NOTES AND BRIEFS.

Trusts; how created. 205

Created by parol; in policy of insurance. 384

Trustee as debtor; following trust funds. 494

Effect of statute of uses. 861

UNBORN CHILDREN.

See DEEDS, NOTES AND BRIEFS.

UNIVERSITIES.

See STATE INSTITUTION; STATE UNIVERSITIES, NOTES AND BRIEFS.

USAGE.

See EVIDENCE, 4.

USES.

See TRUSTS, 1.

VERDICT.

See TRIAL, 10-12, NOTES AND BRIEFS.

VICE.

See DISORDERLY HOUSES, 2.

VOTERS AND ELECTIONS.

See also OFFICERS, NOTES AND BRIEFS.

1. The ineligibility of a person who received the majority of the votes cast for an office does not entitle the minority candidate to the office,—at least when those who voted for the former did not know of his ineligibility. *State, Goodell, v. McGeary* (Vt.) 446

2. Building and furnishing a new house, with the purpose of living in it, does not render the owner an inhabitant of the ward in which it is situated, for the purpose of becoming an elector therein, so long as he continues, with his wife, the actual occupancy of leased premises in another ward. *Id.*

WAGER.

See INSURANCE, 18.

WAGES.

See RECEIVERS, 2.

WAIVER.

See MASTER AND SERVANT, 1.

WARRANTY.

See DAMAGES, 1.

WASTE.

See LIFE TENANTS.

WATERS.

See also ACTION OR SUIT, 5; BOUNDARIES; CANALS; CONTRACTS, 7; MUNICIPAL CORPORATIONS, 2; NOTICE, 1.

An ordinance granting the exclusive privilege to construct and maintain water-works within the corporate limits of the town, and the exclusive use of its streets, alleys, sidewalks, public grounds, streams, and bridges, is within the condemnation of N. C. Const. art. 1, § 31, declaring that "perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed." Thrift v. Elizabeth City (N. C.) 427

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Waters; what constitutes a natural water-course; rule as to surface water. 729

WELL.

See HIGHWAYS, 1, 2.

WILFUL INJURY.

See NEGLIGENCE, 4.

WILFULNESS.

See DAMAGES, 2.

WILLS.

See also STATE INSTITUTION, 1; TRUSTS, 4.

A county court has no jurisdiction, after the end of the term at which it has admitted a will to probate, to admit a codicil which is entirely inconsistent with the original will, where the statutes provide for vacating, reversing, or annulling a decree probating a will only by appeal to the circuit court, or application to equity to impeach the judgment. Couchman v. Couchman (Ky.) 136

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Wills; probate of, as an entirety; separate probate of codicil. 137

Nature of testamentary instrument. 542

WIND.

See PROXIMATE CAUSE, 4.

WINDOWS.

See NEGLIGENCE, 3; TRIAL, 4.

WITNESSES.

See also EXECUTION.

1. One holding a deed of real estate and suing for possession thereof is not an indorsee, assignee, or transferee of a bond for titles given by a person since deceased to his 44 L. R. A.

grantors, within the meaning of a statute forbidding testimony by the opposite party as to transactions with deceased in suits by such indorsees, assignees, and transferees. Heard v. Phillips (Ga.) 369

2. One accused of holding another in front of him as a shield from an impending explosion cannot, on cross-examination in a suit for damages for the injuries, be shown not to have exhibited proper sympathy or paid proper attention to plaintiff after the injury. Laidlaw v. Sage (N. Y.) 216

NOTES AND BRIEFS.

Wife as witness against husband. 311

WRIT AND PROCESS.

See also CONSTITUTIONAL LAW, 5; CONTRACTS, 1.

1. An agent of a foreign life insurance company, who comes into the state to examine the conditions under which a death occurred, and who submits a proposition to compromise the claim, is an agent on whom service of process may be made, under Shannon's (Tenn.) New Code, §§ 4543, 4546. Connecticut Mut. L. Ins. Co. v. Spratley (Tenn.) 442

2. The existence of a power of attorney by which a foreign insurance company authorized service of process to be made on the secretary of state does not preclude service on an agent as authorized by Tenn. act 1887. Id.

3. The service on a foreign insurance company as garnishee is governed by 18 Del. Laws, chap. 681, providing for garnishment of a corporation by service upon the president, treasurer, cashier, or paying clerk, and not by 16 Del. Laws, chap. 140, providing for the appointment by a foreign insurance company of a person or agent upon whom service of process may be made. National Bank v. Furtick (Del.) 115

4. To break and enter a dwelling house for the purpose of serving a writ of replevin, after admittance has been demanded and refused, constitutes the officer a trespasser. Kelley v. Schuyler (R. I.) 435

NOTES AND BRIEFS.

Writ; right to break and enter doors to serve. 435

Service on foreign corporation. 115

Substituted service to give jurisdiction. 442

YEAS AND NAYS.

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SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN AP-
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WAY AFFECTED BY LATER DECISIONS THAT HAVE
CITED THESE CASES AS PRECEDENTS, WITH
HOLDINGS OF CITING CASES; ALSO
REFERENCES TO LATER AN-
NOTATIONS CITING
CASES OR NOTES



L. R. A. CASES AS AUTHORITIES.

CASES IN 44 L. R. A.

44 L. R. A. 33, *JAMES v. RAPIDES LUMBER CO.* 50 La. Ann. 717, 23 So. 469.
Master's duty to warn servant of dangers.

Cited in *Daly v. Kiel*, 106 La. 173, 30 So. 254, holding master liable for insufficiently warned servant injured while working in gravel pit, by caving in of earth.

Cited in footnotes to *Ribich v. Lake Superior Smelting Co.* 48 L. R. A. 649, which holds master required to instruct employee as to nature, force, and probable effect of explosion of molten metal on contact with water; *Cincinnati, N. O. & T. P. R. Co. v. Gray*, 50 L. R. A. 47, which sustains railroad company's duty to instruct employees or promulgate rules as to operation of automatic switches; *McLaine v. Head & D. Co.* 58 L. R. A. 462, which denies master's duty to warn workman in trench before dumping in dirt.

Cited in notes (48 L. R. A. 97) on right of servant to recover for injuries caused by projecting screws in shaft and other moving machinery; (48 L. R. A. 377) on duty of master as to employment of his servants; (48 L. R. A. 544) on effect of assurance of safety given by master or coservant; (46 L. R. A. 47, 75) on right of servant to recover damages from persons other than his master for injuries received in performance of duties; (47 L. R. A. 162, 165) on *volenti non fit injuria*, as defense to actions by injured servants.

Distinguished in *Jenkins v. Maginnis Cotton Mills*, 51 La. Ann. 1018, 25 So. 643, holding master not responsible for injury to servant who voluntarily assumed a dangerous method of operating machine.

Annotation in 44 L. R. A. 33, referred to with approval in *North Birmingham Street R. Co. v. Wright*, 130 Ala. 425, 30 So. 360, holding superintendent of railroad not negligent in failing to warn engineer of location of telegraph poles, plainly visible, along track.

Injuries to servants obeying orders.

Cited in note (48 L. R. A. 753) on servant's right of action for injuries received in obeying direct command.

Risks of employment.

Cited in *Adolff v. Columbia Pretzel & Baking Co.* 100 Mo. App. 208, 73 S. W. 321, holding it question for jury whether one ordered to perform a known dangerous service assumes risk thereof.

Cited in footnote to *Cudahy Packing Co. v. Marcan*, 54 L. R. A. 258, which holds

risk of block on which minor employee works, slipping on greasy floor, assumed.

Doctrine of vice principalship.

Cited in notes (51 L. R. A. 518, 550, 557) on vice principalship considered with reference to superior rank of negligent servant; (54 L. R. A. 96) on vice principalship as determined with reference to character of act which caused injury.

44 L. R. A. 90, *L'HOTE v. NEW ORLEANS*, 51 La. Ann. 93, 24 So. 608.

Municipal powers with reference to houses of ill fame.

Cited in footnotes to *State v. Chauvet*, 51 L. R. A. 630, which holds covered wagon moving from place to place a house within prohibition against houses of ill fame; *Ogden v. Madison*, 55 L. R. A. 506, which sustains city's power to impose penalty for keeping house of ill fame, though misdemeanor under state statute.

44 L. R. A. 92, *BARRICKMAN v. MARION OIL CO.* 45 W. Va. 634, 32 S. E. 327.

Liability for escape and explosion of dangerous substances.

Cited in *Indiana Natural & Illuminating Gas Co. v. Long*, 27 Ind. App. 227, 59 N. E. 410, holding natural gas company liable for damages caused through negligent increase in pressure of gas furnished customers; *Paden v. Van Blarcom*, 100 Mo. App. 197, 74 S. W. 124, holding it question for jury whether house owner was negligent in not testing valves in range before turning on gas.

Cited in footnotes to *McKenna v. Bridgewater Gas Co.* 47 L. R. A. 790, which denies gas company's liability for explosion due to blundering act of employee of other company; *Purdy v. Westinghouse Electric & Mfg. Co.* 51 L. R. A. 881, which holds use of barrels formerly containing explosive substance, for shipping iron, not render one liable for injury to employee by explosion.

Degree of care required to prevent accident.

Cited in *McVey v. Chesapeake & O. R. Co.* 46 W. Va. 115, 32 S. E. 1012, holding fact that pedestrians are accustomed to travel on railroad at particular place imposes duty of greater precaution in operation of trains there.

44 L. R. A. 101, *STEWART v. NORTHERN ASSUR. CO.* 45 W. Va. 734, 32 S. E. 218.

Garnishment.

Cited in footnotes to *Strause Bros. v. Aetna Ins. Co.* 48 L. R. A. 452, which holds debt of insurance company for loss in another state, without situs where company has agent, for garnishment purposes, in third state; *Hawley v. Hurd*, 52 L. R. A. 195, which sustains discrimination between banks in and out of state as to attachment of negotiable paper by trustee process; *Tootle v. Coleman*, 57 L. R. A. 120, which holds right to garnish debtor not limited to situs of chose in action; *Pennsylvania R. Co. v. Rogers*, 62 L. R. A. 178, which holds nonresident summoned as garnishee while temporarily within state not subject to further proceedings unless he has property within state.

Common-law disability of married woman.

Cited in *Mynes v. Mynes*, 47 W. Va. 698, 35 S. E. 935, concurring opinion by

Dent, J., who holds common-law disability of husband and wife to enter into valid contracts with each other during coverture not abrogated.

44 L. R. A. 107, *STEELSMITH v. GARTLAN*, 45 W. Va. 27, 29 S. E. 978.

Oil and gas leases.

Cited in *Eclipse Oil Co. v. South Penn Oil Co.* 47 W. Va. 106, 34 S. E. 923, holding former lessee's payment of commutation money for a past term not consideration for future royalty as against lessor; *Lawson v. Kirchner*, 50 W. Va. 348, 40 S. E. 344, holding lease of tract of land for oil and gas purposes, contingent and conditional sale of the oil and gas in place; *Foster v. Elk Fork Oil & Gas Co.* 32 C. C. A. 563, 61 U. S. App. 576, 90 Fed. 181, holding lease in consideration of share of oil produced, work being abandoned after completion of dry well within stipulated time, inoperative; *Huggins v. Daley*, 48 L. R. A. 324, footnote p. 320, 40 C. C. A. 18, 99 Fed. 612, holding oil and gas lease forfeited by failure to bore well within time specified; *Barnsdall v. Boley*, 119 Fed. 200, holding oil lease not perpetuated by drilling, within stipulated time, of well producing small quantity of oil, under stipulation for continuation as long as oil or gas is produced in paying quantities; *Urpman v. Lowther Oil Co.* 53 W. Va. 505, 97 Am. St. Rep. 1027, 44 S. E. 433, canceling oil lease where facts showed intent on part of lessee to abandon; *Haskell v. Sutton*, 53 W. Va. 224, 44 S. E. 533, dissenting opinion by Dent, J., who holds that oil lessee has no property in the oil in place.

Cited in footnotes to *Parish Fork Oil Co. v. Bridgewater Gas Co.* 59 L. R. A. 566, which holds vested interest in oil not vested in lessees by mere drilling of well and discovery of oil; *Gadbury v. Ohio & I. Consol. Natural & Illuminating Gas Co.* 62 L. R. A. 895, which holds forfeiture of gas lease for breach of condition subsequent sufficiently shown to give equity jurisdiction by failure for long time, without apparent excuse, to develop the property.

Distinguished in *Harness v. Eastern Oil Co.* 49 W. Va. 243, 38 S. E. 662, holding lease of two contiguous tracts owned by husband and wife, proceeds payable to both lessors with royalty to joint credit, joint lease as between lessors and lessees; *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 589, 59 L. R. A. 569, 42 S. E. 655, upholding lessor's right to lease to another after lessee's abandonment of well for eighteen months; *Henne v. South Penn Oil Co.* 52 W. Va. 199, 43 S. E. 147, holding lessee drilling "dry hole" and then taking away machinery entitled to reasonable time to return and continue operations under lease.

44 L. R. A. 114, *SLEVIN v. POLICE PENSION FUND COMRS.* 123 Cal. 130, 55 Pac. 785.

44 L. R. A. 115, *NATIONAL BANK v. FURTICK*, 2 Marv. (Del.) 35, 69 Am. St. Rep. 99, 42 Atl. 479.

Rights of nonresident debtors and garnishees.

Cited in *Smith v. Armour*, 1 Penn. (Del.) 365, 40 Atl. 720, holding that foreign attachment will not lie under statute for action sounding in tort; *McKinney v. Mills*, 80 Minn. 481, 81 Am. St. Rep. 278, 83 N. W. 452, directing discharge of garnishee process served on nonresident garnishee while temporarily in state, plaintiff and defendants also being nonresidents; *Gilbert v. Hewetson*, 79 Minn.

336, 79 Am. St. Rep. 486, 82 N. W. 655, holding that causes of action against nonresident pass to receiver of creditor appointed by court of state of creditor's residence; *Strause Bros. v. Aetna F. Ins. Co.* 126 N. C. 230, 48 L. R. A. 454, footnote p. 452, 35 S. E. 471, holding debt of insurance company for loss in another state, without situs where company has agent, for garnishment purposes, in third state; *Boyle v. Musser-Sauntry Land, Logging & Mfg. Co.* 88 Minn. 462, 97 Am. St. Rep. 538, 93 N. W. 520, holding that execution on judgment against nonresident will not be stayed pending determination of foreign attachment suit.

Cited in footnotes to *Balk v. Harris*, 45 L. R. A. 257, which holds debtor garnished outside of state not protected in paying debt after returning to domicile; *Tootle v. Coleman*, 57 L. R. A. 120, which holds right to garnish debtor not limited to situs of chose in action.

44 L. R. A. 122, *PEOPLE ex rel. ATTY. GEN. v. ALTURAS COUNTY*, 6 Idaho, 418, 55 Pac. 1067.

When court will decline to examine constitutional questions.

Cited in *McGinness v. Davis*, 7 Idaho, 668, 65 Pac. 364, refusing to consider question of constitutionality of revenue act, record failing to show any injustice done complainant; *Holmberg v. Jones*, 7 Idaho, 759, 65 Pac. 563, raising but not deciding, question whether constitutional amendment adopted by people is open to attack on ground that submission was not legally authorized by legislature.

Estoppel as applied to municipalities.

Cited in *Simpson v. Stoddard County*, 173 Mo. 465, holding county estopped from asserting irregularities in private sale of swamp lands after acquiescence therein for thirty years.

44 L. R. A. 124, *PEOPLE ex rel. KASSON v. ROSE*, 174 Ill. 310, 51 N. E. 246.

Construction of ordinances and contracts.

Cited in *People's Gaslight & Coke Co. v. Hale*, 94 Ill. App. 420, holding that courts will not go beyond plain and explicit words of ordinance in construing it.

Cited in footnotes to *Re Hogan*, 45 L. R. A. 160, which holds contract guaranteeing a certain revenue per acre from crops, insurance; *Holmes v. Phenix Ins. Co.* 47 L. R. A. 308, which holds damage by hail accompanied by wind storm not covered by policy against wind storms.

44 L. R. A. 127, *RACK v. CHICAGO CITY R. CO.* 173 Ill. 289, 50 N. E. 668.

Care required in running cars in streets.

Cited in *Springfield Consol. R. Co. v. Puntenney*, 200 Ill. 16, 65 N. E. 442, Affirming 101 Ill. App. 98, holding question to car driver whether he had used due care to prevent collision properly excluded; *West Chicago Street R. Co. v. Schwartz*, 93 Ill. App. 396, holding that motorman seeing seven-year-old boy approaching track has right to assume he will stop before crossing; *Elwood Electric Street R. Co. v. Ross*, 26 Ind. App. 262, 58 N. E. 535, holding ten-mile speed of street car along city street not of itself negligence; *Chicago City R. Co. v. Fennimore*, 99 Ill. App. 175, holding rate of speed, although not of itself negligent, may be considered by jury with other evidence tending to establish negligent operation of cars; *Chicago Union Traction Co. v. Browdy*, 206 Ill. 618,

69 N. E. 570, and *Chicago City R. Co. v. Ahler*, 107 Ill. App. 404, holding street car company not liable for unavoidable collision due to sudden turning of wagon in front of car.

Cited in footnote to *Sample v. Consolidated Light & R. Co.* 57 L. R. A. 186, which requires high degree of care from motorman to prevent injury to small children.

Distinguished in *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 58 L. R. A. 272, footnote p. 270, 63 N. E. 997, holding question for jury whether motorman kept proper lookout for child slowly approaching track.

Rule as to taking case from jury.

Cited in *Offutt v. World's Columbian Exposition*, 175 Ill. 475, 51 N. E. 651, holding "scintilla rule of evidence" not in force in Illinois; *Marshall v. John Grosse Clothing Co.* 184 Ill. 425, 75 Am. St. Rep. 181, 56 N. E. 807, holding that where there was no evidence tending to support any defense to action for rent, jury was properly instructed to find for plaintiff; *Groszewski v. Chicago Sugar Ref. Co.* 84 Ill. App. 586; *Barnes v. Western Wheel Works*, 84 Ill. App. 653; *Gravadahl v. Chicago Ref. Co.* 85 Ill. App. 345; *Roberts v. Chicago & G. T. R. Co.* 78 Ill. App. 530,—holding case should have been submitted to jury where there was evidence tending to prove plaintiff's case; *Swift v. Zerwick*, 88 Ill. App. 562; *Chicago & E. I. R. Co. v. Stonecipher*, 90 Ill. App. 512; *Norton Bros. v. Nadebok*, 92 Ill. App. 545; *North Chicago Street R. Co. v. Hoffart*, 82 Ill. App. 541,—holding case properly submitted to jury, where evidence of plaintiff tended to prove defendant's negligence; *Illinois C. R. Co. v. Batson*, 81 Ill. App. 154, sustaining instruction to find for defendant where there was no evidence tending to show person killed by railroad train used due care to prevent accident; *Cohen v. Chicago & N. W. R. Co.* 104 Ill. App. 322, holding case improperly taken from jury where evidence showed omission to ring bell or blow whistle, and other omissions alleged to have been negligent; *Nolan v. Morris*, 108 Ill. App. 263, holding case properly taken from jury where evidence merely showed that injured person was struck by omnibus, and did not show negligence of driver; *Chicago Title & T. Co. v. Standard Fashion Co.* 106 Ill. App. 139, holding case properly taken from jury where stranger pried open elevator door, pulled cable, and was in some unknown manner killed by the ascending car.

44 L. R. A. 129, *TUCKER v. HYATT*, 151 Ind. 332, 51 N. E. 469.

Remittitur of part of verdict.

Cited in *Efroymson v. Smith*, 29 Ind. App. 455, 63 N. E. 328, holding instruction cured by remittitur of amount jury erroneously told to include in damages.

Cited in footnote to *Central R. Co. v. Perkerson*, 53 L. R. A. 210, which denies trial judge's power to order remittitur as condition of refusing new trial.

Distinguished in *Nickey v. Zonker*, 22 Ind. App. 218, 53 N. E. 478, holding verdict rendered on theory contrary to law not cured by remittitur of portion thereof.

Review of errors.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Hawks*, 154 Ind. 549, 55 N. E. 258, holding assignments of error waived by failure to discuss same in briefs; *Kelley v. Houts*, 30 Ind. App. 477, 66 N. E. 408, holding right to object to judgment as defective in certain particulars not available where made for first time on appeal.

44 L. R. A. 131, *FIRST NAT. BANK v. MARSHALLTOWN STATE BANK*, 107 Iowa, 327, 77 N. W. 1045.

Recovery of money paid on forged paper.

Cited in *Canadian Bank of Commerce v. Bingham*, 30 Wash. 492, 60 L. R. A. 958, footnote p. 955, 71 Pac. 43, sustaining drawee's right to recover amount of forged check payable to fictitious person, from one cashing same on indorsement purporting to be payee's, without requiring identification.

Cited in footnote to *Critten v. Chemical Nat. Bank*, 57 L. R. A. 530, which holds bank paying plainly altered check to clerk of drawer without asking explanation liable for loss from subsequent payment of similar checks.

Distinguished in *Citizens' Nat. Bank v. City Nat. Bank*, 111 Iowa, 215, 82 N. W. 464, holding money paid by drawee of check to an indorsee, who acquired it on a forged indorsement of payee, recoverable; *Woods v. Colony Bank*, 114 Ga. 685, 56 L. R. A. 931, 40 S. E. 720, holding money paid by drawee on forged signature recoverable from holder, whose negligence contributed to the fraud and tended to mislead drawee.

44 L. R. A. 133, *FIRST NAT. BANK v. GERMAN BANK*, 107 Iowa, 543, 70 Am. St. Rep. 216, 78 N. W. 195.

Liability for negligence of notary.

Cited in footnote to *Williams v. Parks*, 56 L. R. A. 759, which sustains notary's liability on bond for neglecting to give notice of dishonor.

Liability for negligence in sale of drugs.

Distinguished in *Burgess v. Sims Drug Co.* 114 Iowa, 277, 54 L. R. A. 365, 89 Am. St. Rep. 359, 86 N. W. 307, holding druggist firm liable for negligence of skilled and duly registered pharmacist in their employ.

44 L. R. A. 135, *FIGG v. THOMPSON*, 105 Ky. 509, 49 S. W. 202.

License for business of contracting for public work.

Cited in *Richardson v. Mehler*, 111 Ky. 430, 63 S. W. 957, holding objection to ordinance requiring bidders for public improvements to be licensed, as unconstitutional, too late after work accepted and apportionment made.

44 L. R. A. 136, *COUCHMAN v. COUCHMAN*, 104 Ky. 680, 47 S. W. 858.

44 L. R. A. 141, *BITZER v. THOMPSON*, 105 Ky. 514, 49 S. W. 199.

44 L. R. A. 142, *WIENECKE v. ARBIN*, 88 Md. 182, 40 Atl. 709.

Proof of will and signature by mark.

Cited in footnotes to *Re Thompson*, 45 L. R. A. 682, which holds probate of will not prevented by witness's failure to remember facts stated in attestation clause; *Finley v. Prescott*, 47 L. R. A. 695, which holds good, unattested signature by mark for purpose of identifying maker as party.

44 L. R. A. 149, *CONDON v. MUTUAL RESERVE FUND LIFE ASSO.* 89 Md. 99, 73 Am. St. Rep. 169, 42 Atl. 944.

Interference by court with management of foreign corporations.

Cited in *Stockley v. Thomas*, 89 Md. 668, 43 Atl. 766, dismissing bill asking

appointment of receiver of foreign insolvent corporation, where assets in state not collectible except by involving management of internal affairs of foreign corporation; *Taylor v. Mutual Reserve Fund Life Asso.* 97 Va. 67, 45 L. R. A. 626, footnote p. 621, 33 S. E. 375, denying right to enjoin foreign assessment company from having membership certificate declared forfeited for nonpayment of alleged illegal assessment; *Howard v. Mutual Reserve Fund Life Asso.* 125 N. C. 54, 45 L. R. A. 856, footnote p. 853, 34 S. E. 199, denying right to enjoin levying of assessments on resident member of foreign insurance company; *Howard v. Mutual Reserve Fund L. Asso.* 125 N. C. 54, 45 L. R. A. 857, 34 S. E. 199, refusing to enjoin alleged illegal assessments of foreign corporation.

Construction of foreign contracts.

Cited in *McKean v. New York Nat. Bldg. & L. Asso.* 24 Pa. Co. Ct. 459, holding stockholder's contract with foreign building and loan association is to be construed according to law of foreign state.

Constitution and by-laws as part of insurance contract.

Cited in *Dale v. Brumbly*, 96 Md. 677, 54 Atl. 655, holding assignment of benefit certificate to creditor, contrary to by-laws of society, void as to beneficiaries.

Cited in footnote to *McLendon v. Sovereign Camp*, W. W. 52 L. R. A. 444, which holds reasonable delay in delivering benefit certificate gives no right to recover on certificate delivered after death of insured.

44 L. R. A. 157, *WATSON v. PORTLAND & C. E. R. CO.* 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. 699.

Contributory negligence.

Cited in *Call v. Portsmouth, K. & Y. Street R. Co.* 69 N. H. 565, 45 Atl. 405, holding it question for jury whether plaintiff was negligent in accidentally stepping into open ditch in attempt to board car; *Scott v. Bergen County Traction Co.* 63 N. J. L. 410, 43 Atl. 1060, holding it question for jury as to what is ordinary care in case of passenger standing on platform of car preparing to alight while car is slowing down; *Nieboer v. Detroit Electric R. Co.* 128 Mich. 493, 87 N. W. 626 (dissenting opinion), majority holding person riding on bumper of electric car guilty of contributory negligence; *Seller v. Market-Street R. Co.* 139 Cal. 272, 72 Pac. 1006, holding riding upon platform of electric car not negligence, as matter of law.

Cited in footnote to *Third Ave. R. Co. v. Barton*, 52 L. R. A. 471, which denies right of passenger on running board of street car to recover for injuries by contact with pillar near track, while passing around conductor, also on such board.

44 L. R. A. 159, *TELEGRAM NEWSPAPER CO. v. COM.* 172 Mass. 294, 70 Am. St. Rep. 280, 52 N. E. 445.

Contempt by newspaper publications.

Cited in footnote to *State v. Bee Pub. Co.* 50 L. R. A. 195, which sustains punishment for contempt of newspaper publishing articles threatening judges with public odium if they decide pending cause in certain way.

44 L. R. A. 163, *MAY v. CLELAND*, 117 Mich. 45, 75 N. W. 129.

44 L. R. A. 164, *PEOPLE v. DETTENTHALER*, 118 Mich. 595, 75 N. W. 129.

44 L. R. A. 167, *BELIVEAU v. AMOSKEAG MFG. CO.* 68 N. H. 225, 73 Am. St. Rep. 577, 40 Atl. 734.

Who may compromise action.

Disapproved in effect in *Fletcher v. Parker*, 53 W. Va. 425, 97 Am. St. Rep. 991, 44 S. E. 422, holding that next friend of infant cannot compromise judgment obtained by him in name of infant.

44 L. R. A. 170, *BUCHANAN v. TILDEN*, 158 N. Y. 109, 70 Am. St. Rep. 454, 52 N. E. 724.

Contracts for benefit of third persons.

Cited in *Bouton v. Welch*, 170 N. Y. 557, 63 N. E. 539, Affirming 48 App. Div. 388, 63 N. Y. Supp. 80, holding oral agreement to assign mortgage, made between mortgagor and mortgagee for benefit of mortgagor's wife, adequate consideration having been given by mortgagor, enforceable by wife; *Priester v. Hohloch*, 70 App. Div. 260, 75 N. Y. Supp. 405, holding agreement in lease to pay rent to widow of lessor, in case of lessor's death before expiration of lease, not enforceable by widow; *Huggins v. Lewis*, 31 Misc. 293, 64 N. Y. Supp. 355, refusing to require trustee to sell portion of estate for benefit of testator's child, will giving testator's widow life use of estate and permitting her to use a portion of principal in case of need, for assisting children remaindermen; *Opper v. Hirsh*, 33 Misc. 561, 68 N. Y. Supp. 879, holding mother a proper party plaintiff in action by her son to enforce contract by which latter agreed to perform services for her judgment creditor in consideration for not entering judgment, although such contract not enforceable by the mother; *Flagg v. Fisk*, 93 App. Div. 173, 87 N. Y. Supp. 530, holding contract with surviving partner by widow of deceased partner for payment of partnership debt owed her mother, enforceable on behalf of latter; *Rosseau v. Rouss*, 91 App. Div. 234, 86 N. Y. Supp. 497, holding that illegitimate child may have enforced in its behalf, contract between his mother and putative father for its support; *Wait v. Wilson*, 86 App. Div. 487, 83 N. Y. Supp. 834, holding agreement by wife with husband to will, after his death, so much of his estate as not used by her, to her stepson, not enforceable by latter.

Cited in footnotes to *Morgan v. Randolph-Clowes Co.* 51 L. R. A. 653, which denies right of firm creditor to sue corporation assuming firm debts; *Ferris v. American Brewing Co.* 52 L. R. A. 305, which sustains right of action of one for whose benefit stipulation in lease was made, against sale on premises of other person's beer; *Capital Traction Co. v. Offutt*, 53 L. R. A. 390, which denies liability of street railway company for debts of other company whose property and franchises bought; *Electric Appliance Co. v. United States Fidelity & G. Co.* 53 L. R. A. 609, which denies right of action of one furnishing materials to contractor to sue on bond by latter to city, conditioned on turning over building free of claims for materials; *Boston Ins. Co. v. Chicago, R. I. & P. R. Co.* 59 L. R. A. 796, which denies right of action against railroad company carrying mail under contract with government, by sender of registered mail destroyed through negligence of its employees; *Tweeddale v. Tweeddale*, 61 L. R. A. 509, which sustains right of third person to enforce contract made for his benefit.

Distinguished in *Borland v. Welch*, 162 N. Y. 110, 56 N. E. 556, holding antenuptial settlement by wife, with provision for her collateral heirs in certain con-

tendency, not enforceable by such collaterals so far as property acquired after termination of coverture is concerned; *Glauatz v. People's Guaranty Search Co.* 49 App. Div. 469, 63 N. Y. Supp. 691, holding action not maintainable on guaranty of accuracy of search made to purchaser of property by a subsequent grantee, to whom abstract of title was delivered; *Sullivan v. Sullivan*, 161 N. Y. 557, 56 N. E. 116, holding deposit made payable by order of depositor to herself, or in case of death to a niece, not a contract enforceable against bank by niece after depositor's death; *Everdell v. Hill*, 58 App. Div. 158, 68 N. Y. Supp. 719, holding contract between three persons to will their property to their survivors, the last survivor of them to will to certain nieces, not enforceable by latter.

44 L. R. A. 177, *NORTH CHICAGO STREET R. CO. v. ACKLEY*, 171 Ill. 100, 49 N. E. 222.

Appeal from judgment pro confesso.

Cited in *Monarch Brewing Co. v. Wolford*, 179 Ill. 255, 53 N. E. 583, upholding right of defendant where default and decree *pro confesso* have been entered, to contest sufficiency of bill itself on appeal.

Real party in interest.

Cited in *Chicago, B. & Q. R. Co. v. Murowski*, 78 Ill. App. 662, holding objection that real plaintiff had no interest in cause of action, raised for first time in reply brief, waived; *Chicago General R. Co. v. Capek*, 82 Ill. App. 170, holding judgment awarding damages for personal injuries to person injured, for use of assignee, erroneous; *West Chicago Street R. Co. v. Lundahl*, 82 Ill. App. 556, holding words "for use of" assignee, surplusage, in action for personal injuries brought in name of injured person.

Distinguished in *Williams v. West Chicago Street R. Co.* 199 Ill. 61, 64 N. E. 1024, upholding validity of assignment of judgment for personal injuries, signed and acknowledged before judgment was entered.

Contracts against public policy.

Followed without comment in *Geer v. Frank*, 79 Ill. App. 195.

Cited in *Cameron v. Boeger*, 200 Ill. 92, 93 Am. St. Rep. 165, 65 N. E. 690, denying right of attorney, in absence of contract, to lien on judgment for fees; *London Guarantee & Acci. Co. v. Horn*, 101 Ill. App. 363, holding agreement between insurer against accidents to employees, and assured, which would deprive latter of right to settle without consent of former, void; *Davis v. Webber*, 66 Ark. 197, 45 L. R. A. 199, 74 Am. St. Rep. 81, 49 S. W. 822, holding stipulation in contract with attorney for services, depriving client of right to settle suit without consent of attorney, void; *Ritchie v. Krueger*, 102 Ill. App. 654, upholding lien for fees and right of client to dismiss suit when he will; *Maires's Disbarment*, 189 Pa. 108, 41 Atl. 938, Affirming 21 Pa. Co. Ct. 77, holding agreement by attorney to conduct suit for client for half of amount recovered, after deducting expenses, champertous; *Potter v. Ajax Min. Co.* 19 Utah, 436, 57 Pac. 270 (dissenting opinion), majority denying right of client having agreement with attorney to conduct suit for contingent fee, to settle action in fraud of attorney's rights; *Rose v. Fretz*, 109 Fed. 812, upholding right of defendant to settle suit with complainant for infringement of patent, although he had knowledge that complainant's attorney was to receive half of proceeds for services; *Davis v. Chase*, 159 Ind. 244, 95 Am. St. Rep. 294, 64 N. E. 88, holding contract by which

attorney agrees to prosecute suit for percentage fee, and client agrees not to settle without attorney's consent, void.

Cited in footnote to *Tompkins v. Nashville, C. & St. L. R. Co.* 61 L. R. A. 340, which sustains plaintiff's right to dismiss suit, notwithstanding lien of attorney.

When bill sufficient to support decree.

Cited in *Winnetka v. Chicago & M. Electric R. Co.* 107 Ill. App. 122, holding allegation in bill that trestle work was authorized by ordinance, broad enough to sustain injunction against interference with it, granted on ground of acquiescence by village in the construction, although ordinance void.

44 L. R. A. 193, *DANEHOWER v. DAWSON*, 65 Ark. 129, 46 S. W. 131.

Right of purchaser at foreclosure to possession during redemption period.

Followed in *Vaughan v. Walton*, 66 Ark. 573, 52 S. W. 437, holding purchaser at foreclosure sale entitled to possession during period allowed for redemption.

44 L. R. A. 197, *STATE ex rel. SOUTHEY v. LASHAR*, 71 Conn. 540, 42 Atl. 636.

44 L. R. A. 202, *OWENSBORO v. COM.* 105 Ky. 344, 49 S. W. 320.

Public property exempt from taxation.

Cited in footnote to *Gate City Guards v. Atlanta*, 54 L. R. A. 806, which denies exemption, as public property, to armory owned by volunteer military force.

Franchise tax as to municipal corporations.

Cited in *Newport v. Com.* 106 Ky. 441, 45 L. R. A. 520, 50 S. W. 845, holding municipal corporation owning waterworks plant, subject to franchise tax.

44 L. R. A. 205, *MILHOLLAND v. WHALEN*, 89 Md. 212, 43 Atl. 43.

Trusts and gifts.

Cited in *Snader v. Slingluff*, 95 Md. 366, 52 Atl. 510, holding trust established by written declaration of trustee as to its terms at about date of delivery of property to him, and letters of settler showing intention to create such trust; *De Grange v. De Grange*, 96 Md. 615, 54 Atl. 663, holding promissory note delivered to payee as gift not enforceable against maker's estate.

Cited in footnote to *Whalen v. Milholland*, 44 L. R. A. 208, which holds valid gift not made by deposit in savings bank in name of donor and donee as joint owners, payable to order of either or survivor, where donor retains pass book.

44 L. R. A. 208, *WHALEN v. MILHOLLAND*, 89 Md. 199, 43 Atl. 45.

Trusts and gifts inter vivos.

Cited in *Denigan v. San Francisco Sav. Union*, 127 Cal. 150, 78 Am St. Rep. 35, 59 Pac. 390, and *Denigan v. Hibernia Sav. & L. Soc.* 127 Cal. 141, 59 Pac. 389, holding gift not established by placing of bank account of separate property of wife in alternative names of husband and wife, latter retaining right to withdraw whole fund; *Main's Appeal*, 73 Conn. 642, 48 Atl. 965, holding invalid as gift, deposit in name of owner of money and daughters, intended to operate to transfer title of fund in bank to daughters after death of donor; *Re Bauernschmidt*,

97 Md. 59, 54 Atl. 637, holding rental of safe deposit box in joint names of husband and wife, husband delivering one key to wife and keeping one himself, not gift of securities contained in box.

Cited in footnotes to *Milholland v. Whalen*, 44 L. R. A. 205, which holds valid trust created by deposit in savings bank in trust for owner and another, payable to order of either, with balance to survivor; *Murphy v. Bordwell*, 52 L. R. A. 849, which holds gift of bank deposit consummated by power of attorney to donee, giving right to draw in donor's name; *Lord v. New York L. Ins. Co.* 56 L. R. A. 597, which sustains gift of policy found among papers of insured at his death, on proof of his declarations that it was donee's.

Ownership by the entirety.

Distinguished in *Brewer v. Bowersox*, 92 Md. 570, 48 Atl. 1060, holding that certificate of deposit acknowledged to have been received from husband or wife, interest payable "to them or their order," creates ownership by the entirety.

44 L. R. A. 213, TRENTON PASS. R. CO. v. GUARANTORS' LIABILITY IN- DEMNITY CO. 60 N. J. L. 246, 37 Atl. 609.

Validity of contracts of indemnity.

Cited in *Kansas City, M. & B. R. Co. v. Southern R. News Co.* 151 Mo. 386, 45 L. R. A. 385, 74 Am. St. Rep. 545, 52 S. W. 205, upholding contract in which news company, for valid consideration, agreed to indemnify carrier for loss sustained by injury to news company's agents through carrier's negligence; *Illinois C. R. Co. v. J. L. Fulton Co.* 108 Ill. App. 239, upholding contract between railroad company and contractor performing work for it, relieving former from liability for injury to contractor's employees.

Construction of contracts.

Cited in footnotes to *Holmes v. Phenix Ins. Co.* 47 L. R. A. 306, which holds damage by hail accompanied by wind storm not covered by policy against wind storms; *Re Hogan*, 45 L. R. A. 166, which holds contract guaranteeing a certain revenue per acre from crops, insurance; *People ex rel. Kasson v. Rose*, 44 L. R. A. 124, which holds guaranteeing fidelity of officers and performance of contracts, insurance.

44 L. R. A. 216, LAIDLAW v. SAGE, 158 N. Y. 73, 52 N. E. 679.

Evidence insufficient to support finding or verdict.

Cited in *Jefferson County Nat. Bank v. Townley*, 159 N. Y. 496, 54 N. E. 74, holding finding that assignment was made to evade statute not supported by mere scintilla of evidence on the question; *Shotwell v. Dixon*, 163 N. Y. 53, 57 N. E. 178, holding mere conjecture or surmise that creditor knew of contemplated general assignment of debtor not sufficient to justify finding that such knowledge existed; *Lopez v. Campbell*, 163 N. Y. 348, 57 N. E. 501, holding evidence which might justify court in suspecting that corporation suffered judgments against it for purpose of granting illegal preference, insufficient to warrant setting such judgments aside; *Cassidy v. Uhlmann*, 170 N. Y. 534, 63 N. E. 554, dissenting opinion by Martin, J., who holds evidence in case as to fraud of bank director in permitting receipt of deposits after insolvency, merely conjectural; *Weidinger v. Third Ave. R. Co.* 40 App. Div. 199, 57 N. Y. Supp. 851, holding it error to submit question to jury as to fracture of plaintiff's leg, where

there was no evidence upon the point; *Albring v. New York C. & H. R. R. Co.* 46 App. Div. 465, 61 N. Y. Supp. 763, holding evidence that brakeman's head might have passed through opening in defective telltales not sufficient to render carrier liable for killing of brakeman by being struck by overhead bridge; *Connor v. Metropolitan Street R. Co.* 48 App. Div. 584, 63 N. Y. Supp. 509, denying liability of street railroad company for injury due to running away of horse struck and frightened by flying piece of snow which driver testified came from direction of defendant's street sweeper; *Grockie v. Hirshfield*, 50 App. Div. 91, 63 N. Y. Supp. 365, holding direction of verdict in favor of defendant not warranted where evidence did not so preponderate in his favor that court would have been justified in setting aside verdict for plaintiff; *McAllister v. Ferguson*, 50 App. Div. 530, 64 N. Y. Supp. 197, holding question whether there was any evidence of permanent injury in negligence action improperly submitted to jury; *Craig v. Laffin & R. Powder Co.* 55 App. Div. 54, 67 N. Y. Supp. 74, denying right of recovery where plaintiff's intestate was killed as result of two explosions, second being the one on which negligence was based, and evidence being conjectural as to which caused death; *Casper v. Dry Dock, E. B. & B. R. Co.* 56 App. Div. 375, 67 N. Y. Supp. 805, holding mere presumption of negligence arising from fact that pedestrian caught foot in loose rail rebutted by evidence of due diligence in spiking same upon discovery by inspector; *Nelson v. Masonic Mut. Life Asso.* 57 App. Div. 217, 68 N. Y. Supp. 290, holding evidence that insured's clothes were found in bathing house and that he had asked two friends to go swimming with him insufficient to go to jury upon theory of drowning; *Maimone v. Dry Dock, E. B. & B. R. Co.* 58 App. Div. 387, 68 N. Y. Supp. 1973, holding testimony of physician that plaintiff's condition might be result of constitutional ailment, or might be result of injury complained of, too speculative to afford basis of award by jury; *McConnell v. New York C. & H. R. R. Co.* 63 App. Div. 548, 71 N. Y. Supp. 616, holding verdict for plaintiff, where intestate was killed by being struck by piece of coal falling from passing locomotive tender, not supported by evidence of one witness that coal was piled 3 feet above edges of tender; *Marshall v. Buffalo*, 63 App. Div. 606, 71 N. Y. Supp. 719, holding disputed questions of fact must be submitted to jury, although verdict for plaintiff would not be permitted to stand; *Walters v. Syracuse Rapid Transit R. Co.* 64 App. Div. 155, 71 N. Y. Supp. 853, holding uncorroborated evidence of plaintiff that he received shock from live wire while riding rubber-tired bicycle on dry asphalt pavement insufficient to support verdict where defendant's testimony showed that wire was dead, and that rubber and dry asphalt were nonconductors; *Hoyt v. Metropolitan Street R. Co.* 73 App. Div. 256, 76 N. Y. Supp. 832 (dissenting opinion), majority holding evidence that plaintiff suffered fracture of skull, destruction of ear, paralysis on one side, deafness, loss of eyesight, memory, sexual power, and was rendered mildly insane, sufficient to warrant damages for permanent injury, although receiving same wages after as before accident; *Johnson v. New York C. & H. R. R. Co.* 173 N. Y. 83, 65 N. E. 946, reversing verdict in favor of trespasser claiming to have been injured by being kicked off train, where there was no evidence that he was thus assaulted by any of carrier's servants; *Gray v. Metropolitan Street R. Co.* 39 App. Div. 542, 57 N. Y. Supp. 587 (dissenting opinion), majority holding evidence sufficient to warrant jury in finding that plaintiff was injured by being crowded off platform of car by act of conductor in attempting to board same; *Monahan v. Eidlitz*, 59 App. Div. 229, 69 N. Y. Supp. 335 (dissenting

opinion), as to insufficiency of mere scintilla of proof to sustain claim of party upon whom burden of proof rests; *Taylor v. Commercial Bank*, 174 N. Y. 192, 62 L. R. A. 788, 95 Am. St. Rep. 564, 66 N. E. 726, holding mere conjecture that false representation was made with fraudulent purpose, not sufficient to support finding to that effect; *Carter v. Nunda*, 55 App. Div. 507, 66 N. Y. Supp. 1059, holding mere evidence that one is still suffering from shock of fall insufficient to support recovery on basis of permanent injury; *White v. Lewiston & Y. Frontier R. Co.* 94 App. Div. 7, 87 N. Y. Supp. 901, holding verdict for personal injuries not supported by evidence that carrier employed incompetent motorman, who intrusted power to another, whose negligence caused accident.

Distinguished in *Ivey v. Brooklyn Heights R. Co.* 63 App. Div. 315, 71 N. Y. Supp. 633, upholding refusal of court to recall jury and charge them that there was no question of permanent injury in case, where there was evidence that plaintiff's disabilities would continue for some time to come.

Proximate cause.

Cited in *Schoepflin v. Coffey*, 162 N. Y. 18, 56 N. E. 502, holding speaking of slanderous words in presence of newspaper reporters not proximate cause of damage resulting from subsequent publication of same; *Seifter v. Brooklyn Heights R. Co.* 169 N. Y. 258, 62 N. E. 349, holding fractured bone not proximate cause of death four months later from septic pneumonia, there being no proof of septic condition at point of fracture after bone had united; *Rider v. Syracuse Rapid Transit R. Co.* 171 N. Y. 161, 58 L. R. A. 133, 63 N. E. 836, dissenting opinion by Vann, J., who holds failure to stop car after striking wagon, proximate cause of resulting injury; *Hutchinson v. Charles F. Parker & Co.* 39 App. Div. 138, 57 N. Y. Supp. 168, denying right of injured servant to recover from master for injury from explosion of dynamite proximately caused by negligence of coemployee; *Marks v. Rochester R. Co.* 41 App. Div. 76, 58 N. Y. Supp. 210, holding act of conductor in attempting to drive boys from platform of car not proximate cause of injury to another boy, on platform by conductor's invitation, who was pushed off platform by boys seeking to escape conductor; *Rusk v. Manhattan R. Co.* 46 App. Div. 104, 61 N. Y. Supp. 384, holding depression in platform covered with ice not proximate cause of injury to person who slipped thereon and fell; *Thomson v. Seaman*, 67 App. Div. 63, 73 N. Y. Supp. 488, holding instruction that if defendants' witnesses were believed, verdict must be for defendant, erroneous where evidence presented questions whether contributory negligence proximate cause of injury; *Hoey v. Metropolitan Street R. Co.* 70 App. Div. 63, 74 N. Y. Supp. 1113, holding death from acute pulmonary tuberculosis not proximately caused by injuries due to collision; *Koch v. Fox*, 71 App. Div. 295, 75 N. Y. Supp. 913, holding failure to erect covering over sidewalk by owner of property not proximate cause of injury caused by negligence of employee of contractor in letting brick fall; *Koch v. Zimmermann*, 85 App. Div. 375, 83 N. Y. Supp. 339, holding blow on head from brick not proximate cause of death three months later from pneumonia, due to wetting received by jumping into river; *Lersner v. McDonald*, 38 Misc. 735, 78 N. Y. Supp. 1125, holding blast breaking water main is proximate cause of damages caused by water flowing from broken pipe; *Southern P. Co. v. Yeargin*, 48 C. C. A. 506, 109 Fed. 445, holding question whether proximate cause of collision was failure of engineer to understand despatch, or failure to equip tender with proper light, for jury; *Leeds v. New York Teleph. Co.* 178 N. Y. 121, 70 N. E. 219, Reversing 79 App. Div. 124,

80 N. Y. Supp. 114 (former appeal in 64 App. Div. 489, 72 N. Y. Supp. 250, Which Affirmed 32 Misc. 672, 66 N. Y. Supp. 457), holding injury due to falling bricks proximately caused by derrick striking wire, which pulled down chimney; *Suse v. Metropolitan Street R. Co.* 80 App. Div. 28, 80 N. Y. Supp. 513, condemning instruction that negligence on the part of defendant's motorman might render it liable for plaintiff's injury, even though such negligence did not contribute to the accident which caused the injury; *Roedecker v. Metropolitan Street R. Co.* 87 App. Div. 229, 84 N. Y. Supp. 300, holding fall of street car horse not proximate cause of kicking of passenger by it while trying to get up; *Murphy v. New York*, 89 App. Div. 98, 85 N. Y. Supp. 445, holding break in gas main not proximate cause of death of one suffocated by gas while entering manhole to rescue workman overcome while looking for the leak; *Wheeler v. Norton*, 92 App. Div. 373, 86 N. Y. Supp. 1095, holding breaking of pipe by blasting, proximate cause of injury from resulting escape of water; *Berman v. Schultz*, 40 Misc. 213, 81 N. Y. Supp. 647, holding owner of electric delivery wagon not liable for injuries resulting from collision proximately caused by starting of wagon by boys, while chauffeur was away; *Cole v. German Sav. & L. Soc.* 63 L. R. A. 423, 59 C. C. A. 601, 124 Fed. 121, holding opening of door to elevator well by strange boy, proximate cause of injury to one stepping through and falling into shaft.

Cited in note (45 L. R. A. 91) on rule of proximate cause in case of malicious torts.

Objection to evidence available on appeal.

Cited in *Jarvis v. Metropolitan Street R. Co.* 65 App. Div. 492, 72 N. Y. Supp. 829, holding objection to evidence offered to perfect hypothetical question must be made before, and renewed after, to be available on appeal.

Dismissal of complaint by court.

Cited in *Peggo v. Dinan*, 72 App. Div. 437, 76 N. Y. Supp. 565 (dissenting opinion), majority denying power of court at close of defendant's evidence to dismiss complaint "upon the merits."

Master's duty to furnish safe machinery.

Cited in *Whitney v. Queen City Ice Co.* 49 App. Div. 493, 63 N. Y. Supp. 535, sustaining judgment for plaintiff hurt by slipping between slats of ice conveyor, which could not be stopped in time because of defective clutch.

44 L. R. A. 227, *UNION INS. CO. v. CENTRAL TRUST CO.* 157 N. Y. 633, 52 N. E. 671.

Revocation of arbitration agreement.

Cited in *Magoun v. Magoun*, 84 App. Div. 234, 82 N. Y. Supp. 820, holding code remedy for recovery of damages for revocation of arbitration agreement not exclusive.

44 L. R. A. 236, *KERSHAW v. LADD*, 34 Or. 375, 56 Pac. 402.

Sending of commercial paper by collecting bank directly to drawee bank.

Cited in footnotes to *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 44 L. R. A. 504, which denies bank's right to send check for collection directly to drawee, notwithstanding custom; *Givan v. Bank of Alexandria*, 47 L. R. A. 270, which holds sending check directly to drawee bank for collection, negligence;

First Nat. Bank v. Citizens' Sav. Bank, 48 L. R. A. 583, which holds collecting bank impliedly instructed to send certificate of deposit directly to bank making it, which is only bank in place; Second Nat. Bank v. Merchants' Nat. Bank, 55 L. R. A. 273, which holds bank negligent in sending note for collection to bank whose cashier is treasurer of corporation maker, without hearing from similar note previously sent.

44 L. R. A. 242, **KEYES v. KONKEL**, 119 Mich. 550, 75 Am. St. Rep. 423, 78 N. W. 649.

Rights as to disposal and burial of dead body.

Cited in *Louisville & N. R. Co. v. Hull*, 113 Ky. 569, 57 L. R. A. 773, 68 S. W. 433, holding that mental suffering may be considered as element of damages in action against carrier for breach of contract to transport corpse.

Cited in footnotes to *Enos v. Snyder*, 53 L. R. A. 221, which holds next of kin entitled to decedent's body for burial, as against disposition by will; *Wright v. Hollywood Cemetery Corp.* 52 L. R. A. 621, which sustains right of grandmother of orphan child living with her, to determine place of burial; *Thompson v. State*, 51 L. R. A. 883, which holds attempt to make unauthorized sale of dead body of human being a misdemeanor; *Doxtator v. Chicago & W. M. R. Co.* 45 L. R. A. 535, which denies employer's liability for cremation, according to custom of hospital, of fragments amputated in unsuccessful attempt to save employee's life.

44 L. R. A. 243, **YELLOWSTONE NAT. BANK v. GAGNON**, 19 Mont. 402, 61 Am. St. Rep. 520, 48 Pac. 762.

Report of later appeal in 25 Mont. 270, 64 Pac. 664.

Bona fide holder for value.

Cited in *Lewis v. Lindley*, 19 Mont. 441, 48 Pac. 765, holding burden upon wife purchasing real estate from her husband to show bona fides and lack of notice of equitable lien; *Commercial Bank v. Toklas*, 21 Wash. 40, 56 Pac. 927, holding bank bona fide holder of note given in payment of prior note and wrongfully pledged by payee, at least to extent of indebtedness secured.

44 L. R. A. 252, **WILKES COUNTY v. CALL**, 123 N. C. 308, 31 S. E. 481.

Estoppel by recitals in bonds.

Cited in *Uncas Nat. Bank v. Superior*, 115 Wis. 351, 91 N. W. 1004, holding city not estopped by recitals in bonds from defense of utter lack of power to issue same.

Cited in footnotes to *Independent School District v. Rew*, 55 L. R. A. 364, which holds municipal corporation estopped to deny truth of recitals in bonds held by innocent purchaser; *Huron v. Second Ward Sav. Bank*, 49 L. R. A. 534, which holds city estopped by recitals in bonds as to purpose of issuance.

County aid to railroads.

Cited in *Graves v. Moore County*, 135 N. C. 54, 47 S. E. 134, holding power given to counties by Code to subscribe stock to aid in completion of railroad not to include power to subscribe for purpose of "construction" and equipment of railroad; *Henderson County v. Travelers' Ins. Co.* 63 C. C. A. 474, 128 Fed. 824, holding bonds in aid of railroad, valid under prior decisions of state courts, not invalidated by later decisions reversing former rulings.

Formalities required in passage of legislative bills.

Followed in *Wilkes County v. Coler*, 180 U. S. 515, 45 L. ed. 649, 21 Sup. Ct. Rep. 458, Same case in Circuit Court of Appeals in 51 C. C. A. 400, 113 Fed. 726; *Stanly County v. Coler*, 37 C. C. A. 490, 96 Fed. 290, holding that Federal court must follow decisions of state courts as to whether provisions of state Constitution respecting passage of statute are mandatory.

Cited in *Smathers v. Madison County*, 125 N. C. 486, 34 S. E. 554, and *Debnam v. Chitty*, 131 N. C. 678, 43 S. E. 3, holding provision of Constitution as to recording of yeas and nays, mandatory; *Glenn v. Wray*, 126 N. C. 732, 36 S. E. 167, holding act not invalid because immaterial amendment was inserted on third reading, where constitutional requirement as to recording of yea and nay vote had been complied with; *New Hanover County v. De Rosset*, 129 N. C. 280, 40 S. E. 43, holding judgment sustaining validity of bonds purported to have been authorized by legislative act, erroneous, record merely showing number of yeas and nays; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 294, 41 S. E. 488, holding town charter not passed in constitutional manner confers no power of taxation.

Correctness of legislative journals.

Cited in footnote to *State ex rel. Brickman v. Wilson*, 45 L. R. A. 772, which denies right of clerk of House of Representatives to expunge false entries from journal after delivery to Secretary of State.

44 L. R. A. 261, *HALE v. CAIRNS*, 8 N. D. 145, 73 Am. St. Rep. 746, 77 N. W. 1010.

Credits to be allowed borrowing members of insolvent loan association.

Cited in *Clarke v. Olson*, 9 N. D. 366, 83 N. W. 519, holding that in action by receiver of insolvent building and loan association to foreclose mortgage, monthly dues should be deducted from amount agreed to be paid; *Hale v. Gullick*, 13 S. D. 645, 84 N. W. 196, holding that in winding up building association, where there is no finding of insolvency, stockholder should be permitted to offset amount paid as dues on stock against balance due on loan; *Hale v. Phillips*, 68 Ark. 389, 59 S. W. 35, holding that borrowing member of insolvent building and loan association should be credited with interest and premiums, but not with dues; *Hale v. Kline*, 113 Iowa, 527, 85 N. W. 814; *Phelps v. American Sav. & L. Asso.* 121 Mich. 355, 80 N. W. 120, denying right of stockholder of insolvent savings and loan association to offset amount paid as dues on unmatured stock against balance due on loan; *Reddick v. United States Bldg. & L. Asso.* 106 Ky. 112, 49 S. W. 1075, denying right of borrowing member of insolvent building and loan association to be credited with value of stock, unless such value is shown with reasonable certainty; *Coltrane v. Baltimore Bldg. & L. Asso.* 110 Fed. 305, holding borrowing member of insolvent building and loan association entitled to be credited with all premiums paid, and interest; *People's Bldg. & L. Asso. v. McPhillamy*, 81 Miss. 84, 59 L. R. A. 746, footnote p. 743, 95 Am. St. Rep. 693, 32 So. 1001, requiring stock payments of borrowing member to share losses and expenses of winding up loan association; *Georgia State Bldg. & L. Asso. v. Shannon*, 80 Miss. 643, 31 So. 900, holding question whether foreign loan is usurious to be determined by law of state where mortgaged land situated and debt to be paid; *Anselme v. American Sav. & L. Asso.* 63 Neb. 529, 88 N. W. 665, holding borrowing member of insolvent building asso-

ciation to be credited with payments of interest, or premiums and interest thereon, but not with dues.

44 L. R. A. 264, *SILBERMAN v. HEY*, 59 Ohio St. 582, 53 N. E. 258.

Constitutional requirement as to uniformity of general laws.

Cited in *Watkins v. Schlecter*, 7 Ohio N. P. 44, holding act relating to jurisdiction of justices of peace, not of uniform application, unconstitutional; *State v. Spellmire*, 67 Ohio St. 82, 65 N. E. 619, declaring act creating special school district unconstitutional.

44 L. R. A. 266, *STATE v. RENICK*, 33 Or. 584, 72 Am. St. Rep. 758, 56 Pac. 275.

Obtaining money by false representations as to marriage.

Cited in footnote to *Leffler v. State*, 45 L. R. A. 424, which holds obtaining money on false representation by man that he is unmarried, indictable false pretense.

44 L. R. A. 269, *CHESTER TRACTION CO. v. PHILADELPHIA, W. & B. R. CO.* 188 Pa. 105, 41 Atl. 449.

Followed on similar state of facts in *Union R. Co. v. Philadelphia, W. & B. R. Co.* 188 Pa. 115, 41 Atl. 1119.

Grade crossings.

Cited in *Pittsburg & L. E. R. Co. v. Lawrence County*, 198 Pa. 7, 47 Atl. 955, enjoining construction of county bridge where plan of construction would necessitate grade crossings of railroad tracks; *Baltimore & O. R. Co. v. Butler Pass. R. Co.* 207 Pa. 417, 56 Atl. 959, refusing to permit grade crossing of street railway over steam railway tracks on busy street and at point where many trains pass daily.

44 L. R. A. 272, *POST PRINTING & PUB. CO. v. INSURANCE CO. OF N. A.* 189 Pa. 300, 42 Atl. 192.

44 L. R. A. 273, *ADAMS v. UNION R. CO.* 21 R. I. 134, 42 Atl. 515.

Ejection from street car for refusal to pay fare.

Cited in footnotes to *Nashville Street R. Co. v. Griffin*, 49 L. R. A. 451, which denies authority to eject passenger who, after paying fare inside station, enters car which has stopped just outside station; *Kiley v. Chicago City R. Co.* 52 L. R. A. 626, which denies recovery for injuries in resisting ejection from street car by one having incorrect transfer given him by former conductor; *Southern R. Co. v. Wood*, 55 L. R. A. 536, which holds carrier liable for ejection of passenger whose round-trip ticket unstamped from inability to find agent.

44 L. R. A. 277, *ANDERSON v. YOUNG*, 54 S. C. 388, 32 S. E. 448.

Right to custody and services of minors.

Cited in *State v. Rhody*, 67 S. C. 288, 45 S. E. 205, holding that a father may, by contract, transfer his rights to minor child's service.

Cited in footnotes to *Hibbette v. Bains*, 51 L. R. A. 839, which sustains father's right to custody of child, notwithstanding assent to wife's deathbed contract to give custody to her relatives; *Stapleton v. Poynter*, 53 L. R. A. 784, which upholds taking of custody of child against its will from wealthy grandparent and giving to parent of moral habits; *State ex rel. Lasserre v. Michel*, 54 L. R. A. 927, which denies father's absolute right to custody of minor child; *Fletcher v. Hickman*, 55 L. R. A. 896, which holds father bound by agreement intrusting custody of infant child to another.

44 L. R. A. 279, *TEXAS LOAN AGENCY v. FLEMING*, 92 Tex. 458, 49 S. W. 1039.

Followed on subsequent appeal in 24 Tex. Civ. App. 203, 58 S. W. 971.

Liability of landlord for defective condition of leased premises.

Cited in footnotes to *Towne v. Thompson*, 46 L. R. A. 748, which denies boarding-house lessee's liability to tenant's boarders for illness from unsanitary condition of premises; *Smith v. State*, 51 L. R. A. 772, which denies landlord's liability for injury to subtenant's child from defective balustrade on porch; *Brady v. Klein*, 62 L. R. A. 909, which denies right of action by licensee of tenant on landlord's covenant to repair, for injury due to defective condition of premises; *Langenbaugh v. Anderson*, 62 L. R. A. 948, which denies liability of lessor of lot for production of oil or gas therefrom, for injury to adjoining owner's property through escape of oil by lessee's negligence.

Insufficient evidence to take case to jury.

Cited in *Texas & P. R. Co. v. Ball*, 96 Tex. 625, 75 S. W. 4, holding mere scintilla of evidence not sufficient to take case to jury on question whether engineer saw trespasser on track in time to have avoided hitting him.

44 L. R. A. 285, *CROCO v. OREGON SHORT-LINE R. CO.* 18 Utah, 311, 54 Pac. 985.

Jurisdiction of supreme court on appeal.

Cited in *Kennedy v. Oregon Short-Line R. Co.* 18 Utah, 329, 54 Pac. 988, holding court without jurisdiction to consider alleged error in amount of verdict for causing death of plaintiff's husband; *Burt v. Utah Light & P. Co.* 26 Utah, 161, 72 Pac. 497, holding that supreme court cannot review facts in case at law, except so far as may be necessary to determine questions of law.

Damages provable under general allegations of complaint.

Cited in *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 23 Utah, 200, 63 Pac. 812, holding plaintiff entitled, under general allegation of damage, to recover all damages which are natural and proximate result of act complained of; *Youngblood v. South Carolina & G. R. Co.* 60 S. C. 15, 85 Am. St. Rep. 824, 38 S. E. 232, holding direct effects of injury charged to have been caused by defendant's negligence provable without being specially alleged; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 90, 41 C. C. A. 42, 100 Fed. 758, holding aggravation of plaintiff's injuries due to fright, the proximate effect of collision, provable under general allegation as to bodily injury.

Champertry; contingent fee contracts of attorneys.

Cited in *Re Evans*, 22 Utah, 380, 53 L. R. A. 958, 83 Am. St. Rep. 794, 62 Pac. 913, and *Nelson v. Evans*, 21 Utah, 205, 60 Pac. 557, holding contract by which attorney agrees to pay expenses of litigation in consideration of payment of half of amount recovered, champertous; *Potter v. Ajax Min. Co.* 22 Utah, 293, 61 Pac. 999, upholding right of attorney, agreeing to prosecute plaintiff's case for half of recovery, to prosecute same, after compromise by plaintiff without attorney's consent; *Potter v. Ajax Min. Co.* 19 Utah, 436, 57 Pac. 270, holding that satisfaction and dismissal of action in fraud of attorney for plaintiff, whose compensation is contingent upon recovery, may be set aside by court.

Cited in footnotes to *Geer v. Frank*, 45 L. R. A. 110, which holds champertous, agreement by attorney to pay costs and expenses of litigation; *Davis v. Webber*, 45 L. R. A. 196, which sustains agreement to give statutory penalty on sheriff's bond as attorney's compensation; *Newman v. Freitas*, 50 L. R. A. 548, which holds void, contract to pay attorney one third of all amounts recovered in divorce suit; *Irwin v. Curie*, 58 L. R. A. 830, which sustains right of person placing demands in attorney's hands to recover agreed compensation, though statute forbids such agreements.

44 L. R. A. 289, *HARMAN v. NORFOLK & W. R. CO.* 91 Va. 601, 50 Am. St. Rep. 855, 22 S. E. 490.

Liability for injury to stock.

Cited in *Chesapeake & O. R. Co. v. American Exch. Bank*, 92 Va. 500, 44 L. R. A. 454, 1 S. E. 935, holding carrier liable for failure to provide owner with proper facilities for loading, unloading, feeding, and watering stock.

Cited in footnotes to *Illinois C. R. Co. v. Harris*, 48 L. R. A. 175, which holds carrier liable for communication of Texas fever by infected cars to cattle transported; *Beinhorn v. Griswold*, 59 L. R. A. 771, which denies liability of owner of unfenced land for death of trespassing animals by drinking poisonous liquids used in his business.

Contracts to limit liability.

Cited in footnotes to *Tecumseh Mills v. Louisville & N. R. Co.* 49 L. R. A. 558, which holds prohibition against carriers' limiting liability inapplicable to contract by domestic corporation in other state for transportation entirely outside of state; *Central R. Co. v. Murphey*, 53 L. R. A. 720, which holds negligent carrier liable for true value, notwithstanding arbitrary preadjustment in bill of lading assented to by shipper; *Ullman v. Chicago & N. W. R. Co.* 56 L. R. A. 246, which sustains carrier's right to secure entire exemption from liability as insurer for loss not due to negligence or misfeasance; *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which authorizes carrier to stipulate for exemption from liability for wet; *Rosenthal v. Weir*, 57 L. R. A. 527, which holds failure to comply with agreement for stoppage *in transitu* not within contract limiting liability to specified amount; *Parker v. Atlantic Coast Line R. Co.* 63 L. R. A. 827, which holds requirement that perishable freight must be carried at owner's risk, void where no other terms offered by carrier.

Statutes regulating duties of carriers of live stock.

Cited in footnote to *Atchison, T. & S. F. R. Co. v. Campbell*, 48 L. R. A. 251, which holds void, statute for free transportation of shippers of stock.

44 L. R. A. 297, *SOUTHERN R. CO. v. FRANKLIN & P. R. CO.* 96 Va. 693, 32 S. E. 485.

Contracts enforceable in equity.

Cited in *Pacific States Sav. Loan & Bldg. Co. v. Green*, 59 C. C. A. 170, 123 Fed. 46, holding contract between loan association and borrowing member, in absence of fraud, misrepresentation, deceit, mistake, or undue influence, enforceable in equity.

44 L. R. A. 305, *NEW YORK L. INS. CO. v. DAVIS*, 96 Va. 737, 32 S. E. 475.
Right of assignee of policy to proceeds.

Cited in *Tate v. Commercial Bldg. Asso.* 97 Va. 78, 45 L. R. A. 245, 75 Am. St. Rep. 770, 33 S. E. 382, denying right of assignee of life insurance policy, without insurable interest, to more than reimbursement from proceeds for premiums paid, expenses, and interest; *First Nat. Bank v. Terry*, 99 Va. 196, 37 S. E. 843, holding assignee creditor's interest in proceeds of life insurance policy limited to amount of liability together with premiums paid and interest.

Effect of killing or suicide of insured upon payment of policy.

Cited in footnotes to *Schmidt v. Northern Life Asso.* 51 L. R. A. 141, which sustains right of estate of insured, murdered by beneficiary, to recover insurance; *Lanier v. Box*, 64 L. R. A. 458, which sustains right of wife's distributees to proceeds of policy on husband's life, payable to wife if she survived husband, although latter murdered her and afterwards took his own life.

Forfeiture of policy.

Cited in *Ley v. Metropolitan L. Ins. Co.* 120 Iowa, 209, 94 N. W. 568, holding fraudulent concealment by insured of fact that he had suffered hemorrhage of stomach not clearly enough established by evidence to warrant forfeiture of policy.

44 L. R. A. 306, *MERCHANTS' BANK v. BALLOU*, 98 Va. 112, 81 Am. St. Rep. 715, 32 S. E. 481.

Retroactive statutes.

Cited in *Cassard v. Tracy*, 52 La. Ann. 848, 49 L. R. A. 277, 27 So. 368, holding provisions of Constitution of 1898 conferring jurisdiction upon appellate courts of law and fact not retroactive; *Evans-Snyder-Buel Co. v. McFadden*, 105 Fed. 304, 44 C. C. A. 505, 58 L. R. A. 906, upholding act validating certain prior mortgages of personal property, in suit by creditor attaching property before passage of curative act.

44 L. R. A. 311, *FRANKENTHAL v. SOLOMONSON*, 20 Wash. 460, 72 Am. St. Rep. 116, 55 Pac. 754.

Competency of wife as witness against husband.

Cited in *Re Jefferson*, 96 Fed. 827, denying right to compel wife in bankruptcy proceedings to disclose communications made by her husband concerning his property or income.

Cited in footnote to *State v. Kodat*, 51 L. R. A. 509, which holds that divorce does not make wife competent witness against husband as to crime previously committed.

44 L. R. A. 313, TROXLER v. SOUTHERN R. CO. 124 N. C. 189, 70 Am. St. Rep. 580, 32 S. E. 550.

Duty of master to furnish safe places and appliances.

Followed in Elmore v. Seaboard Air Line R. Co. 130 N. C. 506, 41 S. E. 786, holding railroad company liable for injury to employee due to defective coupling.

Cited in Lloyd v. Hanes, 126 N. C. 362, 35 S. E. 611, holding master only bound to furnish such safety devices as are in general use; Harden v. North Carolina R. Co. 129 N. C. 355, 55 L. R. A. 785, 85 Am. St. Rep. 747, 40 S. E. 184, holding failure of railroad company to equip cars with automatic couplers, negligence *per se*; Wright v. Southern R. Co. 127 N. C. 227, 37 S. E. 221, holding question whether train was equipped with proper brakes to prevent derailment, for jury; Elmore v. Seaboard Air Line R. Co. 132 N. C. 875, 44 S. E. 620, on Second Rehearing, Reversing First Rehearing 131 N. C. 573, 42 S. E. 989, Affirming Original Opinion, 130 N. C. 506, 41 S. E. 786, and holding that where law requires railroad to use automatic coupler, allowing same to be out of repair for unreasonable time is continuing negligence, and cuts off defense of contributory negligence; Orr v. Southern Bell Teleph. & Teleg. Co. 132 N. C. 693, 44 S. E. 401, holding master liable for injury resulting from failure to furnish safe tools for taking down telegraph poles; Walker v. Carolina C. R. Co. 135 N. C. 741, 47 S. E. 675, holding carrier liable for injuries due to defective sand-drier; McGinn v. McCormick, 109 La. 402, 33 So. 382, holding master liable for injury partly due to failure to furnish safe spring for hand car; Fleming v. Southern R. Co. 131 N. C. 481, 42 S. E. 905, holding negligence of master in not providing automatic coupler not excused by contributory negligence of servant making coupling.

Vice principalship.

Cited in note (54 L. R. A. 71) on vice principalship as determined with reference to character of act which caused injury.

Assumed risks of employment.

Cited in Coley v. North Carolina R. Co. 128 N. C. 537, 129 N. C. 415, 57 L. R. A. 824, 843, 39 S. E. 43, 40 S. E. 195, holding rule as to assumed risks no longer applicable under special statutes; Ausley v. American Tobacco Co. 130 N. C. 40, 40 S. E. 819 (dissenting opinion), majority holding machinist employed to run machinery assumes risks incident to master's failure to handle or fix cogwheels.

44 L. R. A. 316, PIERCE v. NORTH CAROLINA R. CO. 124 N. C. 83, 32 S. E. 399.

Liability of master for acts of servant within apparent scope of authority.

Cited in Cook v. Southern R. Co. 128 N. C. 333, 38 S. E. 925, holding railroad company liable for acts of flagman and brakeman assaulting person, who was forced to jump from train and was thereby injured; Dorsey v. Kansas City, P. & G. R. Co. 104 La. 481, 52 L. R. A. 94, footnote p. 92, 29 So. 177, holding carrier liable for death of trespasser falling under wheels in escaping from rocks thrown by brakeman; McNeill v. Durham & C. R. Co. 135 N. C. 721, 67 L. R. A. 229, 47 S. E. 765 (dissenting opinion), Reversing on Rehearing 132 N. C. 514,

95 Am. St. Rep. 641, 44 S. E. 34, majority holding that one riding on pass, contrary to law, may recover damages for injuries due to carrier's negligence; *Lewis v. Norfolk & W. R. Co.* 132 N. C. 387, 43 S. E. 919, holding carrier liable for injury to trespasser, knocked off moving train by brakeman.

Cited in footnotes to *Galveston, H. & S. A. R. Co. v. Zantzinger*, 44 L. R. A. 553, which sustains right to recover from company for engineer throwing steam and water on trespasser negligently standing on footboard between engine and flat car; *Nelson Business College Co. v. Lloyd*, 46 L. R. A. 314, which holds employer liable for servant's wilful or malicious acts in course of employment; *Galveston, H. & S. A. R. Co. v. Zantzinger*, 47 L. R. A. 282, which sustains liability for injuries from engineer's ejection of trespasser from footboard of engine; *Enright v. Pittsburgh Junction R. Co.* 53 L. R. A. 330, which denies right to eject or frighten ten-year-old boy from rapidly moving train; *Lamb v. Littman*, 53 L. R. A. 852, which holds employer liable for assault by cruel overseer on minor employee; *Lynch v. Florida C. & P. R. Co.* 54 L. R. A. 810, which denies company's liability for assault by station agent as result of personal quarrel; *Guille v. Campbell*, 55 L. R. A. 111, which denies master's liability for injury to bystander by slipping of hook from servant's hand while pretending to throw at boys playing on cotton bales; *Alsever v. Minneapolis & St. L. R. Co.* 56 L. R. A. 748, which sustains liability for injuries by engineer operating blow-off cock to frighten children; *Palmisano v. New Orleans City R. Co.* 58 L. R. A. 405, which denies master's liability for injury to boy running blindly against moving car after release by employee, who had caught and lectured him; *Southern R. Co. v. James*, 63 L. R. A. 257, which holds master liable for injury by night watchman shooting trespasser while running away after being arrested by him.

Distinguished in *Adams v. Southern R. Co.* 125 N. C. 566, 34 S. E. 642, holding carrier not liable for services of physicians employed by its conductor to treat injured trespassers; *Palmer v. Winston-Salem R. & Electric Co.* 131 N. C. 252, 42 S. E. 604, holding carrier not liable for assault by motorman upon passenger after latter had left car at termination of his passage; *Julian v. Central Trust Co.* 193 U. S. 108, 48 L. ed. 637, 24 Sup. Ct. Rep. 399, holding that corporation property does not continue liable for debts of corporation accruing after foreclosure sale.

Liability of lessor of railroad for negligence of lessee.

Cited in *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 83, 41 C. C. A. 30, 100 Fed. 746; *Harden v. North Carolina R. Co.* 129 N. C. 359, 55 L. R. A. 786, 85 Am. St. Rep. 747, 40 S. E. 184; *Perry v. Western North Carolina R. Co.* 129 N. C. 335, 40 S. E. 191, — holding railroad company leasing its road liable for negligence of lessee in operation of road.

44 L. R. A. 319, *HALL v. FIRST NAT. BANK*, 173 Mass. 16, 73 Am. St. Rep. 255, 53 N. E. 154.

Oral agreements relating to negotiable paper.

Cited in *Equitable Marine Ins. Co. v. Adams*, 173 Mass. 438, 53 N. E. 883, denying right of defendant to prove that when he indorsed promissory note, he understood it was merely in his representative character as assignee of insolvent; *Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 445, 73 Am. St. Rep. 305, 53 N. E. 881, denying right of maker of promissory note to prove agreement made at de-

livery of note by payee not to enforce it according to its tenor; *Kelley v. Thompson*, 175 Mass. 429, 56 N. E. 713, denying right of maker of promissory note to prove oral agreement as to discount to be made by payee upon payment of note.

44 L. R. A. 321, *HOADLEY v. SAVINGS BANK*, 71 Conn. 599, 42 Atl. 667.

Sale of real estate through inducement of brokers.

Cited in *Hartman v. Warner*, 75 Conn. 200, 52 Atl. 719, holding real estate broker, in absence of agreement fixing amount, entitled to customary commissions or to reasonable compensation, where customary rate not established; *Adams v. McLaughlin*, 159 Ind. 25, 64 N. E. 462, holding broker's right to commissions on finding purchaser not affected by fact that another broker was also employed for same purpose; and referring particularly to annotation in 44 L. R. A. 321.

Cited in footnotes to *Cadigan v. Crabtree*, 55 L. R. A. 77, which denies broker's right to commissions for procuring offer of lease, subsequently accepted and contract executed through other broker; *Livermore v. Crane*, 57 L. R. A. 402, which holds purchaser refusing to complete purchase liable to broker for loss of commissions from seller.

Cited in notes (43 L. R. A. 606) on real estate broker's commissions as affected by negligence, fraud, or default of principal, and a defective title; (44 L. R. A. 593, 600, 608, 611) on performance by real estate broker of his contract to find a purchaser or effect an exchange of his principal's property; (45 L. R. A. 33) on fraud and secret dealings or interest of real estate brokers as affecting their commissions; (53 L. R. A. 243) on duty of broker to disclose identity of purchaser to his principal.

Findings of fact by trial court.

Cited in *Post v. Hartford Street R. Co.* 72 Conn. 365, 44 Atl. 547, refusing to review assignments of alleged error in finding, or to find certain facts from conflicting evidence; *Fox v. Kinney*, 72 Conn. 406, 44 Atl. 745, refusing to correct finding when fact relied on was not admitted or undisputed or necessary to present a question of law decided adversely to appellant; *Duncan v. Kearney*, 72 Conn. 586, 45 Atl. 358, refusing to disturb finding of fact that plaintiff was procuring cause of sale of real estate; *Morris v. Winchester Repeating Arms Co.* 73 Conn. 686, 49 Atl. 180, holding finding by trial court of facts upon which judgment was based, accompanying judgment file, where no other findings were made, should be treated as part of judgment record; *Hyde v. Mendel*, 75 Conn. 142, 52 Atl. 744, refusing to consider claim that trial court erred in weighing the evidence supporting facts on which its judgment was founded; *Williams v. Clowes*, 75 Conn. 160, 52 Atl. 820, holding findings of trial court upon facts, conclusive, where not shown to have been unreasonable.

Cited in footnote to *Corbett v. Matz*, 48 L. R. A. 217, which denies power of court to make part of record, finding of facts made after term expires.

Statement of conditions of admissibility of evidence.

Cited in *Standard Cement Co. v. Windham Nat. Bank*, 71 Conn. 680, 42 Atl. 1006, holding that where record contains full statement of conditions as to admissibility of certain evidence, certified by judge, recital in finding may be read in the light of that statement.

44 L. R. A. 353, *LITTLE ROCK & FT. S. R. CO. v. OPPENHEIMER*, 64 Ark. 271, 43 S. W. 150.

Construction of penal statutes.

Cited in *State v. Arkadelphia Lumber Co.* 70 Ark. 331, 67 S. W. 1011, denying liability of ferryman for penalty for failure to post rates, where clerk failed to give him copy of rates, as required by statute.

44 L. R. A. 364, *Re ROYER*, 123 Cal. 614, 56 Pac. 461.

Status of public institutions.

Cited in *People ex rel. Stone v. Jefferds*, 126 Cal. 301, 58 Pac. 704, holding irrigation district not sovereign so as to be relieved from imputation of laches.

Cited in footnote to *Watson Seminary v. County Court*, 45 L. R. A. 675, which holds charter provisions of educational corporation changeable at will of legislature.

Charitable trusts.

Cited in *Fay v. Howe*, 136 Cal. 603, 69 Pac. 423, holding gift of fund to trustee "in aid of deserving, aged, native-born" inhabitants in specified town, needing such aid, to be used as in his judgment he may think best, valid trust.

Construction of statutes as affecting state.

Cited in *Reclamation Dist. No. 551 v. Sacramento County*, 134 Cal. 480, 66 Pac. 668, holding state not bound by general words in Code upon subject of taxation.

44 L. R. A. 369, *HEARD v. PHILLIPS*, 101 Ga. 691, 31 S. E. 216.

Computation of time.

Cited in note (49 L. R. A. 221) on rule as to first and last days in computation of time.

Competency of witness to testify to transaction with deceased person.

Cited in *Boynton v. Reese*, 112 Ga. 358, 37 S. E. 437, holding grantee of deed sought to be canceled by heir at law of grantor not disqualified to testify to transactions and communications between deceased and witness.

Sale by administrator of land in adverse possession of another.

Cited in *Lowe v. Bivins*, 112 Ga. 342, 37 S. E. 374, and *Hanesley v. Bagley*, 109 Ga. 348, 34 S. E. 584, holding title not acquired by administrator's sale of land in possession of another holding adversely to him; *Davitte v. Southern R. Co.* 108 Ga. 668, 34 S. E. 327, holding that administrator must first obtain possession before he can sell property of his intestate held adversely.

44 L. R. A. 372, *EXCHANGE BANK v. LOH*, 104 Ga. 446, 31 S. E. 459.

Followed without comment in *West v. Sanders*, 104 Ga. 728, 31 S. E. 619.

Rights of creditors and representatives of insured to proceeds of policy.

Cited in *Morris v. Dodd*, 110 Ga. 611, 50 L. R. A. 43, 78 Am. St. Rep. 129, 36 S. E. 83, holding that insurance policy on life of bankrupt, not having cash surrender value, does not vest in trustee as assets; *Morris v. Georgia Loan, Sav. & Bk. Co.* 109 Ga. 18, 46 L. R. A. 510, footnote p. 506, 34 S. E. 378, holding creditor taking assignment of policy entitled to retain from proceeds sufficient

to pay debt and advances only; *Strode v. Meyer Bros. Drug Co.* 101 Mo. App. 635, 74 S. W. 379, holding that creditor receiving proceeds of policy must account to estate of insured for amount above that necessary for his reimbursement.

Cited in footnotes to *Fisher v. Donovan*, 44 L. R. A. 383, which denies insured's right to impress with trust in creditors' favor proceeds of certificate payable to widow; *Tate v. Commercial Bldg. Asso.* 45 L. R. A. 243, which holds void, policy on life of member of loan association assigned to secure loan.

Nature of insurance contract.

Cited in *Fireman's Fund Ins. Co. v. Pekor*, 106 Ga. 10, 31 S. E. 779, upholding stipulation in policy requiring insured to carry insurance to extent of 75 per cent of value of property or be considered coinsurer to extent of deficiency.

Contract of assignment and indorsement.

Cited in *Sanders Mfg. Co. v. Dollar Sav. Bank*, 110 Ga. 563, 35 S. E. 777, holding fact that indorsement was made with secret intention merely to pass title cannot affect rights of indorsee with knowledge of such intent.

44 L. R. A. 383, *FISHER v. DONOVAN*, 57 Neb. 361, 77 N. W. 778.

Nature of interest of insured in benefit certificate.

Cited in *Warner v. Modern Woodmen (Neb.)* 61 L. R. A. 606, 93 N. W. 397, holding that estate of insured has no property interest in certificate of benefit association upon failure of beneficiaries.

Insurable interest.

Cited in footnotes to *Exchange Bank v. Loh*, 44 L. R. A. 372, which holds creditor's insurable interest limited to amount of indebtedness; *Morris v. Georgia Loan, Sav. & Bkg. Co.* 46 L. R. A. 506, which holds creditor taking assignment of policy entitled to retain from proceeds sufficient to pay debt and advances only; *Sternberg v. Levy*, 53 L. R. A. 438, which sustains right as against creditors, to procure with exempt wages insurance for sister and her children, constituting family.

Presumption as to law of sister state.

Cited in footnote to *Aslanian v. Dostumian*, 47 L. R. A. 495, which denies presumption that law merchant as to protest of draft prevails in Asiatic Turkey.

Parol promise to answer for debt or default of another.

Cited in footnote to *Hartley v. Sandford*, 55 L. R. A. 206, which holds void, father's oral promise to reimburse surety for son if latter fails to pay debt.

44 L. R. A. 387, *BLOOMFIELD STATE BANK v. MILLER*, 55 Neb. 243, 70 Am. St. Rep. 381, 75 N. W. 569.

Statute of frauds.

Cited in *Kendall v. Garneau*, 55 Neb. 408, 75 N. W. 852, holding grantee in deed bound by covenant to pay encumbrances not due for more than year from delivery of deed, although deed not subscribed by him.

44 L. R. A. 392, *PUGH v. HIGHLEY*, 152 Ind. 252, 71 Am. St. Rep. 327, 53 N. E. 171.

Prior equities as affecting purchaser at judicial sale.

Cited in *Union Cent. L. Ins. Co. v. Dodds*, 155 Ind. 368, 58 N. E. 258, holding

judgment creditor purchasing at sheriff's sale, on same footing as stranger as to unrecorded titles and secret claims; *Dodds v. Winslow*, 26 Ind. App. 656, 60 N. E. 458, holding purchaser at judicial sale, buying in good faith and without notice, protected against prior equities and unrecorded deeds; *Blumenthal v. Tibbits*, 160 Ind. 72, 66 N. E. 159, holding purchaser at sheriff's sale without notice not affected by prior equity.

Cited in footnote to *Johnson v. Equitable Securities Co.* 56 L. R. A. 933, which holds bona fide purchaser paying purchase money protected from unknown equities.

Subordination of judgment lien to inchoate right of dower.

Cited in *Higgins v. Ormsby*, 156 Ind. 86, 59 N. E. 321, denying lien of judgment against husband on land conveyed to wife in consideration of release of dower in other land.

Rights of purchaser without notice of unrecorded assignment of mortgage.

Cited in *Artz v. Yeager*, 30 Ind. App. 681, 66 N. E. 917, holding purchaser of real estate from assignee of mortgage of record takes same free from lien of unrecorded assignment of mortgage.

44 L. R. A. 397, *HAMLIN v. SIMPSON*, 105 Iowa, 125, 74 N. W. 906.

Prompt presentment of checks and drafts for collection.

Cited in *First Nat. Bank v. German Bank*, 107 Iowa, 544, 44 L. R. A. 134, 70 Am. St. Rep. 216, 78 N. W. 195, denying liability of bank to which draft had been delivered for collection, for negligence of its cashier while acting in capacity of notary.

Cited in footnote to *Edminsten v. Herpolsheimer*, 59 L. R. A. 934, which requires check to be presented not later than day after receipt to hold drawer.

44 L. R. A. 400, *GOWDY v. JOHNSON*, 104 Ky. 648, 47 S. W. 624.

Effect of loss of family on homestead right.

Cited in footnote to *Lyons v. Andry*, 55 L. R. A. 724, which holds eighteen-year-old daughter working for father, dependent person within homestead law.

44 L. R. A. 405, *ADDYSTON PIPE & STEEL CO. v. CHICAGO*, 170 Ill. 580, 48 N. E. 967.

Subjection of moneys owing by municipality to payment of debts.

Cited in *Chicago v. People*, 98 Ill. App. 521, holding assignment by police officer of unearned salary to creditor, void; *Geist v. St. Louis*, 156 Mo. 649, 79 Am. St. Rep. 545, 57 S. W. 766, denying right of creditor to compel city to pay officer's salary in satisfaction of judgment, after return of execution unsatisfied; *Clarksdale Compress Co. v. Caldwell Co.* 80 Miss. 348, 31 So. 790, denying right of creditor to garnish municipality as debtor of nonresident creditor.

Cited in footnote to *Portsmouth Gas Co. v. Sanford*, 45 L. R. A. 246, which authorizes garnishment of city for money due nonresident contractor.

Cited in note (54 L. R. A. 574) on exemption of officer's salary from claims of his creditors.

Proceedings against executors for debt.

Cited in *Williams v. Smith*, 117 Wis. 146, 93 N. W. 464, holding that creditors' suits on supplementary proceedings cannot be maintained against executors of debtor's estate.

44 L. R. A. 407, *SNYDER v. MT. PULASKI*, 176 Ill. 397, 52 N. E. 62.

Control of municipality over its streets.

Cited in *McGann v. People*, 194 Ill. 539, 62 N. E. 941, denying right of common council to permit individual to lay railroad tracks in street without petition of property owners; *Macon Consol. Street R. Co. v. Macon*, 112 Ga. 787, 38 S. E. 60, denying right of city to contract so as to divest itself of discretionary power as to location of railway tracks in street; *People ex rel. Kocourek v. Chicago*, 193 Ill. 565, 62 N. E. 187 (dissenting opinion), majority refusing to take original jurisdiction of suit for writ of mandamus to compel city to remove bridge over an alley connecting mercantile buildings; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 254, 91 N. W. 1081, holding no rights in streets acquired by grant of franchise by city which it was without power to grant; *Ashland v. Northern P. R. Co.* 119 Wis. 219, 96 N. W. 688 (dissenting opinion), majority holding city not estopped from claiming streets not vacated after passage of ordinance not complying with statutory requirements, vacating same; *Winnetka v. Chicago & M. Electric R. Co.* 107 Ill. App. 125, restraining village from interfering with railroad trestlework constructed in part of highway, under void ordinance but with consent of municipality; *People ex rel. Faulkner v. Harris*, 203 Ill. 282, 96 Am. St. Rep. 304, 67 N. E. 785, denying power of city to authorize bay window extending 18 inches into street.

44 L. R. A. 410, *CHICAGO & E. I. R. CO. v. ROUSE*, 178 Ill. 132, 52 N. E. 951.

Conflict of laws relating to liability for negligence.

Cited in footnotes to *Kansas City, Ft. S. & M. R. Co. v. Becker*, 46 L. R. A. 814, which holds servant's assumption of risks from fellow servant's negligence governed by laws of state where injury occurs; *Jones v. Chicago, St. P. M. & O. R. Co.* 49 L. R. A. 640, which holds statute of state where railroad employee injured, as to presumptive evidence of employer's knowledge of defect in appliance, not govern in action in another state; *Baltimore & O. S. W. R. Co. v. Read*, 56 L. R. A. 468, which denies right to recover in another state for injury from fellow servant's negligence in state where no remedy given.

Cited in note (56 L. R. A. 196, 204, 220) on conflict of laws as to action for death or bodily injury.

44 L. R. A. 413, *CLARK v. RENNINGER*, 89 Md. 66, 42 Atl. 928.

44 L. R. A. 415, *RUDELL v. OGDENSBURG TRANSIT CO.* 117 Mich. 503, 76 N. W. 380.

Contracts of shipment between shipper and agent of carrier.

Cited in *Stoner v. Chicago G. W. R. Co.* 109 Iowa, 554, 80 N. W. 509, holding railroad company bound by contract of agent within apparent scope of authority, for delivery of car at specified place within specified time.

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Cited in footnote to *Seasongood v. Tennessee & O. River Transp. Co.* 49 L. R. A. 270, which holds carrier bound by act of person permitted to act as its agent.

44 L. R. A. 417, *STEINBACK v. DIEPENBROCK*, 158 N. Y. 24, 70 Am. St. Rep. 424, 52 N. E. 662.

Assignment of life insurance policies.

Cited in *Morschauser v. Pierce*, 64 App. Div. 559, 72 N. Y. Supp. 328, holding that policy of life insurance assigned by husband to wife passes, on latter's death intestate, to her administrator; *Dannhauser v. Wallenstein*, 28 Misc. 693, 60 N. Y. Supp. 50, upholding validity of assignment of policy by wife, although without written consent of husband, where latter induced her to assign it for his own benefit; *McDonough v. Aetna L. Ins. Co.* 38 Misc. 628, 78 N. Y. Supp. 217, upholding right of insured to assign life policy to one having no insurable interest; *Maynard v. Life Ins. Co.* 132 N. C. 714, 44 S. E. 405, denying right of intervener claiming proceeds of policy as against assignee thereof, to assail validity of policy.

Cited in footnotes to *Chamberlain v. Butler*, 54 L. R. A. 338, which sustains right to assign policy on own life to one without insurable interest; *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which sustains right to provide that assigned policy shall be void as to all above debt due assignee; *Steele v. Gatlin*, 59 L. R. A. 129, which holds complete gift not made by verbal assignment of life policy, accompanied with words indicating intent to give, and delivery of policy; *Opitz v. Karel*, 62 L. R. A. 982, which sustains right of one taking policy on his own life to make valid gift of proceeds by mere delivery of policy; *American Mut. L. Ins. Co. v. Bertram*, 64 L. R. A. 935, which sustains right of assignee, without knowledge of facts, of policy void because taken out without consent of insured by one having no insurable interest, to recover from company premiums paid by him.

Insurable interest.

Cited in *Mechanics Nat. Bank v. Comins*, 72 N. H. 17, 101 Am. St. Rep. 650, 55 Atl. 191, holding that one furnishing money to carry on business of corporation has insurable interest in life of its manager.

44 L. R. A. 420, *PEOPLE ex rel. PUBLIC CHARITIES & C. COMRS. v. CULLEN*, 153 N. Y. 629, 47 N. E. 894.

Jurisdiction of court of appeals.

Cited in *People v. Malone*, 169 N. Y. 570, 62 N. E. 665, holding reversal by appellate division of conviction under Pen. Code, § 292, not appealable; *People v. Helmer*, 154 N. Y. 616, 49 N. E. 249 (dissenting opinion), majority holding questions of fact or sufficiency of evidence not reviewable by court of appeals on appeal from conviction for exhibiting false books to bank examiner.

Penal prosecution for abandonment.

Cited in *People ex rel. Feeney v. Dershem*, 78 App. Div. 626, 79 N. Y. Supp. 612, holding offer in good faith of home and maintenance, good defense to penal proceeding against husband for abandonment; *People v. Crouse*, 86 App. Div. 354, 83 N. Y. Supp. 812, holding refusal of husband in New York to support wife after separation in another state not desertion in New York.

Provisions by court for maintenance and expense of wife on separation or divorce.

Cited in *Hauscheld v. Hauscheld*, 33 App. Div. 299, 53 N. Y. Supp. 831, upholding order of court granting alimony where judgment for absolute divorce ten years before, reserved question for future consideration of court; *Livingston v. Livingston*, 74 App. Div. 264, 77 N. Y. Supp. 476, holding judgment of divorce providing for alimony, court not reserving power to modify its provisions, fixed obligation of husband not changeable by court or legislature; *Cullen v. Cullen*, 23 Misc. 81, 50 N. Y. Supp. 433, granting alimony upon application of wife under right reserved in decree of separation; *Naumer v. Gray*, 28 App. Div. 534, 51 N. Y. Supp. 222, holding action maintainable for legal services against husband by attorney for wife suing for separation because of cruel and inhuman treatment.

Protection of courts against legislative changes.

Cited in footnote to *Love v. Liddle*, 62 L. R. A. 482, which denies power to regulate jurisdiction of justices of peace by classification of cities in which they reside.

44 L. R. A. 424, *PRETZFELDER v. MERCHANTS INS. CO.* 123 N. C. 164, 31 S. E. 470.

Submission of issues to jury.

Cited in *Vanderbilt v. Brown*, 128 N. C. 499, 39 S. E. 36, and *Kendrick v. Mutual Ben. L. Ins. Co.* 124 N. C. 321, 70 Am. St. Rep. 592, 32 S. E. 728, upholding refusal to submit other issues where, under issue submitted by court, every phase of defendant's contention was presented without prejudice; *Bradley v. Ohio River & C. R. Co.* 126 N. C. 739, 36 S. E. 181, holding that when issues submitted arise on pleadings, and every phase of contentions of parties can be presented thereunder, they are not subject to review; *Hatcher v. Dabbs*, 133 N. C. 241, 45 S. E. 562, holding submission of issue "what damages, if any," plaintiff entitled to recover, in action for services rendered decedent, erroneous; *Ray v. Long*, 132 N. C. 893, 44 S. E. 652, holding issue submitted whether purchase money furnished equally by husband and wife, sufficient, in ejectment by husband and wife for land sold under execution against husband.

Rule as to reconsideration of issues determined on appeal.

Cited in *Hendon v. North Carolina R. Co.* 127 N. C. 112, 37 S. E. 155, denying right of defendant on second appeal to attack act decided to be valid on first appeal; *Kramer v. Southern R. Co.* 128 N. C. 270, 38 S. E. 872, and *Wright v. Southern R. Co.* 128 N. C. 79, 38 S. E. 283, denying right on second appeal to review point decided on first appeal; *Setzer v. Setzer*, 129 N. C. 207, 40 S. E. 62, and *Jones v. Wilmington & W. R. Co.* 131 N. C. 135, 42 S. E. 559, holding that questions adjudicated on appeal cannot be readjudicated except on rehearing; *Perry v. Western North Carolina R. Co.* 129 N. C. 334, 40 S. E. 191, and *Carter v. White*, 134 N. C. 470, 101 Am. St. Rep. 853, 46 S. E. 983, holding questions decided on appeal cannot be again heard under form of a second appeal.

Records not complying with rules.

Cited in *Sigman v. Southern R. Co.* 135 N. C. 182, 47 S. E. 420, holding that appeal will be dismissed where record without index or marginal references.

44 L. R. A. 427, *THRIFT v. ELIZABETH CITY*, 122 N. C. 31, 30 S. E. 349.

Municipal water supply.

Cited in *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 241, 91 N. W. 1081, holding grant of franchise beyond statutory period void for period in excess of time allowed by statute.

Cited in footnotes to *Skaneateles Waterworks Co. v. Skaneateles*, 46 L. R. A. 687, which denies power of village establishing own waterworks as against existing water company to impose rates for fire protection on property where village works not used; *Fawcett v. Mt. Airy*, 63 L. R. A. 870, which sustains municipality's power to incur expense of owning and operating water and electric light plants without submitting proposition to voters; *Westminster Water Co. v. Westminster*, 64 L. R. A. 630, which denies city's power to contract to pay water company specified percentage of assessed valuation in perpetuity for water supply.

Cited in note (61 L. R. A. 34, 81) on establishment and regulation of municipal water supply.

Mandatory provisions of Constitution.

Cited in *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 294, 41 S. E. 488, holding power of taxation not authorized by portion of charter not passed in compliance with constitutional requirement as to reading and recording of yeas and nays.

Necessary expenses of municipality.

Cited in *Wadsworth v. Concord*, 133 N. C. 592, 45 S. E. 948, raising, but not deciding, question whether providing lights for city is necessary expense.

44 L. R. A. 430, *BOND v. MARTIN*, 33 Or. 551, 54 Pac. 158.

44 L. R. A. 432, *KRAMER v. KISTER*, 187 Pa. 227, 42 W. N. C. 392, 40 Atl. 1008.

Acts affecting validity of verdicts in criminal causes.

Cited in *Hechter v. State*, 94 Md. 444, 56 L. R. A. 461, footnote p. 457, 50 Atl. 1041, holding sealed verdict of guilty on some counts of indictment not invalidated by adding not guilty as to others, before recording.

Distinguished in *Com. v. Price*, 10 Kulp, 42, holding right to new trial waived by defendant not objecting to resubmission to jury after one juror had disagreed upon coming into court after jury had separated.

44 L. R. A. 435, *KELLEY v. SCHUYLER*, 20 R. I. 29, 78 Am. St. Rep. 887, 39 Atl. 893.

Invasion of dwelling house.

Cited in *Gusdorff v. Duncan*, 94 Md. 169, 50 Atl. 574, holding officer not authorized by writ of replevin to enter house of stranger against his will, where goods covered by writ are not located there; *Hillman v. Edwards*, 28 Tex. Civ. App. 309, 66 S. W. 788, holding levy on piano in dwelling house entered by officer climbing through window, void.

44 L. R. A. 438, WESTERN TWINE CO. v. WRIGHT, 11 S. D. 521, 78 N. W. 942.

Proof of contents of telegram.

Distinguished in *Distad v. Shanklin*, 15 S. D. 512, 90 N. W. 151, holding copy of telegram admissible where copy had been received without objection on former trial and letter to plaintiff acknowledged a telegram reading same as copy.

Evidence as to quality of binding twine.

Cited in *Standard Rope & Twine Co. v. Olmen*, 13 S. D. 301, 83 N. W. 271, holding evidence that quality of binding twine rendered it susceptible to action of crickets, which destroyed it after grain was bound, admissible on behalf of defendant in action for price of twine.

44 L. R. A. 442, CONNECTICUT MUT. L. INS. CO. v. SPRATLEY, 99 Tenn. 322, 42 S. W. 145.

Affirmed in 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

Due service of process.

Cited in *Guthrie v. Connecticut Indemnity Asso.* 101 Tenn. 651, 49 S. W. 829, holding jurisdiction of foreign corporation after withdrawal from business in state not acquired by service of process on former local agent.

Cited in footnotes to *Mutual Reserve Fund Life Asso. v. Boyer*, 50 L. R. A. 538, which denies right to serve process on state officer designated by foreign insurance company which has ceased to do business in state; *Abbeville Electric Light & P. Co. v. Western Electrical Supply Co.* 55 L. R. A. 146, which authorizes service on traveling salesman of foreign corporation sent to investigate controversy out of which cause of action arose; *Buie v. Chicago, R. I. & P. R. Co.* 55 L. R. A. 861, which authorizes service of railroad company by serving in other state, officers of company organized to construct extension of system.

Cited in note (50 L. R. A. 590, 594) on what service of process is sufficient to constitute due process of law.

What constitutes doing business within state by foreign corporation.

Distinguished in *State v. Connecticut Mut. L. Ins. Co.* 106 Tenn. 288, 61 S. W. 75, holding receipt of premiums by foreign insurance company which has ceased to solicit new insurance and has withdrawn agents, not "doing business" within state so as to render it liable to payment of privilege tax.

44 L. R. A. 446, STATE *ex rel.* GOODELL v. McGEARY, 69 Vt. 461, 38 Atl. 165.

44 L. R. A. 449, CHESAPEAKE & O. R. CO. v. AMERICAN EXCH. BANK, 92 Va. 495, 23 S. E. 935.

Pleadings.

Cited in *Chesapeake & O. R. Co. v. Rison*, 99 Va. 28, 37 S. E. 320, holding that special replication should be rejected after filing of general replication not withdrawn.

Transportation of live stock and caretakers.

Cited in *Brockway v. American Exp. Co.* 168 Mass. 259, 47 N. E. 87, holding express company liable for negligence in keeping horses in car without food and drink for forty-nine hours; *Burns v. Chicago, M. & St. P. R. Co.* 104 Wis.

655, 80 N. W. 927, holding failure to perform statutory duty of unloading, feeding, and watering stock actionable negligence.

Cited in footnotes to *Illinois C. R. Co. v. Harris*, 48 L. R. A. 175, which holds carrier liable for communication of Texas fever by infected cars to cattle transported; *Atchison, T. & S. F. R. Co. v. Campbell*, 48 L. R. A. 251, which holds void, statute for free transportation of shippers of stock; *Chicago, B. & Q. R. Co. v. Williams*, 55 L. R. A. 289, which holds carrier liable for failure to properly provide for live stock knowingly taken without caretaker.

Cited in notes (44 L. R. A. 295) on duties of carriers of live stock as to pens or yards at station; (48 L. R. A. 34) on administration of Federal laws in state courts, as to transportation of live stock.

44 L. R. A. 459, *PACE v. PACE*, 95 Va. 792, 30 S. E. 361.

Contribution between co-obligors.

Cited in *Sands v. Durham*, 99 Va. 269, 54 L. R. A. 624, 86 Am. St. Rep. 884, 38 S. E. 145, holding partner, upon payment of firm debts after dissolution of partnership out of his individual means, entitled to subrogation to creditor's rights as against remaining partners.

44 L. R. A. 464, *FARRELLY v. COLE*, 60 Kan. 356, 56 Pac. 492.

Constitutional law.

Cited in *People ex rel. State Harbor v. Mullender*, 132 Cal. 222, 64 Pac. 299, holding act providing for establishment of board of state harbor commissioners for bay of San Diego not abuse of discretion as to enactment of local and special law.

44 L. R. A. 474, *CLAYTON v. HENDERSON*, 103 Ky. 228, 44 S. W. 667.

Report of second appeal in 22 Ky. L. Rep. 283, 53 L. R. A. 146, 57 S. W. 1.
Liability for acts of municipal officials done to prevent spread of disease.

Cited in footnotes to *Frazer v. Chicago*, 51 L. R. A. 306, which holds establishment of smallpox hospital not taking or damaging of adjoining property; *Nicholson v. Detroit*, 56 L. R. A. 601, which denies city's liability for death of unwarned employee from smallpox contracted in tearing down smallpox hospital; *Henderson v. O'Haloran*, 59 L. R. A. 718, which holds city liable for contraction of smallpox by guest from inmate of house contracting disease from unlawful location of pesthouse near.

Distinguished in *Twyman v. Frankfort (Ky.)* 64 L. R. A. 573, 78 S. W. 446, holding municipal corporation not liable for death caused by removal of smallpox patient to overcrowded pesthouse; *Arnold v. Stanford*, 113 Ky. 855, 69 S. W. 726, holding city of fifth class not liable for injury to property by erection of pesthouse within city limits.

Disapproved in *White v. San Antonio*, 94 Tex. 316, 60 S. W. 426, holding city not liable for acts of its officers in taking possession of plaintiff's hotel and detaining guests suspected of having been exposed to infection from yellow fever.

Liability of sureties for wrongful acts of municipal officials.

Cited in footnote to *State ex rel. McLauren v. McDaniel*, 50 L. R. A. 118,

which holds sureties on mayor's bond liable for his causing arrest without warrant, and trying and sentencing for offense not punishable by city ordinance.

Joinder of parties.

Cited in footnote to *Howe v. Northern P. R. Co.* 60 L. R. A. 950, which authorizes joinder of master and negligent servant in action for injuries to other servant.

44 L. R. A. 477, *HOGGARD v. MONROE*, 51 La. Ann. 683, 25 So. 349.

44 L. R. A. 479, *TAYLOR v. CARROLL*, 89 Md. 32, 42 Atl. 920.

Laches in prosecution of claim.

Cited in *Hadaway v. Hynson*, 89 Md. 314, 43 Atl. 806, holding delay of fifteen years in asserting claim on behalf of estate against trustee, followed by abandonment of claim until after trustee's death, fatal to recovery.

Cited in footnote to *Robinson v. Bierce*, 47 L. R. A. 275, which holds lien for taxes defeated by eight years' unexplained delay in prosecuting suits for same.

44 L. R. A. 482, *BONAPARTE v. WISEMAN*, 89 Md. 12, 42 Atl. 918.

Liability of landlord or owner for defects in buildings or premises.

Cited in *Hearn v. Quillen*, 94 Md. 44, 50 Atl. 402, holding defendant owners cannot escape liability for injury caused by fall of roof on ground that they employed experienced and competent carpenter to erect it; *Davis v. Summerfield*, 133 N. C. 330, 63 L. R. A. 496, footnote p. 493, 45 S. E. 654, holding lot owner liable for injury to adjoining owner through negligent excavation of such depth that injury might reasonably be anticipated, though work was done by independent contractor.

Cited in footnote to *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 116, which holds landlord liable to tenants of lower floor for injury from freezing of automatic fire extinguisher in portion retained by former, though building heated by independent contractor.

— For acts of independent contractors.

Cited in footnotes to *Boomer v. Wilbur*, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney; *Peerless Mfg. Co. v. Bagley*, 53 L. R. A. 285, which holds landlord liable for independent contractor's negligence in putting in automatic fire extinguisher; *Hoff v. Shockley*, 64 L. R. A. 538, which holds property owner not liable for injuries to traveler by obstructions placed in street, without danger signals, by independent contractor for construction of building.

44 L. R. A. 485, *MCCREA v. ROBERTS*, 89 Md. 238, 43 Atl. 39.

Mandamus to compel issuance of liquor license.

Cited in *McCrea v. Billingslea*, 89 Md. 767, 43 Atl. 42, upholding dismissal of petition for mandamus to compel clerk of circuit court of county to issue liquor license.

Limitation of judicial powers to judicial functions.

Cited in *Beasley v. Ridout*, 94 Md. 659, 52 Atl. 61, holding provisions of act requiring visitors of county jail to be appointed by judges, unconstitutional;

Cited in footnotes to *Fenton v. Fidelity & C. Co.* 48 L. R. A. 770, which holds indemnity against liability for injuries to employees assignable, though employer insolvent; *Frye v. Bath Gas & Electric Co.* 59 L. R. A. 444, which denies right of injured employee to enforce employer's liability insurance against insurer after employer's insolvency; *Morgan v. Randolph-Clowes Co.* 51 L. R. A. 653, which denies right of firm creditor to sue corporation assuming firm debts; *Ferris v. American Brewing Co.* 52 L. R. A. 305, which sustains right of action of one for whose benefit stipulation in lease was made, against sale on premises of other person's beer; *Electric Appliance Co. v. United States Fidelity & G. Co.* 53 L. R. A. 609, which denies right of action of one furnishing materials to contractor to sue on bond by latter to city, conditioned on turning over building free of claims for materials; *Boston Ins. Co. v. Chicago, R. I. & P. R. Co.* 59 L. R. A. 796, which denies right of action against railroad company carrying mail under contract with government, by sender of registered mail destroyed through negligence of its employees; *Tweeddale v. Tweeddale*, 61 L. R. A. 509, which sustains right of third person to enforce contract made for his benefit.

Distinguished in *Traver v. Snyder*, 35 Misc. 266, 71 N. Y. Supp. 761, Affirming 34 Misc. 407, 69 N. Y. Supp. 750, holding grantees under receiver's sale, stipulating to pay expense of accounting and discharge of receiver, liable in action by receiver's attorney for compensation allowed by court.

44 L. R. A. 515, MITCHELL v. CAROLINA C. R. CO. 124 N. C. 236, 32 S. E. 671.
Contracts to limit liability.

Cited in *Gardner v. Southern R. Co.* 127 N. C. 296, 37 S. E. 328, denying right of carrier to exempt itself by contract from liability for loss due to its negligence; *Gwyn-Harper Mfg. Co. v. Carolina C. R. Co.* 128 N. C. 283, 83 Am. St. Rep. 675, 38 S. E. 894, holding stipulation in bill of lading requiring notice in writing of loss to carrier within thirty days after time for delivery, unreasonable; *Bank of Tarboro v. Fidelity & D. Co.* 128 N. C. 373, 83 Am. St. Rep. 682, 38 S. E. 908, holding that cashier's bond of fidelity and guaranty insurance company should be construed most strongly against company; *Parker v. Atlantic Coast Line R. Co.* 133 N. C. 341, 63 L. R. A. 830, 45 S. E. 658, holding liability of carrier for negligence not limited by indorsing words "subject to delay" on bill of lading.

Burden of proof and circumstantial evidence.

Cited in *Hinkle v. Southern R. Co.* 126 N. C. 937, 78 Am. St. Rep. 685, 36 S. E. 348, holding burden upon carrier to prove facts exempting it from liability for injury to live stock under contract limiting liability; *Gwyn-Harper Mfg. Co. v. Carolina C. R. Co.* 128 N. C. 284, 83 Am. St. Rep. 675, 38 S. E. 894, holding burden upon carrier in whose hands damaged goods are found, to rebut presumption that damage was caused by it; *Williams v. Southern R. Co.* 130 N. C. 124, 40 S. E. 979, dissenting opinion by Douglas, J., who holds negligence of railway in maintenance of spark arrester provable by circumstantial evidence; *Parker v. Atlantic Coast Line R. Co.* 133 N. C. 339, 63 L. R. A. 829, 45 S. E. 658, holding burden of proving due diligence in carrying and delivering melons, upon carrier; *Raleigh Hosiery Co. v. Raleigh & G. R. Co.* 131 N. C. 240, 42 S. E. 602, holding burden upon carrier to rebut presumption of negligence where fire shown to have been caused by sparks from locomotive.

Cited in footnote to *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which holds carrier has burden of proving that delivery of goods in wet condition was not due to its negligence.

Submission of issues.

Cited in *Ray v. Long*, 132 N. C. 893, 44 S. E. 652, holding issue submitted whether purchase money furnished equally by husband and wife, sufficient in ejectment by husband and wife for land sold under execution against husband.

44 L. R. A. 520, *BALTIMORE & O. R. CO. v. FULTON*, 59 Ohio St. 575, 53 N. E. 265.

Followed without comment in *Thomas v. W. J. Gawne Co.* 69 Ohio St. 562, 70 N. E. 1133.

Jurisdiction of state courts after removal of causes to Federal courts.

Cited in *Hickman v. Missouri, K. & T. R. Co.* 97 Fed. 120, holding that in removable cause, after certified copy of record of state court refusing removal is filed, all proceedings in state court are void.

Cited in footnote to *Illinois C. R. Co. v. Benz*, 58 L. R. A. 691, which holds decision on reversal and remanding of action for personal injuries, removed to Federal court, not law of case if action dismissed and new one begun.

Distinguished in *Foley v. Cudahy Packing Co.* 119 Iowa, 250, 93 N. W. 284, and *Adams Exp. Co. v. Schofield*, 111 Ky. 837, 64 S. W. 903, holding dismissal, without prejudice, of cause removed to state court not bar to maintenance of new suit in state court on same cause of action.

Disapproved in *McIver v. Florida C. & P. R. Co.* 110 Ga. 228, 65 L. R. A. 440, 36 S. E. 775; *Cleveland, C. C. & St. L. R. Co. v. Reese*, 93 Ill. App. 663; *Krueger v. Chicago & A. R. Co.* 84 Mo. App. 362; *Fleming v. Southern R. Co.* 128 N. C. 81, 38 S. E. 253; *Hooper v. Atlanta, K. & N. R. Co.* 106 Tenn. 31, 53 L. R. A. 932, footnote p. 931, 60 S. W. 607; *Gassman v. Jarvis*, 100 Fed. 146; *Texas Cotton Products Co. v. Starnes*, 128 Fed. 184,—holding that dismissal, without determination on merits, of suit removed from state to Federal court, does not bar state court from entertaining new suit on same cause of action; *Swift & Co. v. Hoblawetz*, 10 Kan. App. 53, 61 Pac. 969, and *Rodman v. Missouri P. R. Co.* 65 Kan. 648, 59 L. R. A. 705, footnote p. 704, 70 Pac. 642, sustaining right to bring action in state court after dismissal without prejudice of action removed to Federal court.

44 L. R. A. 522, *BLAGEN v. SMITH*, 34 Or. 394, 56 Pac. 202.

Right of private individual to enjoin public nuisance or crime.

Cited in footnotes to *Weakley v. Page*, 46 L. R. A. 552, which sustains right of person specially injured to have house of ill fame abated as nuisance; *Griffith v. Holman*, 54 L. R. A. 178, which denies private individual's right to abate public nuisance consisting of fence across navigable stream.

Distinguished in *People ex rel. L'Abbe v. District Court*, 26 Colo. 393, 46 L. R. A. 853, 58 Pac. 604, denying right of citizen to injunction to stop public gambling not alleged especially to injure complainant's property.

44 L. R. A. 527, *PORTLAND v. PORTLAND BITUMINOUS PAVING & IMPROV. CO.* 33 Or. 307, 72 Am. St. Rep. 713, 52 Pac. 28.

Provisions in contracts for street paving relating to repairs.

Cited in *Alameda Macadamizing Co. v. Pringle*, 130 Cal. 229, 52 L. R. A. 265, footnote p. 264, 80 Am. St. Rep. 124, 62 Pac. 394, holding street improvement contract invalidated by guaranty for year; *Kansas City v. Hanson*, 8 Kan. App. 293, 55 Pac. 513, holding assessment invalidated by provision in contract for street improvement, requiring contractor to keep pavement in repair for five years; *Young v. Tacoma*, 31 Wash. 160, 71 Pac. 742, holding it question for jury whether provision in contract for repairs for five years, was guaranty against defective work or not.

Cited in footnotes to *Seaboard Nat. Bank v. Woesten*, 48 L. R. A. 279, which holds agreement to maintain new pavement for series of years not contract for repairs necessitating letting to lowest bidder; *Barber Asphalt Paving Co. v. French*, 54 L. R. A. 492, which sustains requirement of five years' guaranty of street paving; *Blochman v. Spreckels*, 57 L. R. A. 213, which denies power to assess cost of street improvement on abutters where contractor required to sustain all loss from nature of work.

Distinguished in *Allen v. Portland*, 35 Or. 447, 58 Pac. 509, upholding validity of provision in paving contract requiring contractor to repair defects for stated period at his own expense; *State ex rel. Wheeler v. District Court*, 80 Minn. 308, 83 N. W. 183, upholding validity of guaranty by contractor of pavement for period of ten years; *Shank v. Smith*, 157 Ind. 409, 55 L. R. A. 568, footnote p. 564, 61 N. E. 932, sustaining provision in street paving contract for keeping in good condition for term of years; *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 121, 60 L. R. A. 771, footnote p. 768, 64 N. E. 802, sustaining provision requiring street paving contractor to maintain work during period which it ought to wear.

Estoppel of municipality.

Cited in *Municipal Security Co. v. Baker County*, 33 Or. 353, 54 Pac. 174, holding county receiving benefits not precluded from asserting invalidity of warrants for obligations in excess of constitutional limit.

44 L. R. A. 534, *ROBERTSON v. OMAHA*, 55 Neb. 718, 76 N. W. 442.

Contracts for repairs as guaranty of quality of street pavement.

Cited in *Kansas City v. Hanson*, 60 Kan. 837, 58 Pac. 474; *State ex rel. Wheeler v. District Court*, 80 Minn. 309, 83 N. W. 183; *O'Keefe v. New York*, 73 App. Div. 315, 76 N. Y. Supp. 796; *Shank v. Smith*, 157 Ind. 409, 55 L. R. A. 568, footnote p. 564, 61 N. E. 932; *Williamsport v. Hughes*, 21 Pa. Super. Ct. 454,—sustaining validity of provision in street paving contract for keeping in good condition for term of years.

Cited in footnotes to *Seaboard Nat. Bank v. Woesten*, 48 L. R. A. 279, which holds agreement to maintain new pavement for series of years not contract for repairs, necessitating letting to lowest bidder; *Alameda Macadamizing Co. v. Pringle*, 52 L. R. A. 264, which holds street improvement contract invalidated by guaranty for year; *Barber Asphalt Paving Co. v. French*, 54 L. R. A. 492, which sustains requirement of five years' guaranty of street paving; *People ex rel. North v. Featherstonhaugh*, 60 L. R. A. 768, which sustains provision

requiring street paving contractor to maintain work during period which it ought to wear; *Blochman v. Spreckels*, 57 L. R. A. 213, which denies power to assess cost of street improvement on abutters, where contractor required to sustain all loss from nature of work.

Cited in note (44 L. R. A. 534) on power of city to bind contractor to repair pavement which he makes.

44 L. R. A. 540, *STATE ex rel. WILSON v. TRENTON*, 61 N. J. L. 599, 68 Am. St. Rep. 714, 40 Atl. 575.

Stipulations for repair in street paving contracts.

Cited in *Borton v. Camden*, 65 N. J. L. 516, 47 Atl. 436, holding delay in application for certiorari to review municipal ordinance and contract for paving until after performance, fatal to claim that contract was illegal because of guaranty to repair for ten years; *O'Keefe v. New York*, 73 App. Div. 315, 76 N. Y. Supp. 796, upholding validity of stipulation in contract requiring contractor to keep pavement in repair for fifteen years; *Shank v. Smith*, 157 Ind. 409, 55 L. R. A. 568, footnote p. 564, 61 N. E. 932, and *Williamsport v. Hughes*, 21 Pa. Super. Ct. 456, sustaining provision in street paving contract for keeping in good condition for term of years; *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 121, 60 L. R. A. 771, footnote p. 768, 64 N. E. 802, sustaining provision requiring street paving contractor to maintain work during period which it ought to wear.

Cited in footnotes to *Seaboard Nat. Bank v. Woesten*, 48 L. R. A. 279, which holds agreement to maintain new pavement for series of years not contract for repairs, necessitating letting to lowest bidder; *Alameda Macadamizing Co. v. Pringle*, 52 L. R. A. 264, which holds street improvement contract invalidated by guaranty for year; *Barber Asphalt Paving Co. v. French*, 54 L. R. A. 492, which sustains requirement of five years' guaranty of street paving; *Blochman v. Spreckels*, 57 L. R. A. 213, which denies power to assess cost of street improvement on abutters where contractor required to sustain all loss from nature of work.

44 L. R. A. 542, *WILSON v. ANDERSON*, 186 Pa. 531, 40 Atl. 1096.

Deeds of trust.

Cited in *Rynd v. Baker*, 193 Pa. 491, 44 Atl. 551, holding title of beneficiaries under deed of trust by appointment exercised by grantor in pursuance of its terms not defeated by subsequent deed by grantor without formal revocation of deed of trust; *Kraft v. Neuffer*, 202 Pa. 563, 52 Atl. 100, holding voluntary deed of trust reserving life use of property to settler and wife during joint lives, containing no power of revocation, irrevocable; *Potter v. Fidelity Ins. Trust & S. D. Co.* 199 Pa. 365, 49 Atl. 85, holding voluntary active trust irrevocable, terms of deed expressly declaring it to be so; *Fidelity Trust Co. v. New York Finance Co.* 60 C. C. A. 192, 125 Fed. 278, denying right of creditor of settlor of trust, to reach the trust property, where debt arises after creation of trust.

Cited in footnotes to *Neisler v. Pearsall*, 52 L. R. A. 874, which holds settlement of property in trust stated to be irrevocable, not revocable without interposition of duly constituted tribunal; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustees to pay certain portion of income absolutely to beneficiary;

Hutchinson v. Maxwell, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary.

Intention of grantor.

Cited in *Zeok v. Mercantile Trust Co.* 194 Pa. 391, 45 Atl. 215, refusing to set aside deed executed by wife to husband on latter's deathbed, in pursuance of family settlement perfectly understood and acquiesced in by each; *Carney v. Carney*, 196 Pa. 37, 46 Atl. 264, refusing to set aside deed from father to son, where evidence failed to show former's mental unsoundness, or that undue influence had been used, and it appeared that grantee had supported grantor for thirteen years.

What constitutes a deed.

Cited in *Nixon v. Frick Coke Co.* 27 Pa. Co. Ct. 151, holding instrument conveying land to grantee, reserving portion of house to grantor, and subject to payment of \$10,000 on grantor's death, a deed.

44 L. R. A. 546, *KEATOR v. SCRANTON TRACTION CO.* 191 Pa. 102, 44 W. N. C. 128, 71 Am. St. Rep. 758, 43 Atl. 86.

Presumption of negligence from happening of accident.

Cited in footnote to *Springer v. Ford*, 52 L. R. A. 930, which sustains presumption of negligence from injury to passenger by unexplained breaking of elevator appliance.

When person becomes a passenger.

Cited in footnotes to *Illinois C. R. Co. v. Laloge*, 62 L. R. A. 405, which holds intending passenger resorting to station unreasonable time before train's departure not entitled to protection as a passenger from assaults of strangers; *Cassady v. Old Colony Street R. Co.* 63 L. R. A. 285, which holds ordinary burning out of fuse in electric car not prima facie evidence of carrier's negligence.

Degree of care required of railroad company toward passenger.

Cited in *Austrian v. Union Traction Co.* 19 Pa. Super. Ct. 332, holding street car company liable for injury to person boarding car, by negligent starting thereof.

44 L. R. A. 548, *WISE v. MORGAN*, 101 Tenn. 273, 48 S. W. 971.

Negligence in sale or manufacture of dangerous articles.

Cited in footnotes to *West v. Emanuel*, 53 L. R. A. 329, which denies druggist's negligence in selling patent medicine without analyzing contents; *Burgess v. Sims Drug Co.* 54 L. R. A. 364, which holds druggist liable for injury by prescription negligently put up by registered pharmacist employed by him; *Ives v. Welden*, 54 L. R. A. 854, which holds merchant's failure to label gasoline renders him liable for injury to member of purchaser's family by explosion; *Gibson v. Torbert*, 56 L. R. A. 98, which denies liability of druggist for failure to instruct person of age of discretion as to safe method of handling phosphorus; *Smith v. Middleton*, 56 L. R. A. 484, which holds druggist liable for punitive damages for filling order for calomel tablets with morphine, without notice of fact; *Peters v. Jackson*, 57 L. R. A. 428, which holds one mistakenly selling poisonous drug for harmless medicine liable to third person taking it; *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 303, which holds manu-

facturer supplying dangerous machine to another without notice of dangerous character, liable for injury to vendee's employee; *Skinn v. Reutter*, 63 L. R. A. 743, which holds one selling hogs known to have dangerous and infectious disease liable for injury to life or property caused thereby.

Liability for negligence without privity of contract.

Cited in footnote to *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 117, which holds one contracting with owner to heat portion of building retained, liable to tenants of lower floor for injury by freezing and bursting of water pipes designed for their protection from fire.

44 L. R. A. 553, *GALVESTON, H. & S. A. R. CO. v. ZANTZINGER*, 92 Tex. 365, 71 Am. St. Rep. 859, 48 S. W. 563.

Liability for injury to trespassers.

Cited in *Texas & P. R. Co. v. Black*, 23 Tex. Civ. App. 124, 57 S. W. 330, holding that collusion between brakeman and person riding on freight car, by which latter pays brakeman for privilege, will not relieve carrier from liability for wilful act of brakeman knocking such person from train; *Southern P. Co. v. Bender*, 24 Tex. Civ. App. 135, 57 S. W. 574, sustaining judgment for trespasser struck on head with pistol by conductor and knocked off car.

Proximate cause.

Cited in note (45 L. R. A. 90) on rule of proximate cause in case of malicious torts.

Care required of injured person to lessen damages.

Cited in *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 45, 58 S. W. 278, upholding instruction that if plaintiff, acting on his own judgment, treated injured knee in such manner as physician of ordinary care and skill would have done, law would accept such action as full discharge of duty.

44 L. R. A. 557, *SMITH v. NORTH AMERICAN TRANSP. & TRADING CO.* 20 Wash. 580, 56 Pac. 372.

Followed without comment in *Wheeler v. North American Transp. & Trading Co.* 21 Wash. 704, 57 Pac. 1103.

When nonperformance of contract excused by impossibility.

Cited in *Bullock v. White Star S. S. Co.* 30 Wash. 454, 70 Pac. 1106, holding transportation company engaging to take passengers by water to specified port not excused from performance by fact harbor is icebound.

Cited in footnotes to *Angus v. Scully*, 49 L. R. A. 562, which sustains right to recover under contract to move building destroyed by fire before work completed; *Ontario Deciduous Fruit Growers' Asso. v. Cutting Fruit Packing Co.* 53 L. R. A. 681, which denies liability for failure to deliver specified quantity of fruit contracted for, from failure of crop due to unusual climatic conditions; *Hughson v. Winthrop S. B. Co.* 58 L. R. A. 432, which denies liability to passenger left behind by steamer, already full, leaving before advertised time.

44 L. R. A. 559, *PHILADELPHIA MORTG. & T. CO. v. MILLER*, 20 Wash. 607, 72 Am. St. Rep. 138, 56 Pac. 382.

What constitute fixtures.

Cited in *Hall v. Law Guarantee & Trust Soc.* 22 Wash. 307, 79 Am. St. Rep.

935, 60 Pac. 643, holding curtains, window screens, screen doors, gas and electric fixtures, water tank, sideboard, windmill, etc., not fixtures as between mortgagor and mortgagee; *Neufelder v. Third Street & Suburban R. Co.* 23 Wash. 476, 53 L. R. A. 603, 83 Am. St. Rep. 831, 63 Pac. 197, holding mill machinery attached by log screws to steady it, removable without injury to real estate, not part of real estate as between mortgagor and mortgagee; *Alberson v. Elk Creek Min. Co.* 39 Or. 559, 65 Pac. 978, holding personal property annexed to mine not intended to become part of real estate, personalty; *Hayford v. Wentworth*, 97 Me. 351, 54 Atl. 940, holding "wash-down syphon water closet," put in by tenant, removable; *West v. Farmers' Mut. Ins. Co.* 117 Iowa, 150, 90 N. W. 523, holding furnace and hot-water boiler in house, part of realty.

Cited in footnote to *Murray v. Bender*, 63 L. R. A. 783, which holds that chairs, stage, stage fixtures, and drop curtain annexed to theatre by owner of majority of stock of corporation having title to building, without agreement that they shall remain his personal property, pass as fixtures on execution sale of building.

44 L. R. A. 561, *LAMBERT v. NICKLAS*, 45 W. Va. 527, 72 Am. St. Rep. 828, 31 S. E. 951.

Innkeeper's lien.

Cited in footnote to *McClain v. Williams*, 49 L. R. A. 610, which denies innkeeper's lien on third person's property brought to inn by guest.

Waiver of lien.

Cited in *Rosenbaum v. Hayes*, 10 N. D. 327, 86 N. W. 973, holding factor's lien not waived by taking of additional security.

Cited in note (50 L. R. A. 720) on waiver of lien by attachment or execution.

44 L. R. A. 565, *MARSHFIELD v. WISCONSIN TELEPH. CO.* 102 Wis. 604, 78 N. W. 735.

Authorized use of streets and highways.

Cited in *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 32, 86 N. W. 657, upholding right of telephone company to erect poles in streets of city under statute authorizing construction along any public highway; *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 114 Wis. 507, 90 N. W. 441, holding telephone company's right to use of streets not affected by subsequent adoption by city of statutes regulating selling of franchise; *Allen v. Clausen*, 114 Wis. 250, 90 N. W. 181, holding that franchises for use of streets or highways must come from state or municipality authorized by state to grant them.

Cited in footnotes to *Michigan Teleph. Co. v. Benton Harbor*, 47 L. R. A. 104, which holds city's consent unnecessary to use of streets by telephone companies; *Krueger v. Wisconsin Teleph. Co.* 50 L. R. A. 298, which holds telephone poles and wires additional burden on street.

Cited in note (53 L. R. A. 900) on prescriptive right to maintain public nuisance.

44 L. R. A. 579, *BROWN v. CHICAGO & N. W. R. CO.* 102 Wis. 137, 77 N. W. 748, 78 N. W. 771.

Statutory actions for wrongful killing and for injuries resulting in death.

Cited in *Hubbard v. Chicago & N. W. R. Co.* 104 Wis. 164, 76 Am. St. Rep. 855, 80 N. W. 454, holding final settlement of estate of deceased not bar to action by personal representative to recover under statutes for his death caused by alleged negligence of defendant; *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 582, 50 L. R. A. 697, 36 S. E. 881, denying right of action for death by personal representative of deceased, where latter had settled in full with defendant for injury causing his death; *Dolson v. Lake Shore & M. S. R. Co.* 128 Mich. 448, 87 N. W. 629, holding that where deceased survived injuries twelve hours, remedy for death was under survival statute, and not under act giving right of action for death; *McMillan v. Spider Lake Saw Mill & Lumber Co.* 115 Wis. 336, 60 L. R. A. 591, 95 Am. St. Rep. 947, 91 N. W. 979, holding statute giving action for death for benefit of next of kin of deceased not applicable where action was brought for benefit of alien mother of deceased; *Schleiger v. Northern Terminal Co.* 43 Or. 12, 72 Pac. 324, holding right of action given by statute to parents against one wrongfully causing death of minor child not exclusive of remedy given personal representatives of deceased minor.

Cited in footnotes to *Re Meekin*, 51 L. R. A. 235, which holds action for death by administrator, who is also father and sole beneficiary of deceased, survives father's death; *Worcester & S. Street R. Co. v. Travelers' Ins. Co.* 57 L. R. A. 629, which holds cases of instantaneous death not covered by policy insuring railroad company against loss from liability to persons sustaining "personal injuries."

Distinguished in *Staeffer v. Menasha Woodenware Co.* 111 Wis. 487, 87 N. W. 480, holding statute of limitations applicable to actions for personal injuries resulting in death where right of action survives under Wis. Stat. § 4253.

Questions in case that are not obiter dicta.

Cited in *State v. National Acci. Asso.* 103 Wis. 218, 79 N. W. 220, holding decision of court upon question of statute of limitations binding until overruled, although case was decided independent of such question; *State ex rel. Atkinson v. McDonald*, 108 Wis. 16, 81 Am. St. Rep. 878, 84 N. W. 171, holding naturalization judgment conclusive as to year's residence preceding judgment in state in which it was rendered; *Trapp v. New Birdsall Co.* 109 Wis. 555, 85 N. W. 478, holding every point in, or assumed to be in, a case considered and decided as basis for final conclusion, *res judicata*.

Haste in decision of cause on first hearing.

Cited in *Illinois Steel Co. v. Bilot*, 109 Wis. 431, 83 Am. St. Rep. 905, 85 N. W. 402, as to statements in brief of counsel as to haste by court in consideration of questions on first hearing.

44 L. R. A. 593, *LUNNEY v. HEALEY*, 56 Neb. 313, 76 N. W. 558.

When real estate broker is entitled to commissions.

Cited in *Leupold v. Weeks*, 96 Md. 289, 53 Atl. 937, holding agent procuring purchase entitled to commissions, although contract was subsequently modified through efforts of another agent, and referring particularly to annotation in 44 L. R. A. 593.

Cited in footnotes to *Caston v. Quimby*, 52 L. R. A. 785, which denies right to commissions for obtaining unaccepted offer to loan money, requiring payment in gold; *Cadigan v. Crabtree*, 55 L. R. A. 77, which denies broker's right to commissions for procuring offer of lease subsequently accepted and contract executed through another broker; *Livermore v. Crane*, 57 L. R. A. 402, which holds purchaser refusing to complete purchase liable to broker for loss of commissions from seller.

Cited in notes (43 L. R. A. 593) on real estate broker's commissions as affected by negligence, fraud, or default of principal, and defective title; (44 L. R. A. 321, 324, 340, 345) as to when real estate broker is considered as procuring cause of the sale or exchange effected; (45 L. R. A. 33) on fraud and secret dealings or interest of real estate brokers as affecting their commissions; (53 L. R. A. 243) on duty of broker to disclose identity of purchaser to principal.

44 L. R. A. 632, *GRAHAM PAPER CO. v. PEMBROKE*, 124 Cal. 117, 71 Am. St. Rep. 26, 56 Pac. 627.

Sale of debtor's interest in personal property before attachment.

Distinguished in *Yank v. Bordeaux*, 23 Mont. 211, 75 Am. St. Rep. 522, 58 Pac. 42, holding that failure to notify attaching creditors and officer making levy, of prior sale of debtor's interest in ore, will not invalidate sale as to them.

44 L. R. A. 635, *VAN VLECK v. DENTAL EXAMINERS* (Cal.) 48 Pac. 223.

44 L. R. A. 638, *PITTSBURG, C. C. & ST. L. R. CO. v. MOORE*, 152 Ind. 345, 53 N. E. 290.

Demurrer to pleading.

Cited in *Lake Erie & W. R. Co. v. Hoff*, 25 Ind. App. 243, 56 N. E. 925, and *Smith v. Barber*, 153 Ind. 327, 53 N. E. 1014, holding error in overruling demurrer to bad paragraph of pleading, harmless where facts found rest upon good paragraph; *Midland Steel Co. v. Citizens Nat. Bank*, 26 Ind. App. 84, 59 N. E. 211, and *Cleveland, C. C. & St. L. R. Co. v. Parker*, 154 Ind. 155, 56 N. E. 86, holding defective pleading not cured by finding in special verdict or finding of omitted fact; *Lake Erie & W. R. Co. v. Mikesell*, 23 Ind. App. 397, 55 N. E. 488, holding allegation that train was run at specified speed in violation of ordinance not good averment that such an ordinance was in force at time accident complained of happened.

Acceptance of benefits of relief association in lieu of damages for personal injury.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 416, 53 N. E. 419, holding contract by which employee is given option to accept benefits of relief association in lieu of damages not a release of liability; *Pittsburgh, C. C. & St. L. R. Co. v. Elwood*, 25 Ind. App. 674, 58 N. E. 866, holding acceptance of benefits of voluntary relief association bar to action for damages for personal injury; *Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 269, 80 N. W. 315, holding acceptance of benefits of relief association by injured employee of railroad company under mistake in supposing injuries temporary, bar to recovery of damages where money was not returned; *Beck v. Pennsylvania R. Co.* 63 N. J. L. 240, 76 Am. St. Rep. 211, 43 Atl. 908, upholding validity of contract by

which employee agreed that acceptance of benefits of relief association should operate as release of claims for damages against railroad company; *Oyster v. Burlington Relief Department*, 65 Neb. 793, 59 L. R. A. 294, footnote p. 292, 91 N. W. 699, denying right to recover on certificate of railroad relief department, after recovering full statutory penalty for employee's death; *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 421, 53 N. E. 419, holding acceptance of benefits of relief association by widow in lieu of damages not bar to action for use of her child; *Pittsburgh, C. C. & St. L. R. Co. v. Gipe*, 160 Ind. 365, 65 N. E. 1034, holding acceptance of benefit of certificate in relief association by widow, prima facie bar to claim as administratrix for benefit of children; *State ex rel. Sheets v. Pittsburg, C. C. & St. L. R. Co.* 68 Ohio St. 42, 64 L. R. A. 413, 96 Am. St. Rep. 635, 67 N. E. 93, holding maintenance of voluntary relief association for employees by railroad corporation not against public policy; *Hamilton v. St. Louis, K. & N. W. R. Co.* 118 Fed. 95, holding contract by servant to accept voluntary relief in lieu of action for damages not affected by statute forbidding carrier to limit liability.

Cited in footnote to *Johnson v. Charleston & S. R. Co.* 44 L. R. A. 645, which sustains contract making acceptance of benefits of relief fund operate to release company.

Cited in note (57 L. R. A. 506) on insurance on life of minor.

Distinguished in *Tarbell v. Rutland R. Co.* 73 Vt. 351, 56 L. R. A. 658, 87 Am. St. Rep. 734, 51 Atl. 6, holding contract by which next of kin releases railroad company from statutory liability for injuries to one about to be employed, void.

Violation of ordinance by railroad companies.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Martin*, 157 Ind. 223, 61 N. E. 229, holding refusal of instruction that speed ordinance was enacted for benefit of public, and not for carrier's employees, proper; *Baltimore & O. S. W. R. Co. v. Peterson*, 156 Ind. 372, 59 N. E. 1044, holding failure of railroad company to comply with city ordinance providing for maintenance of watchman on rear of backing train, and ringing of bell, negligence *per se*; *Martin v. Chicago, R. I. & P. R. Co.* 118 Iowa, 150, 59 L. R. A. 700, 91 N. W. 1034, holding brakeman continuing work with knowledge of constant violation of speed ordinance by railroad assumes risk of such excess of speed.

Assumption of risks of employment.

Cited in *American Rolling Mill Co. v. Hullinger*, 161 Ind. 679, 67 N. E. 986, holding doctrine of assumed risk applicable to action under employer's liability act.

Competency of witnesses.

Cited in *Lake Erie & W. R. Co. v. Charman*, 161 Ind. 109, 67 N. E. 923, holding administrator's action under statute for wrongful death being for exclusive benefit of widow and next of kin, defendant is competent to testify.

Constitutionality of employer's liability act.

Cited in *Terre Haute & I. R. Co. v. Rittenhouse*, 28 Ind. App. 636, 62 N. E. 295, upholding constitutionality of employer's liability act.

44 L. R. A. 645, *JOHNSON v. CHARLESTON & S. R. CO.* 55 S. C. 152, 32 S. E. 2, 33 S. E. 174.

Report of second appeal in 58 S. C. 489, 36 S. E. 851.

Contracts with railroad relief associations.

Cited in *Petty v. Brunswick & W. R. Co.* 109 Ga. 672, 35 S. E. 82, upholding contract by which employee, by accepting pecuniary and other benefits, released master from all liability for injury.

Cited in footnote to *Oyster v. Burlington Relief Department*, 59 L. R. A. 292, which denies right to recover on certificate of railroad relief department, after recovering full statutory penalty for employee's death.

44 L. R. A. 655, *BIGGS v. CONSOLIDATED BARB-WIRE CO.* 60 Kan. 217, 56 Pac. 4.

Liability for injuries to child trespasser.

Cited in *Consolidated Electric Light & P. Co. v. Healy*, 65 Kan. 801, 70 Pac. 884, holding electric light company liable for killing of boy by wire in place known by defendant to be attractive to children; *Kopplekom v. Colorado Cement Pipe Co.* 16 Colo. App. 277, 54 L. R. A. 285, footnote p. 284, 64 Pac. 1047, holding owner of uninclosed city lot liable for injury to young child by toppling over of cement pipe used by children as plaything; *Edgington v. Burlington, C. R. & N. Co.* 116 Iowa, 421, 57 L. R. A. 566, 90 N. W. 95, holding railroad company liable for injury to child seven years and eight months old, hurt by turntable in unfenced lot near public way.

Cited in footnotes to *Ryan v. Towar*, 55 L. R. A. 310, which denies land owner's duty to make premises safe for attempting to rescue trespassing child caught in water wheel in unused building; *Gleason v. Smith*, 55 L. R. A. 622, which denies liability for injury by collision with team, to twelve-year-old boy using street as playground; *Uttermohlen v. Bogg's Run Min. & Mfg. Co.* 55 L. R. A. 911, which denies liability of mine owner for injury to trespassing child by cable and pulleys hauling coal cars; *Brinkley Car Works Mfg. Co. v. Cooper*, 57 L. R. A. 724, which denies liability for injury to six-year-old boy from carelessly walking into pool of hot water; *Paolino v. McKendall*, 60 L. R. A. 133, which denies duty of occupier of land burning rubbish, to guard young children accustomed to play there, from fire.

Contributory negligence.

Report of second appeal in 62 Kan. 492, 63 Pac. 740, holding contributory negligence question for jury.

Distinguished in *Bess v. Atchison, T. & S. F. R. Co.* 62 Kan. 305, 62 Pac. 996, denying right of recovery for killing of child with capacity to understand danger of situation, and who was run over by cars through his own negligence.

44 L. R. A. 659, *SUMRALL v. COLUMBIA FINANCE & T. CO.* 106 Ky. 260, 90 Am. St. Rep. 223, 50 S. W. 69.

Building and loan associations.

Cited in *Forwood v. Eubank*, 106 Ky. 293, 50 S. W. 255, denying right of holder of paid-up stock who has given withdrawal notice, to preference over holders of instalment stock on winding up of building association; *Globe Bldg. & L. Co. v. Wood*, 110 Ky. 11, 96 Am. St. Rep. 417, 60 S. W. 858, upholding right of insolvent building association to make general assignment; *North Texas Bldg. & L. Asso. v. Hay*, 23 Tex. Civ. App. 103, 56 S. W. 580, holding borrower in building association entitled to rescission of contract and adjustment of his account, upon sale of assets of association.

44 L. R. A. 664, *CITIZENS' BANK v. MILLETT*, 103 Ky. 1, 82 Am. St. Rep. 540, 44 S. W. 366.

44 L. R. A. 673, *PALMER v. MAINE C. R. CO.* 92 Me. 399, 69 Am. St. Rep. 513, 42 Atl. 800.

Arrests.

Cited in *Harness v. Steele*, 159 Ind. 295, 64 N. E. 875, holding sheriff detaining innocent prisoner longer than necessary to procure warrant, liable for false arrest; *State v. McLeod*, 97 Me. 81, 53 Atl. 878, holding it unnecessary for people to show that prisoner was subsequently convicted, in prosecution for forcibly rescuing prisoner.

Cited in footnotes to *McCullough v. Greenfield*, 62 L. R. A. 906, which holds that possession by officer of a warrant will not justify arrest of accused by police department of other town under direction by telephone by officer holding warrant; *Markley v. Snow*, 64 L. R. A. 685, which denies liability of employer for act of employee in causing arrest, long after commission of the crime, of one suspected of having set fire to building of employer.

44 L. R. A. 677, *PEOPLE ex rel. MAYNARD v. HOLLY*, 119 Mich. 637, 75 Am. St. Rep. 435, 78 N. W. 665.

44 L. R. A. 679, *PINGREE v. DIX*, 120 Mich. 95, 78 N. W. 1025.

Rule of uniformity in taxation.

Cited in note (60 L. R. A. 341, 364, 374) on constitutional equality in United States in relation to corporate taxation.

Distinguished in *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 490, 84 N. W. 1101, upholding constitutionality of inheritance tax law as a tax upon privilege of inheritance.

Taxation of telegraph companies.

Cited in *Detroit v. Western U. Teleg. Co.* 130 Mich. 475, 90 N. W. 283, holding act providing for specific tax on telegraph companies not repealed by later unconstitutional acts.

44 L. R. A. 689, *VOSS v. CONNECTICUT MUT. L. INS. CO.* 119 Mich. 161, 77 N. W. 697.

Report of later appeal in 131 Mich. 597, 92 N. W. 102.

Interest of children in proceeds of policies on lives of parents.

Cited in *Millard v. Brayton*, 177 Mass. 543, 52 L. R. A. 123, footnote p. 117, 83 Am. St. Rep. 294, 59 N. E. 436, holding that policy payable to children in case of wife's death gives children living at wife's death before insured, vested interest; *Jones v. Jones*, 23 Pa. Co. Ct. 256, holding interest of beneficiary children under policy taken out by the mother on her own life, without reserving right to make new appointment of beneficiaries, vested; *Elgar v. Equitable Life Assur. Soc.* 113 Wis. 92, 88 N. W. 927, holding that where policy provided for payment of proceeds to insured's children if surviving, and, if not, to insured's executors, etc., surviving son took whole proceeds to exclusion of grandchild of deceased child.

Nature of beneficiary's interest in policy.

Cited in *Laughlin v. Norcross*, 97 Me. 34, 53 Atl. 834, holding that interest of beneficiary in policy passed by will, although policy not issued when will made.

44 L. R. A. 692, *STATE ex rel. KNIGHT v. HELENA POWER & LIGHT CO.*
22 Mont. 391, 56 Pac. 685.

Mandamus to compel operation of railroad.

Cited in footnote to *State ex rel. Bridgeton v. Bridgeton & M. Traction Co.*
45 L. R. A. 837, which holds street railway company's duty to operate road enforceable by mandamus.

44 L. R. A. 694, *UPCHURCH v. STATE*, 36 Tex. Crim. Rep. 624, 38 S. W. 206.
Former jeopardy.

Cited in *Woodward v. State*, 42 Tex. Crim. Rep. 197, 58 S. W. 135, holding discharge of jury before verdict on account of serious illness of child of juror, and order of mistrial, not jeopardy; *Bland v. State*, 42 Tex. Crim. Rep. 288, 59 S. W. 1119, holding that upon plea of former jeopardy involving issue of fact as to proper exercise of court's discretion in discharging juror on account of sickness of juror, court should hear evidence in order that necessity for discharge may be properly determined.

Cited in footnotes to *State v. Hager*, 48 L. R. A. 254, which holds discharge on plea of former jeopardy not an acquittal; *Dreyer v. People*, 58 L. R. A. 869, which holds discharge of jury without consent of accused, because jurors unable to agree not jeopardy.

Instructions in criminal cases.

Cited in *Chapman v. State*, 42 Tex. Crim. Rep. 138, 57 S. W. 965, holding reading of lecture by court, ridiculing law of self-defense, to panel of jurors previous to drawing of jury in murder case, and in absence of defendant, reversible error.

Challenges to jury.

Cited in footnote to *People v. Zeigler*, 56 L. R. A. 882, which requires restoration to prisoner of peremptory challenges used on juror discharged for illness occurring while jury being impaneled.

44 L. R. A. 699, *Re KNOWACK*, 158 N. Y. 482, 53 N. E. 676.

General powers of supreme court.

Cited in *Re Steinway*, 159 N. Y. 258, 45 L. R. A. 472, 53 N. E. 1103, upholding power of supreme court to compel corporation to permit stockholder to inspect books.

Arrest, commitment, and custody of children.

Cited in *Wood v. Wood*, 61 App. Div. 99, 70 N. Y. Supp. 72, denying power of court, pending divorce proceedings, to award custody of defendant's child to his grandfather, defendant not having notice of application; *People ex rel. McGrath v. Cooper*, 75 App. Div. 621, 78 N. Y. Supp. 161, refusing to take orphan girl from home of persons who took her for adoption, where she was well cared for and desired to stay, on petition of maternal aunt, who worked out for a livelihood; *People v. Angie*, 74 App. Div. 541, 77 N. Y. Supp. 832, upholding right of

police officer to arrest without a warrant, unaccompanied child under sixteen years of age, found in place where spirituous liquors are sold and drunk; *People ex rel. Aikins v. State Industrial School*, 33 Misc. 401, 67 N. Y. Supp. 674, dismissing certiorari proceeding to review commitment of boy to reformatory as a truant, on ground that it did not recite notice to parents, the proceeding not being taken by parent.

Distinguished in *People ex rel. Stern v. New York Soc. for Prevention of Cruelty to Children*, 27 Misc. 458, 58 N. Y. Supp. 118, denying power of court to review commitment of infant to house of industry upon returns to writs of habeas corpus and certiorari; *Re Cohn*, 28 Misc. 658, 59 N. Y. Supp. 1028, denying right of parents on application to supreme court to have imprisonment of child, committed to reformatory institution on complaint of father, terminated on proof that they deem boy sufficiently reformed; *People ex rel. Sampson v. New York Catholic Protectory*, 93 App. Div. 197, 87 N. Y. Supp. 557, holding that child should be remanded where untraversed return shows that he was committed to institution by magistrate.

44 L. R. A. 703, *HERTER v. MULLEN*, 159 N. Y. 28, 70 Am. St. Rep. 517, 53 N. E. 700.

Holding over by tenants beyond term of lease.

Report of second appeal in 52 App. Div. 326, 65 N. Y. Supp. 279, holding tenant holding over on account of sickness, liable for rent until he gives landlord actual, personal notice of quitting.

Cited in *Probst v. Rochester Steam Laundry Co.* 171 N. Y. 588, 64 N. E. 504, holding that assignee of lessee holding over and paying rent, accepted by lessor, elects to exercise option for extension of term provided for in lease; *Preiser v. Wielandt*, 48 App. Div. 572, 62 N. Y. Supp. 890, holding landlord liable for damages resulting in death of tenant's wife, too ill to be removed at expiration of lease, whose condition was aggravated by tearing down of house; *Sullivan v. Ringler*, 59 App. Div. 185, 69 N. Y. Supp. 38, upholding right of landlord to treat holding over by subtenant as renewal of lessee's lease; *Coleman v. Fitzgerald Bros. Brewing Co.* 29 Misc. 350, 60 N. Y. Supp. 460, denying right of landlord, reletting to new tenant after old tenant had held over, to recover rent for period before he could relet; *Macklin v. McNetton*, 30 Misc. 750, 63 N. Y. Supp. 433, denying right to recover for use and occupation of premises from tenant holding over beyond term; *Ketcham v. Ochs*, 34 Misc. 472, 70 N. Y. Supp. 268, holding tenant not made liable by failure of mortgagees to remove certain personal property of subtenant until after expiration of term; *Willis v. McKinnon*, 37 Misc. 389, 75 N. Y. Supp. 770, denying right of tenant holding over, to defeat ejectment by acquiring outstanding title; *Beeston v. Yale*, 75 App. Div. 390, 78 N. Y. Supp. 158, holding tenants surrendering possession of premises, accepted by landlord, not liable for use and occupation because leaving boiler and two cutting machines, which he intended to abandon; *German State Bank v. Herron*, 111 Iowa, 27, 82 N. W. 430, holding possession of premises after termination of written lease, tenancy at will under statutes; *Weber v. Rogers*, 41 Misc. 665, 85 N. Y. Supp. 232, enjoining temporarily, prosecution of proceeding for summary removal of tenant on ground that removal would endanger his life.

Cited in footnotes to *Byxbee v. Blake*, 57 L. R. A. 222, which holds tenant

liable for another month's rent, by keeping keys and remaining in possession five days to clean up rubbish; *Andrews v. Marshall Creamery Co.* 60 L. R. A. 399, which holds mere holding over after term expires does not show election to renew for additional term under provisions of original lease.

Impossibility as excuse for nonperformance of act.

Cited in *Walden v. Jamestown*, 178 N. Y. 217, 70 N. E. 466, holding charter requirement of notice within two days of accident substantially complied with by service of notice within three days, where plaintiff unable to transact business within statutory period for notice.

Distinguished in *Rhodes v. Hinds*, 79 App. Div. 381, 79 N. Y. Supp. 437, holding proprietor of sawmill entitled to compensation for sawing and piling lumber, destroyed by fire before delivery to owner.

44 L. R. A. 711, *SAMPSON v. BAGLEY*, 21 R. I. 174, 42 Atl. 712.

Proceeds of insurance on premises held by life tenant.

Cited in footnote to *Green v. Green*, 46 L. R. A. 525, which requires money collected on total loss under policy taken out by life tenant, to be used in rebuilding or to go to remaindermen.

44 L. R. A. 716, *STORRIE v. HOUSTON CITY STREET R. CO.* 92 Tex. 129, 46 S. W. 796.

Liability of street railway for paving between tracks.

Cited in *Shreveport v. Prescott*, 51 La. Ann. 1924, 46 L. R. A. 212, 26 So. 664, holding railway company occupying street benefited by street improvement to extent of space occupied by it, and liable for its proportionate share of cost; *Lincoln Street R. Co. v. Lincoln*, 61 Neb. 134, 84 N. W. 802, upholding power of legislature to require street railway to pave part of street occupied by its tracks.

Cited in note (46 L. R. A. 194, 202) on liability of street railway for paving assessment.

Power of legislature to alter or revoke corporate charters.

Cited in note (50 L. R. A. 144) on privilege of using streets as a contract within constitutional provision against impairing obligation of contracts.

44 L. R. A. 725, *HOOPER v. HOOPER*. 102 Wis. 598, 78 N. W. 753.

44 L. R. A. 728, *CASE v. HOFFMAN*, 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945.

Disqualification of members of court.

Cited in *Re Nevitt*, 54 C. C. A. 624, 117 Fed. 450, holding judge not disqualified to hear and determine lawsuit, because in another action between other parties involving similar questions of law or fact he was counsel for one of litigants; *Deming v. McClaughry*, 51 C. C. A. 361, 113 Fed. 651, holding judgment against officer of voluntary army raised under acts of 1898 and 1899, by court-marshal composed of officers of regular army, void because of disqualification of members of court; *State v. Hartley*, 75 Conn. 110, 52 Atl. 615, holding that action of disqualified judge in presiding at trial renders judgment erroneous only.

Doctrine of res judicata.

Cited in *State v. National Acci. Soc.* 103 Wis. 218, 79 N. W. 220, holding decision as to applicability of statute of limitations to foreign corporations, involved in decision of case, binding upon court until overruled; *Keystone Lumber Co. v. Kolman*, 103 Wis. 303, 79 N. W. 224, holding that every question decided on appeal is binding, not only on trial court, but on supreme court on subsequent appeal; *Priewe v. Wisconsin State Land & Improv. Co.* 103 Wis. 549, 74 Am. St. Rep. 904, 79 N. W. 780, holding decision on former appeal binding as to all questions covered by it; *Hart v. Moulton*, 104 Wis. 353, 76 Am. St. Rep. 881, 80 N. W. 599, holding that judgment is as binding on privies as on parties, as to questions actually decided and upon which the judgment rests; *Crouse v. Chicago & N. W. R. Co.* 104 Wis. 480, 80 N. W. 752, holding decision of supreme court deciding that verdict submitted was sufficient must be followed on second appeal, whether right or wrong; *Rupiper v. Calloway*, 105 Wis. 8, 80 N. W. 916, holding that verdict for plaintiff in ejectment for only part of land is, in effect, a judgment against him as to balance asked for in pleadings; *South Bend Chilled Plow Co. v. George C. Cribb Co.* 105 Wis. 446, 81 N. W. 675, holding question not raised, but necessarily involved, in decision on first appeal *res judicata* on second appeal; *Huesbschmann v. Cotzhausen*, 107 Wis. 73, 82 N. W. 720, holding judgment as to legitimacy of plaintiff's grantor *res judicata* in subsequent suit in ejectment by plaintiffs, defendants having been parties in former proceeding; *Becker v. Chester*, 115 Wis. 128, 91 N. W. 87, holding every proposition upon which final conclusion rests, *res judicata*; *Lonsdorf v. Lonsdorf*, 118 Wis. 161, 95 N. W. 961, refusing to overrule former decision, regardless of whether court would decide in same way were case heard for first time; *Jerde v. Furbush*, 115 Wis. 282, 95 Am. St. Rep. 904, 91 N. W. 661, holding that principles of law on which decision is based are necessarily part of decision.

Cited in footnote to *Illinois C. R. Co. v. Benz*, 58 L. R. A. 691, which holds decision on reversal and remand of action for personal injuries removed to Federal court, not law of case if action dismissed and new one begun.

Rights in use of waters.

Cited in *Huber v. Merkel*, 117 Wis. 366, 62 L. R. A. 594, 98 Am. St. Rep. 933, 94 N. W. 354, upholding right of land owner to sink artesian wells and use water therefrom as he chooses, although diminishing flow from wells of his neighbors; *Blohovak v. Grochoski*, 119 Wis. 195, 96 N. W. 551, holding question whether natural water course exists, question for jury on conflicting evidence.

Cited in footnote to *Kray v. Muggli*, 45 L. R. A. 218, which denies prescriptive right of riparian owners to maintenance of dam after proprietor chooses to abandon it.

Cited in note (50 L. R. A. 838) on rights acquired in artificial condition of body of water.

Right of third party to sue on contract for his benefit.

Cited in footnotes to *Ferris v. American Brewing Co.* 52 L. R. A. 305, which sustains right of action of one for whose benefit stipulation in lease was made, against sale on premises of other person's beer; *Electric Appliance Co. v. United States Fidelity & G. Co.* 53 L. R. A. 609, which denies right of action of one furnishing materials to contractor on bond given by latter to city, conditioned on turning over building free of claims for materials; *Boston Ins. Co. v. Chi-*

cago, R. I. & P. R. Co. 59 L. R. A. 796, which denies right of action against railroad company carrying mail under contract with government, by sender of registered mail destroyed through negligence of its employees; Tweeddale v. Tweeddale, 61 L. R. A. 509, which sustains right of third person to enforce contract made for his benefit.

44 L. R. A. 734, BROWN v. ORANGEBURG COUNTY, 55 S. C. 45, 32 S. E. 764.
Liability of municipality for acts of mob.

Cited in footnotes to Chicago v. Manhattan Cement Co. 45 L. R. A. 848, which sustains statute compelling county to pay three fourths of value of property destroyed by mob; Wallace v. Norman, 48 L. R. A. 620, which denies city's liability for acts of officers participating in conspiracy or misdeeds of mob.

44 L. R. A. 737, CARUTHERS v. KANSAS CITY, FT. S. & M. R. CO. 59 Kan. 629, 54 Pac. 673.

Liability of lessor road for negligence of another company using road.

Cited in footnotes to Sias v. Rochester R. Co. 56 L. R. A. 850, which denies liability of street railway company for death by collision with tree near track, of passenger of other company using track under traffic arrangement; Muntz v. Algiers & G. R. Co. 64 L. R. A. 222, which holds railroad company liable for negligent operation of cars on its road, whether operated by itself or lessee.

Distinguished in McCabe v. Maysville & B. S. R. Co. 112 Ky. 876, 66 S. W. 1054, holding lessor liable for negligence of lessee railroad company in killing pedestrian; Louisville & N. R. Co. v. Breeden, 111 Ky. 748, 64 S. W. 667, holding railroad companies, parties to joint traffic agreement for use of tracks owned by one of the companies, both liable for negligence in operation of trains thereon, and referring particularly to annotation in 44 L. R. A. 737.

Annotation in 44 L. R. A. 737, referred to particularly in Sinkhorn v. Lexington, H. & P. Turnp. Co. 112 Ky. 211, 65 S. W. 356, holding turnpike company surrendering entire control of road to county as lessee, not liable for failure of latter to repair.

44 L. R. A. 757, ANTHONY v. NORTON, 60 Kan. 341, 62 Am. St. Rep. 360, 56 Pac. 529.

Actions for seduction.

Cited in Snider v. Newell, 132 N. C. 616, 44 S. E. 354, holding it unnecessary for father to show loss of services to maintain action for seduction of daughter.

44 L. A. A. 761, WARNER v. PENoyer, 33 C. C. A. 222, 91 Fed. 587.

Liability of corporation directors for negligence and misconduct.

Cited in Chick v. Fuller, 51 C. C. A. 649, 114 Fed. 23, holding, under facts in case, directors of manufacturing concern not liable for negligence, because they authorized payment of dividend while corporation was insolvent; Hanna v. People's Nat. Bank, 35 Misc. 521, 71 N. Y. Supp. 1076, holding directors of national bank liable to injured stockholders for losses due to negligence in permitting discount of notes; Campbell v. Watson, 62 N. J. Eq. 439, 50 Atl. 120, holding directors of bank liable for loss due to their negligent examination into condition of affairs of corporation.

Cited in footnotes to *Utley v. Hill*, 49 L. R. A. 323, which denies liability of directors for deceit, for false statements in reports to secretary of state, believed to be true; *Gerner v. Mosher*, 46 L. R. A. 244, which holds bank directors attesting false report, liable to person purchasing stock in reliance on same.

Cited in note (55 L. R. A. 757, 758, 767, 768, 771, 773) on liability of corporate directors to corporation.

44 L. R. A. 766, *COREY v. WADSWORTH*, 118 Ala. 488, 25 So. 503.

Rights of creditors in assets of corporation.

Cited in *Wilson v. Stevens*, 129 Ala. 637, 87 Am. St. Rep. 87, 29 So. 678; *Brady v. James McDonnell Co.* 122 Ala. 651, 26 So. 1029; *Anderson v. Bullock County Bank*, 122 Ala. 289, 25 So. 523, — upholding right of insolvent corporation to prefer its officers in payment of their bona fide debts; *Henderson v. Hall*, 134 Ala. 505, 63 L. R. A. 704, 32 So. 840, holding that assets of corporation do not constitute trust fund for creditors; *Hawkins v. Donnerberg*, 40 Or. 107, 66 Pac. 691, denying right of creditors of corporation to compel payment of subscriptions due on stock, after right of corporation to such payments had been barred by statute.

Disapproved in *James Clark Co. v. Colton*, 91 Md. 212, 49 L. R. A. 704; 46 Atl. 386, denying right of corporation officers to prefer their own claims to those of other creditors; *Taylor v. Mitchell*, 80 Minn. 497, 83 N. W. 418, declaring mortgage by insolvent corporation to secure claims of directors, fraudulent as to other creditors.

44 L. R. A. 786, *LAMKIN v. BALDWIN & L. MFG. CO.* 72 Conn. 57, 43 Atl. 593.

Right of third party to sue on contract for his benefit.

Cited in *Morgan v. Randolph & C. Co.* 73 Conn. 398, 51 L. R. A. 654, footnote p. 653, 47 Atl. 658, denying right of creditor of copartnership to maintain action at law for his claim against corporation assuming copartnership debts; *Barber v. International Co.* 73 Conn. 594, 48 Atl. 758, upholding right of creditors to invoke aid of court of chancery to compel enforcement of contract between insolvent corporation and another corporation, by which latter agreed to pay debts of former, and which constituted its only asset.

Cited in footnote to *Capital Traction Co. v. Offutt*, 53 L. R. A. 390, which denies liability of street railway company for debts of other company whose property and franchises bought.

44 L. R. A. 790, *PULLMAN'S PALACE-CAR CO. v. HALL*, 106 Ga. 765, 71 Am. St. Rep. 293, 32 S. E. 923.

Liability of sleeping car companies for loss of passenger's property.

Cited in *Pullman Palace Car Co. v. Hatch*, 30 Tex. Civ. App. 304, 70 S. W. 771, holding that passenger must show negligence on part of sleeping car company to render it liable for loss of baggage.

Cited in footnotes to *Pullman's Palace Car Co. v. Adams*, 45 L. R. A. 767, which holds sleeping car company liable for theft of passenger's property, where porter went to sleep while on watch; *Pullman's Palace Car Co. v. Hunter*, 47 L. R. A. 286, which sustains liability for theft of diamond rings from woman while asleep in sleeping car; *Cooney v. Pullman Palace-Car Co.* 53 L. R. A. 690,

which holds sleeping car company liable for loss of passenger's valise, intrusted to employees of company.

44 L. R. A. 795, *BARTLETT v. COLUMBUS*, 101 Ga. 300, 28 S. E. 599.

Liability of municipality for torts of its officers in exercise of governmental functions.

Cited in *Gray v. Griffin*, 111 Ga. 364, 51 L. R. A. 132, 36 S. E. 792, holding city not liable for physical injury and mental suffering of person illegally arrested, caused by condition in which prison was kept; *Gray v. Griffin*, 111 Ga. 368, 51 L. R. A. 134, 36 S. E. 792, holding city not liable for act of mayor in requiring person arrested to give larger bond than law authorized; *McIlhenny v. Wilmington*, 127 N. C. 152, 50 L. R. A. 472, footnote p. 470, 37 S. E. 187, denying city's liability for wrongful arrest of, and brutal assault on, innocent person by notoriously incompetent policeman; *McFadin v. San Antonio*, 22 Tex. Civ. App. 142, 54 S. W. 48, and *Simpson v. Whatcom*, 33 Wash. 402, 63 L. R. A. 819, 99 Am. St. Rep. 951, 74 Pac. 577, denying liability of city for arrest of person under void ordinance; *Carter v. Worcester County*, 94 Md. 626, 51 Atl. 830, holding county commissioners not liable for illegal arrest by county road supervisor, and referring particularly to annotation in 44 L. R. A. 795.

Cited in footnotes to *Tillman v. Beard*, 46 L. R. A. 215, which denies liability of village president for procuring arrest for violation of void ordinance; *Levin v. Burlington*, 55 L. R. A. 396, which denies city's liability for officer's arrest and quarantine of one who has passed night in house containing smallpox patient.

44 L. R. A. 801, *PEOPLE ex rel. DENEEN v. SIMON*, 176 Ill. 165, 68 Am. St. Rep. 175, 52 N. E. 910.

Separation of executive, legislative, and judicial departments.

Cited in *State ex rel. White v. Barker*, 116 Iowa, 110, 57 L. R. A. 252, 93 Am. St. Rep. 222, 89 N. W. 204, denying right of legislature to vest in district court, power of choosing managers of municipal water supply system.

Acts providing for registration of land titles.

Cited in *State ex rel. Douglas v. Westfall*, 85 Minn. 446, 57 L. R. A. 302, footnote p. 297, 89 Am. St. Rep. 571, 89 N. W. 175, sustaining act for Torrens system of registering land titles; *Gage v. Consumer's Electric Light Co.* 194 Ill. 34, 64 N. E. 653, holding question as to sufficiency of proof of payment of taxes in proceeding for registration of titles cannot be raised for first time in supreme court.

Rule as to notice.

Cited in *Tyler v. Registration Ct. Judges*, 175 Mass. 80, 51 L. R. A. 437, footnote p. 433, 55 N. E. 812, holding land registration act not invalidated by failure to provide for notice of transfers.

Option to adopt statute.

Cited in footnote to *Adams v. Beloit*, 47 L. R. A. 441, which sustains option giving specially chartered cities power to adopt provisions of general law.

Construction of statutes.

Cited in *People ex rel. Hillel Lodge No. 72, I. O. B. B. v. Rose*, 207 Ill. 332, 69 N. E. 762, refusing to adopt construction which would place statute making

failure to report annually prima facie evidence of nonuser, in conflict with Constitution.

44 L. R. A. 809, HOGAN v. STOPHLET, 179 Ill. 150, 53 N. E. 604.

Rewards for arrest and conviction of criminals.

Cited in Williams v. West Chicago Street R. Co. 191 Ill. 615, 85 Am. St. Rep. 278, 61 N. E. 456, Affirming 94 Ill. App. 389, denying right to reward for "arrest and conviction" of murderers, where plaintiff merely furnished information which led to arrest; Cornwell v. St. Louis Transit Co. 100 Mo. App. 262, 73 S. W. 305, holding that officer may be rewarded for extraordinary services beyond the limit of his ordinary duty; Clinton County v. Davis, 162 Ind. 66, 64 L. R. A. 784, 69 N. E. 680, holding that vote buyer cannot claim reward offered to one who furnishes information for conviction of vote seller.

44 L. R. A. 814, SIZOR v. LOGANSPOUT, 151 Ind. 626, 50 N. E. 377.

Meander line as boundary.

Cited in footnote to Security Land & Exploration Co. v. Burns, 63 L. R. A. 157, which holds that supposed meander line will be held boundary line if consistent with other calls and distances indicated on plat.

44 L. R. A. 815, BARMAN v. SPENCER (Ind.) 49 N. E. 9.

Liability of landlord for defective condition of premises.

Cited in footnotes to Towne v. Thompson, 46 L. R. A. 748, which denies boarding-house lessee's liability to tenant's boarders for illness from unsanitary condition of premises; Smith v. State, 51 L. R. A. 772, which denies landlord's liability for injury to subtenant's child from defective balustrade on porch; Brady v. Klein, 62 L. R. A. 909, which denies right of action by licensee of tenant on landlord's covenant to repair, for injury due to defective condition of premises.

44 L. R. A. 821, WHEELER v. BOONE, 108 Iowa, 235, 78 N. W. 909.

Laws relating to bicycles.

Cited in Des Moines v. Keller, 116 Iowa, 650, 57 L. R. A. 244, 93 Am. St. Rep. 268, 88 N. W. 827, upholding validity of ordinance requiring bicyclists to carry lamps; Overhouser v. American Cereal Co. 118 Iowa, 420, 92 N. W. 74, holding ordinance admissible in action to recover for death of bicyclist caused by obstruction in street in violation of such ordinance.

Cited in note (47 L. R. A. 297) on bicycle law.

Duty of municipalities as to safety of bicyclists.

Cited in Morrison v. Syracuse, 45 App. Div. 422, 61 N. Y. Supp. 313, holding that city allowing bicyclist to ride on sidewalks upon payment of nominal fee owes him no greater care to keep walk safe than it owes pedestrians.

Cited in footnote to Lee v. Port Huron, 55 L. R. A. 308, which holds city liable for injury to bicyclists from defective sidewalk.

Amendments to pleadings after verdict.

Cited in Shawyer v. Chamberlain, 113 Iowa, 745, 86 Am. St. Rep. 411, 84 N. W. 661, upholding order of court striking from files amendment to answer filed after verdict, and raising new issue.

44 L. R. A. 823, REED v. LOUISVILLE & N. R. CO. 104 Ky. 603, 47 S. W. 591, 48 S. W. 416.

Rule as to stopping of train after injury to passenger.

Cited in Chesapeake & O. R. Co. v. Saulsberry, 112 Ky. 923, 56 L. R. A. 583, 66 S. W. 1051, holding railroad company ejecting drunken passenger at station not bound to stop train to ascertain extent of injuries in case he is hurt trying to reboard train.

Sufficiency of general allegations of negligence.

Cited in note (59 L. R. A. 243) on sufficiency of general allegations of negligence.

44 L. R. A. 825, DEPOSIT BANK v. DAVIESS COUNTY, 102 Ky. 174, 39 S. W. 1030, 44 S. W. 1131.

Affirmed in 173 U. S. 636, 662, 663, 43 L. ed. 840, 850, 19 Sup. Ct. Rep. 530, 875.

Repeal of charter provision granting exemption from taxation.

Cited in Newport v. Masonic Temple Asso. 103 Ky. 595, 45 S. W. 881, holding provision in charter exempting corporation from taxation repealed by subsequent Constitution requiring taxation of all property, unless exempted by Constitution.

Taxation of corporations.

Cited in notes (45 L. R. A. 747) on state taxation of national banks; (57 L. R. A. 72) on taxation of corporate franchises in United States.

Power to grant extensions to corporations by special act.

Cited in footnote to Bank of Commerce v. Wiltzie, 47 L. R. A. 489, which holds invalid, extension of old special charter of corporation.

44 L. R. A. 837, STATE v. HAINES, 51 La. Ann. 731, 25 So. 372.

Bill of exceptions.

Cited in State v. Napoleon, 104 La. 166, 28 So. 972, and State *ex rel.* Markham v. Read, 52 La. Ann. 272, 26 So. 826, holding mere reservation of bill of exceptions in criminal cause insufficient; State *ex rel.* Periou v. Foster, 106 La. 195, 30 So. 749, upholding right of judge signing bill of exception, to assign his grounds for rulings objected to.

44 L. R. A. 840, VAN NORMAN v. GORDON, 172 Mass. 576, 70 Am. St. Rep. 304, 53 N. E. 267.

Presumption as to jurisdiction.

Cited in American Mut. L. Ins. Co. v. Mason, 159 Ind. 19, 64 N. E. 525, holding foreign court presumed to be one of general jurisdiction where transcript shows that it had a judge, clerk, and seal.

Conclusiveness of foreign judgment.

Cited in American Mut. L. Ins. Co. v. Mason, 159 Ind. 17, 64 N. E. 525, holding judgment of foreign court barring jurisdiction of subject-matter and person, conclusive until reversed or vacated.

Cited in footnote to Crim v. Crim, 54 L. R. A. 502, which holds judgment,

valid where rendered, against nonresident on judgment note with power of attorney, entitled to full faith elsewhere.

44 L. R. A. 841, **LAMB KNIT-GOODS CO. v. LAMB GLOVE & MITTEN CO.** 120 Mich. 159, 78 N. W. 1072.

Infringement of trade name.

Cited in *Penberthy Injector Co. v. Lee*, 120 Mich. 180, 78 N. W. 1074, upholding right of corporation purchasing trade name, to restrain infringement of same by vendor of same name; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* 121 Fed. 367, denying right of corporation to use trade name "Bissell," owned by another corporation known as "The Bissell Plow Works."

44 L. R. A. 844, **CONELY v. COLLINS**, 119 Mich. 519, 78 N. W. 555.

Action on replevin bond in *Dudley v. Conely*, 125 Mich. 300, 84 N. W. 286.

Conveyances of debtor's property to secure creditors.

Distinguished in *Belding-Hall Mfg. Co. v. Smith*, 125 Mich. 57, 83 N. W. 1001, construing instrument purporting to chattel mortgage specified property, for purpose of securing certain debts, as chattel mortgage, and not as common-law assignment; *Ontario Bank v. Hurst*, 43 C. C. A. 201, 103 Fed. 239, holding deed of property in trust to pay specified debts and return surplus to grantor, conveyance in nature of mortgage.

44 L. R. A. 846, **JOHN HANCOCK MUT. L. INS. CO. v. DICK**, 117 Mich. 518, 76 N. W. 9.

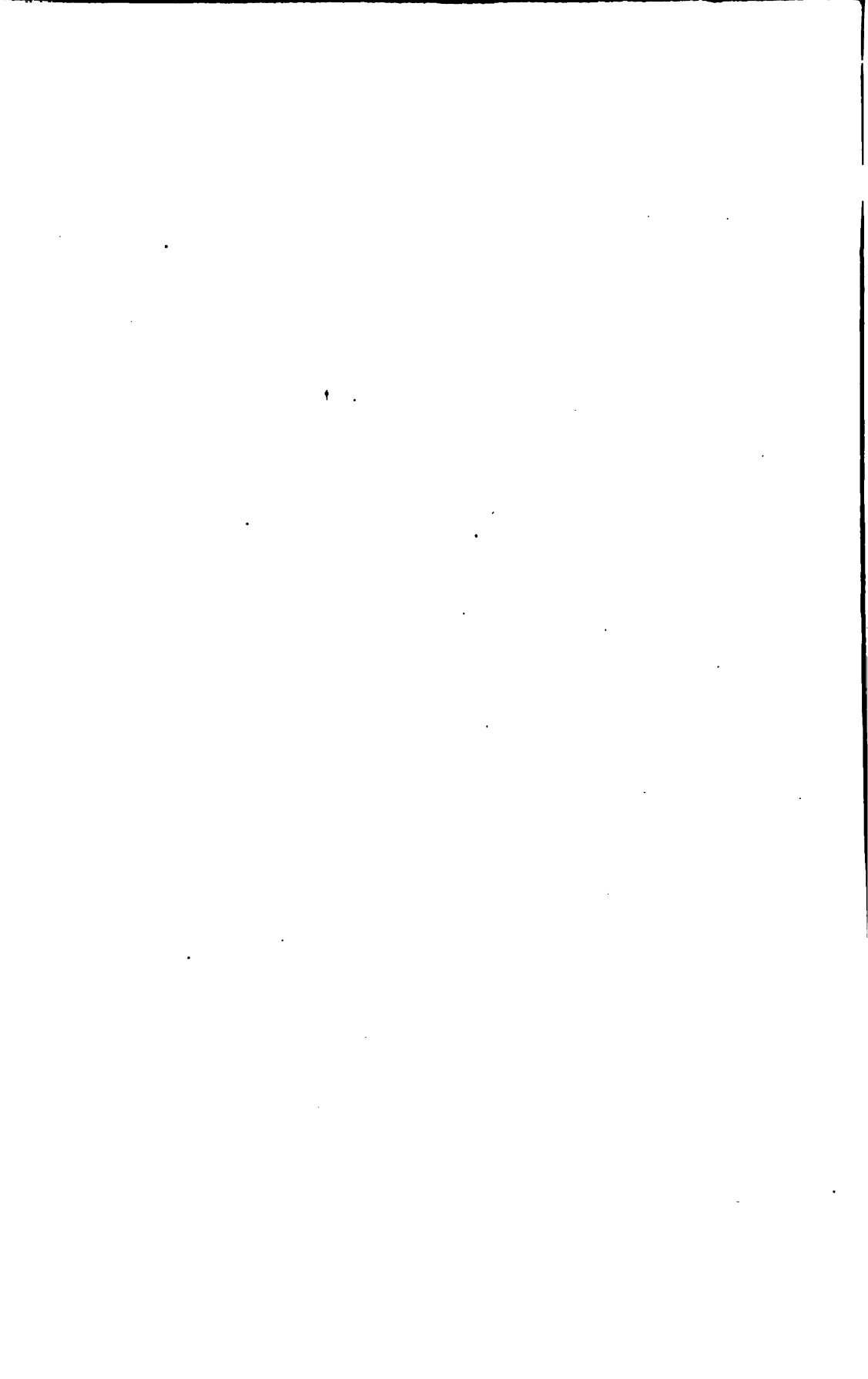
Statements in proofs of loss as admissions against beneficiary.

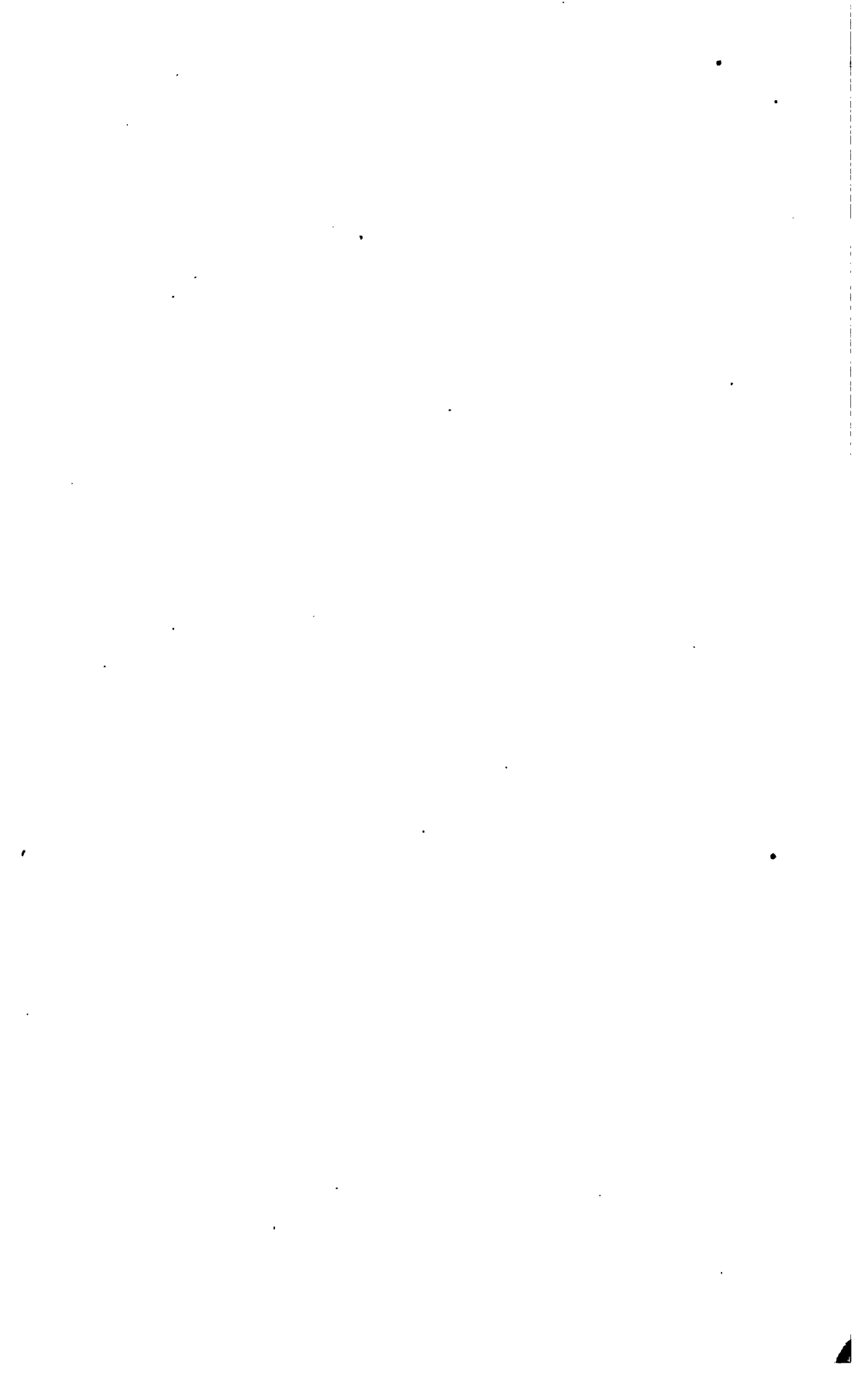
Cited in *Wasey v. Travelers' Ins. Co.* 126 Mich. 126, 85 N. W. 459, holding statements in proofs of loss furnished another company, competent as admissions against beneficiary; *Nelson v. Nederland L. Ins. Co.* 110 Iowa, 607, 81 N. W. 807, holding affidavit of physician as to cause of death, offered as part of proof of loss, competent evidence as an admission by beneficiary that contents were true, and referring particularly to annotation in 44 L. R. A. 846; *Supreme Tent, K. of M. W. v. Stensland*, 206 Ill. 131, 99 Am. St. Rep. 137, 68 N. E. 1098, upholding right of beneficiary signing proof of loss furnished by company, to contradict statement therein that death of insured was caused by suicide, and referring particularly to annotation in 44 L. R. A. 846.

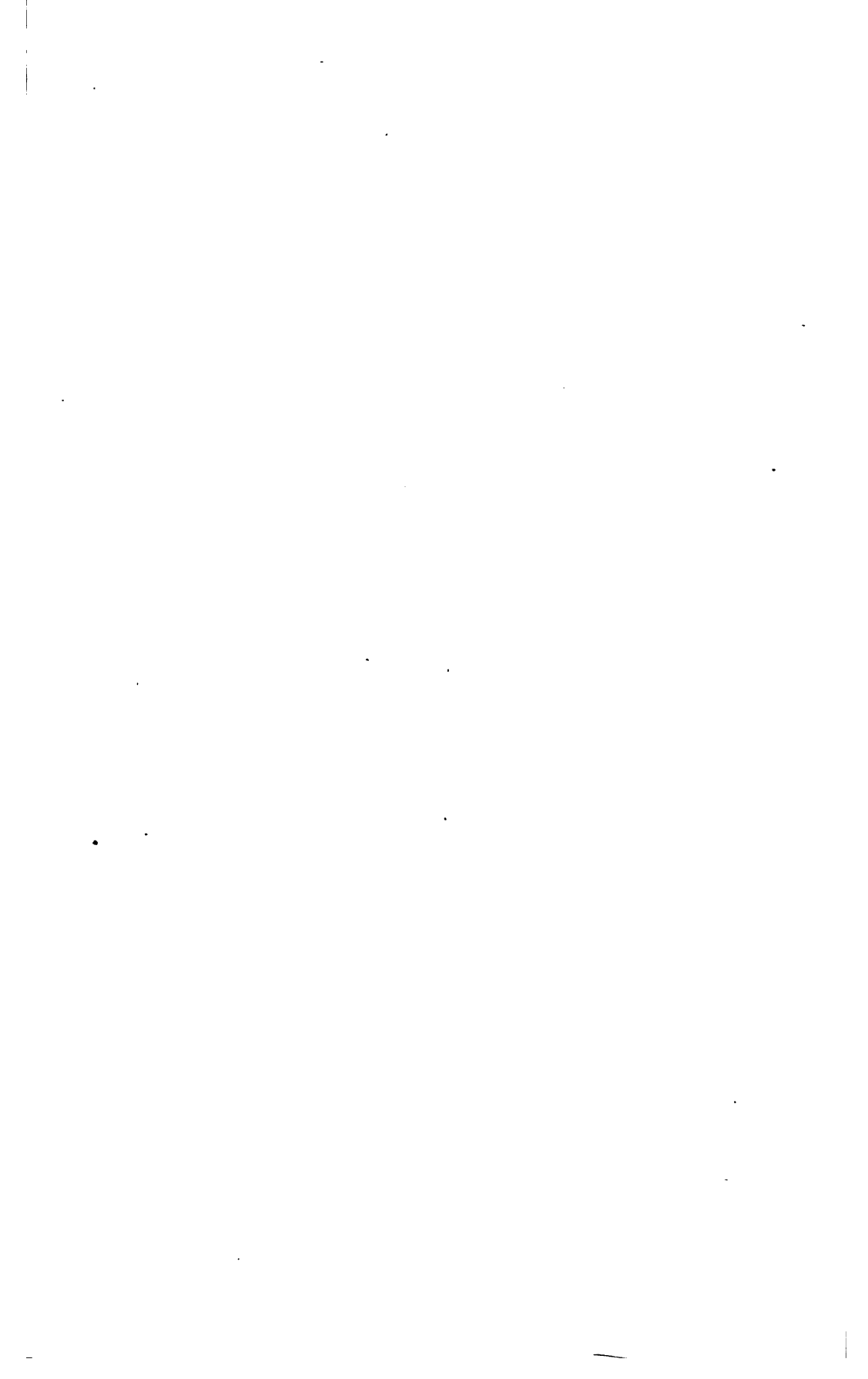
44 L. R. A. 861, **FARMERS' & M. INS. CO. v. JENSEN**, 56 Neb. 284, 76 N. W. 577, 78 N. W. 1057.

Change of interest as affecting validity of insurance policy.

Cited in *Home F. Ins. Co. v. Collins*, 61 Neb. 201, 85 N. W. 54, holding policy forbidding change of interest violated by transfer of legal title, even if without consideration; *Henton v. Farmers & M. Ins. Co.* 1 Herdman (Neb.) 426, 95 N. W. 670, holding change of title not made within meaning of policy, by conveyance absolute in form, but intended as mere security for contingent liability.









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